THE JURIDICAL REVIEW

A Journal of Legal and Political Science

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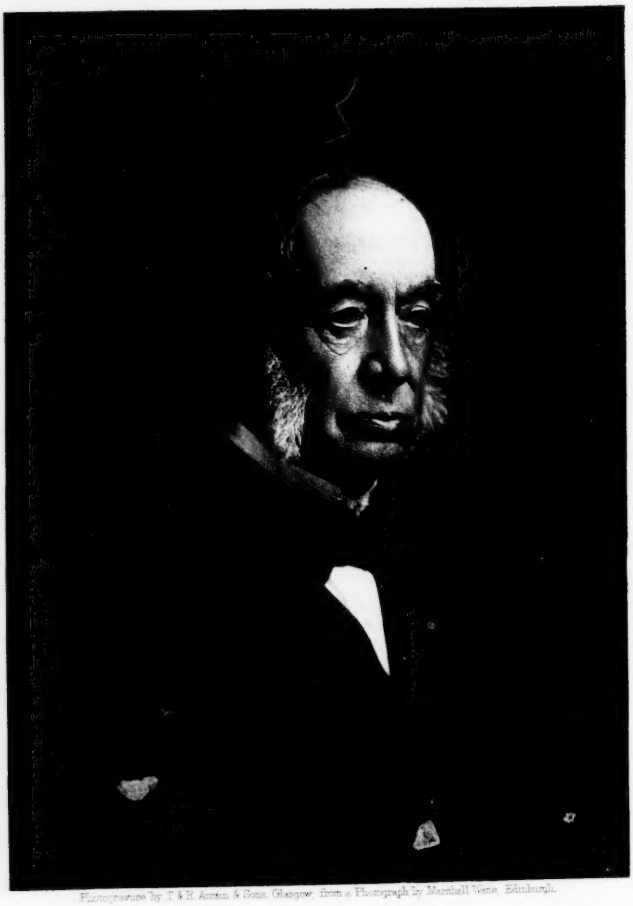

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The Right Hon. John Inglis.

LORD JUSTICE GENERAL OF SCOTLAND

THE JURIDICAL REVIEW.

PREFATORY NOTE.

THE object of this Review will be to record accurately and discuss impartially subjects relating to the science and practice of law and politics. It will be entirely independent of party, and will regard politics apart from the contentious and disputed points which are already ably and adequately represented by recognised organs of public opinion. The place of its publication being in Scotland, it will devote special attention to the law of Scotland both in its principles and its practice. A critical Record of the leading decisions of the Supreme Courts in Scotland and England is intended to be one of its prominent features, and will be intrusted to gentlemen who have made a special study of the branches of law to which such decisions relate. The Law of Scotland owes a large debt to the jurisprudence of other countries, especially to the Roman and the English Law, and to the works of the Jurists of France, Holland, Germany, and America. Scotland may, perhaps, repay a small part of that debt by showing, by means of practical examples, how principles derived from foreign as well as native sources have been combined in a good working system by her own eminent judges and legal writers.

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The Review will, however, aim at treating both law and politics from a cosmopolitan rather than from a merely local standpoint.

Its columns will be open to the jurists and publicists of all parts of the United Kingdom, India, and the Colonies, and also to those of the Continent and of America. Generous offers of assistance have been already received from Foreign as well as Scottish lawyers. The wide area over which the English Language is spoken, and the number of educated lawyers and publicists in Europe who now read and write it with facility, render this international collaboration possible in a way it would not have been in the last century. The rapidity of communication, indeed, by means of which England is now as near to America as it was, within living memory, to Scotland, and the principal cities of the Continent as near to London and Edinburgh as they were to each other, render the place of publication of such a Review of minor importance. Its character will depend upon the position and knowledge of the Contributors.

While the Review must look for its principal support, both in Contributions and Subscribers, to the United Kingdom, the aim of its conductors will be to make it International as well as national. There are at present several excellent English, Scottish, and American Law Magazines and Reviews (and in particular the *English Law Quarterly Review*, edited by Professor Pollock), but there is no Review which covers the field of Political Science as well as that of Jurisprudence and International Law and Private Law. It is believed there will be some advantage in this combination. Without ignoring the fact that lawyers and politicians regard law from different sides, it is hoped that the improvement of law and legislation and the progress of International Law, objects both of which will be steadily kept in view, may be furthered by the interchange of opinions and the collection of information on matters relating to law and government in a publication which will be common ground for both classes.

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It is intended to devote particular attention to the administrative law and practice which concern the large class of officials in the service of the different branches both of the local and of the central government. These subjects, also, are at present without any representation in English Reviews. While avowedly, in the first instance, a review for persons engaged in the profession of the law, in parliament, or other branches of the public service, it is believed that many of the subjects treated will be found to interest the public generally. With this view the articles will be written, so far as possible, without the use of technical language, and so that they may be intelligible to all educated persons.

A list of the works published, both at home and abroad, on jurisprudence and political science will be given from time to time, and the most important of such works will be reviewed. The Editors will endeavour to make the Review a chronicle and guide for current legal and political literature, and pains will be taken in indexing both the separate parts and the annual volume.

It is proposed that the most important articles should be signed by the contributors, who will thus be responsible for their own contributions.

THE EDITORS.

THE FACULTY OF LAW. (*a*)

ON the 5th of January 1864, I delivered to the students of law in the University of Edinburgh generally, as well as to my own class, or *publice*, as it is called in Germany, an address on the "Sphere and Function of an Academical Faculty of Law." That is more than twenty-four years ago, and these have not been years of involuntary silence or enforced inactivity like the fourteen years of Domitian's reign over which Tacitus sighed. If we have been silent or inactive the blame has been our own, and it seems fitting that we should inquire what use we have made of this *grande spatium mortalis ævi.* The views which I then presented, have they been rejected or accepted? and, if accepted, to what extent, if any, have the aspirations which I cherished been realised?

It is to these questions, rather than to any re-discussion of the general Academical question, that I wish now to invite attention.

There are, as I then pointed out, and as I have often since remarked, three distinct conceptions of a Faculty of Law. Seen from the positive or practical side there is a twofold conception—a narrower and a wider one. In accordance with the first or narrower conception of it, which has hitherto mainly prevailed in this country, its function is to train legal practitioners, and its sphere is limited to jurisdiction. In accordance with the second, or wider notion of it which

[(*a*) This article contains in substance the Introductory Lecture delivered to the Class of Public Law in the University of Edinburgh, November 1888, by Professor Lorimer.]

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prevails on the Continent, it embraces legislation as well as jurisdiction, and aims at the formation in the whole community of those legal conceptions of the various relations between human beings in their individual, their citizen, and their cosmopolitan capacities out of which positive laws arise. It seeks to train the law-giver as well as the administrator of the law. Beyond and behind both of these lies the ultimate or scientific conception of it as that branch of the Academical system, or *studium generale scientiarum*, which has for its object the discovery of those permanent and inevitable though, alas, not inviolable laws which we call Natural Laws. All true Positive Law, as Mr. Burke has said, is "merely declaratory," and it is these Natural or Divine Laws that it declares. It is when seen from this point of view that the Faculty of Law takes rank with the other Academical Faculties, and derives nourishment from the organism of which it forms a part. "The proper study of mankind is man;" it is for his sake—with a view to the elucidation of his position in the universe and the guidance of his activity—that knowledge is sought after.

But man presents himself to the contemplation of mankind in various aspects, and the Academical system looks at him from various points of view. As I said on the occasion to which I have referred: "As the highest manifestation of mere animal life, man falls to the share of the faculty of medicine; as an isolated spiritual existence, he forms the noblest study of the faculty of arts; in his relation to his Creator, it is the sublime function of the faculty of divinity to deal with him; but *as a social being, he is ours and ours alone.*"(*a*)

Now strange as, at first sight, it may seem, I have no hesitation in saying that, of the three conceptions of our faculty which I have mentioned, the last, or scientific conception of it, is that which has made the most satisfactory progress in the general mind during the period of my tenure of this chair. During these years there has been a growing

(*a*) "Law Magazine and Law Review," Feb. 1864, p. 314.

tendency to abandon the arbitrary notion of Positive Law as something dictated by mere human ingenuity, and having no deeper source than human legislation. Men have begun to feel that social life, like life in general, is governed by ultimate laws which it belongs to science to discover, and which, when discovered, must be obeyed. The "effacing fingers" of utilitarianism which had well-nigh obliterated every trace of scientific method from English Jurisprudence have been arrested, and the task of unlearning, so needful to the disciples of Bentham and Austin, has been resolutely faced by the representatives of the rising school of Jurisprudence in the English universities and the Inns of Court. Amongst ourselves the study of the *jus naturale*, and of its action as the ultimate factor in the development of the Roman Law preserved, to some extent, all along, the scientific character of our jurisprudence and of our Faculty of Law. But the lamp of science burned feebly amongst us also till it was re-enforced from what I believe to have been the main source of the general revival—viz., the improved method of inquiry which has been adopted in other departments of knowledge. Nature, physical nature, more especially, has been examined more closely than at any previous period, and the result has been a marvellous accession to our conception of her laws, or, in other words, of the fixed and pre-determined lines along which she works. How these lines were fixed or determined, we know not, and indeed shall never know. The ultimate problem, not of the creation alone, but of the government of the universe, remains unsolved and insoluble. The most exhaustive discovery of the efficient causes of evolution leaves the final cause of it precisely where it was. Why was there ever any evolution at all, or anything to evolve? *Ex nihilo nihil fit* is as true as ever. We are told that it—this primary something—star-dust, protoplasm, or whatever it was, evolved and evolves itself by means of efficient causes, attraction, selection, and the like, and that this process has gone on through countless ages; and it seems to me that the

latter part of this assertion is extremely probable. The noble army of investigators, of whom Darwin is the central figure, have brought the hypothesis of evolution, as regards physical existence, animate as well as inanimate, far nearer to demonstration than any of us who are old could have believed possible when we were young. Nor will most of us deny that Herbert Spencer and his followers have made a good beginning in explaining the progressive apprehension by the creature of the laws of his spiritual life. Consciousness and conscience are no longer regarded as full grown faculties implanted in a ready-made soil. Hitherto untrodden paths of psychological, ethical, and philological archæology have been opened up, and if the results obtained in these directions have not been in all respects entirely trustworthy, they have been sufficient to justify the method which has yielded them. Our own Professor Laurie here claims special notice. His higher and more accurate philosophical culture has enabled him to tread in the dreaded but inevitable region of metaphysics with a security which few of his English fellow-workers can feel, and when his "*Metaphysica, nova et vetusta*" and his "Ethics of Reason" come to be better known, a unique position amongst students of spiritual evolution cannot fail to be assigned to him. Those who look at the phenomena of existence exclusively from the physical side have no true conception of what they owe already and may hope for in future from the class of investigators to which Professor Laurie belongs, and whom it is the object of Lord Gifford's Bequest to call into activity. It is upon faith in the universal presence of reason that they, too, must fall back in the last instance; nay, that is the ever present subsumption at each step of their advance. Chaos could never produce Cosmos, even with the aid of undetermined force. We cannot evade the postulate of reason. Physical Science affirms as emphatically as either Theology or Philosophy that there was logic (ὁ λόγος) in the beginning, and logic in this, the widest and truest sense of it, is God. By widening the range of human insight the physicist has thus been playing

into the hands of the metaphysician and the theologian, who differ from him mainly in this that they are somewhat more grateful for the gifts which they mutually bestow. If I may be permitted to take my distinguished colleague Professor Flint, as an exponent of the Scientific Theology of our time, I believe I could name no one who more thoroughly appreciates the advantages which Theology has derived from the progress of Physical Science, and in proof of this assertion I need only call to memory the admiration with which men like Helmholz, Virchow, and Pasteur, listened to the magnificent discourse which he delivered in St. Giles' Cathedral, on the occasion of the Tercentenary Celebration of our University in 1884.

But have the investigators of physical science played equally into the hands of the scientific jurist, as into those of the psychologist and the theologian? To this my affirmative answer must be given with some qualifications. It is in the sociological direction, unfortunately, with which we are most concerned, that the tendency to rash assertion and generalisation has been most conspicuous. Laws of development or evolution, at variance with that very principle of sexual selection on which so much stress is laid, have been hastily assumed to govern whole stages of progressive human existence. The *homo sapiens* has been supposed to be destitute of the social instincts with which his hirsute forefathers have been credited, and modes of life have been ascribed to him which they had repudiated. A very small amount of that knowledge of mankind, of which students of man from the physical side are so frequently destitute, would have sufficed to convince them that promiscuity, and still more, polyandria, never prevailed *as institutions* at any stage of progressive existence, and that, even at periods of national retrogression, however prevalent they may have been, they were abnormal and exceptional irregularities. On this ground it is indirectly only that the study of sociology, so far as it has yet gone, has aided the study of scientific jurisprudence.

But whilst repudiating the exaggerated claims on our

credulity which have been occasionally made by its indiscreet exponents, let us not forget what we, as students of jurisprudence, owe to the scientific spirit of our time. It has confirmed our faith in nature as a reasoned organism, and in the reason by which it is organised. It has vindicated the universal prevalence of law, and in so doing it has restored our belief in the continuous action of that factor in the formation of positive law, which the Stoics and the Roman jurists after them called the *jus naturale*. Unwittingly and unintentionally the cultivators of physical science have slain the utilitarians and left the scientific jurists in possession of the field. Directly and consciously, however, they have done nothing to assist in its cultivation. On the contrary, amongst the causes which have impeded the progress of scientific jurisprudence and its ancillary studies, has been the exclusive interest which the physicists have attracted to themselves and their investigations. It has been an age of physical science, so much so, indeed, that science and physical science have become synonymous terms. The vast preponderance of the resources of our University, and of the numerous gifts and bequests that have been made to it, have been devoted to physical science. A magnificent palace has been built exclusively for its uses. Men of the highest ability have been attracted to its service, and retained in it by honours and emoluments far beyond those which have been bestowed upon any other class of scientific labourers. In this state of matters it was not wonderful that the sphere and functions of the Faculty of Law should have been almost wholly forgotten. In the narrower of the two practical conceptions of it, which I mentioned as a training school for the interpreters and administrators of the law, it has remained stationary; whilst in the wider conception of it, as a training school for legislators and for a self-legislating community, it has made little progress. Still, if the wind has been against us, the stream has been with us. If our progress has been slow, it has been in the right direction, and men's minds are prepared for the forward bound which we hope may result

from the labours of the promised University commission. By rendering graduation the rule of admission to the profession, in place of the rare exception, as it was for many years after the institution of our present law degrees, and by giving to candidates the option between conveyancing and political economy, we have done all, or nearly all, that is within the reach of our present powers. If we are to do more we must not only have ampler powers, but more liberal conditions for their exercise. What is wanted is a department of the University, a school, like the school of medicine, devoted to social and political and jural studies, and so organised as to take them up at once from the historical and statistical, and from the philosophical, point of view. Such a school of law, like our school of medicine, would attract students from every part of the empire, and assert for itself a European position, whereas the influence of our present faculty of law can scarcely transcend mere local limits.

One of the greatest defects of this University and, much more of the other Scottish Universities, as I have often said, is the almost entire absence of any provision for the teaching of history. It is not that the study of history has stood still in our time. On the contrary, with the single exception of physical science, there is no branch of knowledge which has received so much attention, and there is scarcely a single direction in which it has not been prosecuted by specialists with important and, in many cases, marvellous results. But the gratification of curiosity, or the support of some preconceived theory in politics, economics, or religion has often had more to do with it than the hope of being able to appreciate the present more justly or to obtain guidance for the future. Mindful that the conditions in which principles were realised in former times can never recur, men have forgotten the principles which were permanent, and the action of which had merely been impeded or arrested by evanescent causes. It is on this ground, I believe, that the impression has arisen, that, however interesting the history of antiquity or the Middle Ages may be, it is needless for

practical purposes to go further back than to the Reformation for our religious, and to the French Revolution for our political opinions. By these great upheavals it is supposed that old things were swept away, and mankind started on newly-laid rails for a new race. Now to suppose that new principles of progressive existence are revealed by such destructive cataclysms as these is just as absurd as to expect to discover a new style of architecture by blowing up an old house. The house, whilst it stood, might have taught us something, but the explosion was inarticulate, and the ruins are mute. In order to learn anything we must reconstruct the house, in imagination at any rate. Till this has been done, we can neither appreciate its beauties and conveniences, nor detect its faults and defects. In like manner, if we would discover the principles of progressive existence which had carried mankind up to the point they had reached when the catastrophe occurred, we must go back not only beyond the catastrophe, but beyond the period of decadence and disorder which led to its occurrence. We must seek our new starting-point in an historical period before the minds of men were unhinged and bewildered by the fierce passions and violent antagonisms which invariably precede such tragical occurrences. *Il faut reculer pour mieux sauter*, and we must take our leap far enough back to carry us over the débris occasioned by the break down of the previous life. As illustrating what I mean, let me mention that it is in the earliest literature of the Aryan race that the sources have been found of the whole of the present religious movement in India. In like manner it is the problem of the schoolmen —the reconciliation of faith and reason, and not the problem of the Reformers and Puritans, the rendering of faith independent of reason, with which our modern theologians are occupied. However irrational Roman Catholicism in its later manifestations may seem to us, our spiritual sympathies are drifting more and more in the direction of Thomas Aquinas and Abelard, and away from Luther and Calvin. The heroic battle which these latter fought against corruption

and superstition must ever claim our admiration and our gratitude; but we are estranged by their dogmatism, and I doubt whether in the whole literature of the Romish Church anterior to Loyola, a passage could be found more at variance with our present forms of thought than Luther's exclamation, "Strangle reason, like a dangerous beast, if it dare to question Scripture."

It is the same in the political sphere. Next year, 1889, is the centenary of the French Revolution. Our neighbours are looking forward to what they themselves characterise as *une débauche de la liberté*. The whole hideous story will be gone over once more, and even on this side of the Channel, it is to be feared, that there are writers and orators who may find a sort of ghastly satisfaction in repeating it. But everything must have an end. I am not without hope that we shall then have heard the last of it, and that a constructive century may succeed the destructive century through which we shall then have lived. But if the work of construction is to be entered upon, it will not be to the traditions of the Revolution that we must look for inspiration. It is the judgment of Zeus "which gives to the greater more, and to the inferior less, always, and in proportion to the nature of each; and above all, greater honour to the greater virtue and to the less, less, and to either in proportion to their respective measure of virtue and education;" (*a*) and not the judgment of Rousseau, that men must be made equal, however great may be their inequalities; which we must accept. It is this, the equality of the Stoics and the Roman jurists, the *proportion* of the Middle Ages, and not the *egalité* of 1789, which is the permanent principle,—the law that never grows old. It is in the fuller and more perfect realisation of this principle, and not in the substitution for it of any new principle that we must strive to outstrip our ancestors. That much unconscious progress has been made in this direction by the wider charity and more active sympathy of the last and present

(*a*) See Lorimer's "Institutes of Law," p. 408.

generations of our countrymen, I most thankfully recognise. But all unconscious progress is apt to be one-sided, and whilst the rights of the non-propertied classes have been recognised with a fulness hitherto unknown, there has been a tendency on their part to forget their corresponding obligations, which has been encouraged by injudicious and it is to be feared not always disinterested partisanship. I may be partial to my own calling, but it appears to me not unreasonable to suppose, that the balance between interests which appear to conflict, would be more evenly held by a scientific jurist, who had nothing personal either to hope or to fear, than by a party politician who, for his own sake and that of his party, must accept the opinion most likely to commend itself to the majority of voters,

In seeking to determine the true function of a Faculty of Law, I have by no means in view solely the benefit of jurists and professional lawyers. My remarks have reference largely to a class of persons more numerous in our profession than in the others: I mean those whom wealth and leisure permit and invite to devote themselves to public affairs. It is from this class that our politicians have been hitherto and will, I trust, continue mainly to be taken, and they alone are in a position to study politics as a science and to follow it as a calling. It is on their behalf, consequently, that I chiefly claim an extension of the sphere of the Faculty of Law; but it is not with a view to their interests as a class, apart from the rest of the community, that I claim it. It is not our governors so much as our servants, whom we desire to train. The free state must be self-governing. It must be the ultimate sovereign, the monarch, and this in a constitutional monarchy just as much and more, I think, than in a republic, because "wire-pulling," is less easy. But, like other sovereigns, the sovereign community must have its ministers, and to them it must delegate the duty of recognising and declaring, as well as of administering its laws. For the training of this class of public servants our own University already offers many advantages, and were the Faculty of Law

developed in the political direction, might confer inestimable benefits on the whole empire. Looking at the matter from the Scottish point of view, not only would the University itself be a gainer, but a substantially new career would be opened to our Scottish gentry at their own doors. It is an open secret that the supposed necessity of sending their sons, those of them more especially who are destined for public life, to be educated in England, imposes a burden on many of the best families in Scotland which, in the present state of their affairs, they are ill able to bear. In order to facilitate this arrangement, sacrifices have to be made which weaken the hold it is so desirable these families should retain in the localities to which they belong. Their establishments have to be reduced, their hospitalities curtailed, and in many cases, their paternal abodes let to strangers, whilst they themselves become strangers in their turn. In ten or fifteen years of non-residence a substantially new generation springs up; new associations arise, new relations are formed, the spell of proprietorship is broken, and when the young laird comes amongst his own people, he brings little along with him save an old name, to which less and less importance is being attached every year. His own sympathies and affections, moreover, are with the friends of his youth. The all-important fifteen years from ten to twenty-five have made an Englishman of him. Patriotic sentiments which he utters from time to time have a hollow sound from his lips, and *nolens volens* an Englishman he continues to be to the end of his days. If these disadvantages were counterbalanced by any real educational gain, the heroic sacrifices made to obtain it would demand our admiration and sympathy. But the gain, to persons of this class in particular, is extremely problematical. The refinement of manners, and the greater purity of speech, which are supposed to result from an English education, they already possess by inheritance. Whatever may be the case with the sons of the *nouveaux riches*, the sons of our impecunious nobility and gentry take with them to Eton and Oxford the manners which the others are expected

to bring away, and furnish the passports to society and to public life which the others go to seek. What they themselves want is not social gifts and graces, but a thoroughly substantial all-round education—classical, mathematical, philosophical, and historical—which will stand them in good stead in after years; not an education to talk about, but an education to use; and I doubt whether there be any course of instruction which fulfils this character more completely than the curriculum for the degree of M.A. in a Scottish University. I do not speak of honours. What I refer to is the ordinary pass degree which we exact as preliminary to the degree of bachelor of laws. The degree of LL.B. itself, even in the present condition of our Faculty, I hold to be unquestionably as good a guarantee for political capacity as any other which this country supplies.

It is quite true that the secondary schools of Scotland, for many years past, have not been all that could be wished. That their defects as regards mere instruction, however, have been much exaggerated, is proved by the fact that they have been all along in a condition to send up pupils who were able to pass the preliminary examination for entrance to the three years' curriculum for the M.A. degree, not by any means of an elementary character. The arrangements which are being made for the new "leaving examination," will, no doubt, equalise, and thus raise the average standard of attainment. The rude and clumsy manners, with which the pupils of these schools are sometimes reproached, are due, I believe, to the almost total withdrawal of the sons of the more cultivated classes. It is thus rather a fault to be corrected than a fact to be deplored, and it is a fault the correction of which these classes have in their own hands. If the representatives of our historical families had become idle, luxurious, and self-indulgent, the separation of their children from those of the rest of the community might have been a gain to the latter at any rate. But as matters stand they are for the most part the hardiest and most spirited and energetic section of our whole population, and it is much to be regretted that they

do not mingle with their youthful fellow-countrymen at a period of life when their influence would be greater that it can possibly be in later years. Nor need any serious difficulties be apprehended from the intermixture of youths of the same race and blood, even where the disparities of rank are very great. School-boys soon get over these barriers to their intercourse, and kindred sympathies prevail over and correct pride on the one side, and shyness or jealousy on the other. When the French princes were sent to the High School of Edinburgh, in order that they might have the benefit of Dr. Schmitz's tuition in 1859-60, they were extremely popular with their class-fellows, and much attached to several of them. They were not *incogniti*. No farce was made of not knowing who they were. But their titles were dispensed with, they entered the class with perfect confidence and simplicity, and took places in the ordinary way. Though the Rector of the High School at this period was, no doubt, a very exceptional person, there was nothing exceptional in the organisation of the school itself which specially favoured this experiment. The provincial grammar-schools of Scotland, which are similarly organised, are the oldest of our educational institutions. Several of them had attained importance centuries before the High School was founded, and before we had any universities at all. It was in them that many of our early scholars who distinguished themselves on the Continent, learned the Latin for which they were so famous, and the present generation of Scotsmen seem thoroughly alive to the necessity of their resuscitation. Much has already been done, and is being done, in order to bring the whole system of secondary education in Scotland up to the requirements of the time; and if those classes from whom our politicians have hitherto been mainly taken are to preserve their hold on the country, it is high time that they should assume the position in this movement to which they are so well entitled. But they cannot do so, so long as they stand aloof and send their own sons to be educated in England, as if they feared that they should

be contaminated by the touch of their fellow-countrymen. The gilding of a *jeunesse dorée* that cannot stand that amount of friction is not good for much. Let our old gentry take courage. Scotland has not forgotten her past. She is not the senselessly democratic country that they sometimes imagine, and they themselves enjoy more favour than they suppose. It is a hopeful sign for them, moreover, that they are most popular in those districts in which, from the moderate size of the estates, they are most numerous and best known. But the attractive qualities which they exhibit in after life never wholly remove the estrangement caused by separation in youth, and much of the influence which early contact would give them is irretrievably lost. They have no old friendships and early associations to fall back upon extending beyond their own class. They are not Scotsmen, in short, in the full national sense, and it is difficult to see how they can ever become so otherwise than by availing themselves of the higher educational institutions of the country and adapting them to their requirements and their tastes.

JAMES LORIMER.

CODIFICATION IN THE UNITED STATES.

I HAVE been asked by the Editors of *The Juridical Review* for a brief historical sketch of Codification in the United States, and its results. To this request I accede with pleasure. The general history is not long to tell, though it would be long enough if one were to go into the details of each step taken. Every movement was a struggle, but, in the main, it was successful. The following epitome will be sufficient to show what has been done, and what remains undone.

The United States — thirty-eight in number — are of English origin, with the single exception of Louisiana; and with the English name and lineage inherited the English law. The common law of the mother country was the patrimony of the American people, as they were wont to boast, though in this they seem to me to have to some extent confounded the civil with the political features, and to have made the excellence of the one cover whatever defects there were in the other. The delay, uncertainty, and expense of the administration of justice for the ordinary concerns of life, were, however, matters of complaint from an early period of our history, and the complaints became at last so urgent that something had to be done to remove or lessen the causes.

The constitution of New York was revised in 1846, and then the complaints found emphatic expression, and a remedy was attempted. The attempt was made in two directions—one towards a reform of procedure in the Courts, and the other towards the codification of the whole

body of the law. Two Commissions were appointed, and they in effect divided the entire work between them in such manner that one took the codification of the law of procedure and the other the codification of the rest of the law.

The Procedure Commission went to work first, and produced two codes—a code of civil procedure, including the law of evidence; and a code of criminal procedure. The other Commission produced afterwards three codes—a penal code, a civil code, and a political code. The first of these defined the acts which should be punished as crimes, and prescribed the punishments to be inflicted; the third prescribed the functions of all the public officers of the State; and the second (which was necessarily the most extensive) defined the personal rights and relations of the citizen, classified and regulated property, and prescribed the rules for contracts and other obligations. Such is the briefest possible description in general terms of codification in the State of New York, or the series of codes commonly known as the New York Codes.

Before the New York Commissioners had finished their labours, the State of Georgia enacted a civil code for that State which, though not so full as the New York Codes, was drawn up with care and precision, and is now in force, and, according to all accounts, is working well. The preparation of this last-named code, which was published I think about the year 1861, was not known to the New York Commissioners while they were engaged in their labours, owing, it is supposed, to the breaking out of the Civil War.

The State of Louisiana being of French and Spanish origin, imported the Roman Civil Law, and finally framed a civil code for itself, modelled in great measure upon the Code Napoleon.

It must not be supposed that the work in New York was accomplished without great labour and many obstacles. The majority of lawyers opposed it at every step. Indeed, I think I may say that in the United States outside of Louisiana

—and probably the same thing may be said of England—no considerable reform of the law has ever been made or supported by the great body of lawyers. Whenever any considerable amelioration has been obtained, either in the form or in the substance of the law, in procedure or in doctrine, it has come from a minority of lawyers supported by the voices of laymen. I do not complain of this. It is the nature of the profession. The lawyer becomes wedded to old things, by the course of his daily avocations. He reposes upon the past. He is concerned with what is, not with what should be. The rights he defends are old rights, grounded, it may be, in the ages that have gone before him. Nor is this conservative tendency altogether to be regretted. Rooted in the past, and covered with the branches of many generations, the legal profession may be said to stand like the oak as a barrier and shelter in many an angry storm, though it may at the same time dwarf the growth beneath. With its innumerable traditions and its sentiments of honour it is one of the strong counteracting forces of civilisation, and we should hold fast to it, with all its good and in spite of its evil, though we may have occasion to combat and overcome its resistance to reforms as often as new wants and altered circumstances make them necessary.

Let me now show, in a little more detail, how it has fared with codification in the State of New York. We had, previous to the constitution of 1846, the English Common Law, including Procedure. Every instructed lawyer knows how law and equity in England grew and withered side by side, and particularly how, in the matter of procedure, the different forms of action impeded the course of justice, and sometimes baffled both the bewildered suitor and his legal adviser. Well, in New York all this clumsy and rickety machinery was got rid of at a single blow, the forms of action, as well as the distinction between legal and equitable suits, were abolished, and a single form of action was substituted, in which the rights of every suitor, whatever they might be, could be definitively adjudicated. The first

instalment of this reform, that which wrought the changes I have mentioned, was passed in a few days during the legislative session of 1848, by the unanimous voice of the people against the certain but silent disapproval of the great majority of lawyers. This instalment, though in some respect the most important part of the work undertaken by the Practice Commissioners, was nevertheless not more than a quarter of it in bulk. But unhappily soon after its enactment the lawyers were able to excite a reaction, and thus prevented the enactment of the remainder of the work, though the completed code was reported to the Legislative House in the next year after the adoption of the first instalment. The portion thus enacted, however, effectually demolished the old system of pleading and practice, and the new system substituted for the old was made to work smoothly enough until 1877. In that year, under the guise of a revision of the Statutes, a so-called Revised Code of Civil Procedure was enacted, which, while retaining the essential features of the old work already in force, was so smothered with details and so reactionary in spirit that the State of New York has since been working under a scheme of civil procedure which scarcely any one approves, and which is far enough behind what the framers of the original code designed and constructed. In other words, that which is commonly known abroad as the New York Code of Civil Procedure, has never in its completed form become the law of that State, but it is the law which was framed by the New York Commissioners, and which being neglected by New York has been taken up and appropriated by other political communities, as I will explain.

The code which the Commissioners thus presented to the State, and which the State, in fact, rejected, was nevertheless published and circulated and, under the name of the New York Code of Civil Procedure, has made the circuit of the world. I do not mean that it has been everywhere repeated in the very shape in which it was prepared and reported in New York, though in many instances—I might perhaps say in

most of them—it has been literally copied. In other words, the essential features of the work, that is to say, the abolition of the forms of action and of the distinction between legal and equitable actions, the powers given to the Court to frame the judgment according to the rights of the parties, and of each of them, plaintiff or defendant, be they few or many, without regard to ancient precedents, and appointing the mode of trial, whether by Court, jury, or referee, according to the exigencies of each case, these features or principles, have been copied in many States of the American Union and in both the English-speaking nations. It is in this sense I repeat that the New York Code of Civil Procedure has been adopted by twenty-five States and Territories of the American Union—that is, by the eighteen States of New York, Connecticut, Missouri, Ohio, Kentucky, Indiana, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Nevada, California, Oregon, Arkansas, North Carolina, South Carolina, and Georgia; and by the seven Territories of Dakota, Idaho, Montana, Arizona, Wyoming, Washington, and Utah. Passing from the United States to other communities it has found its way into the English-speaking settlements of Hong-Kong and Singapore, and into the Consular Courts of Japan, and has been followed by the Judicature Act of England and Ireland, and in this way passed into those English Colonies which have adopted this Act of the mother country. The enumeration which I have thus given is the best answer I can make to the inquiry—What has been the result of the New York Code of Civil Procedure?

The New York Code of Criminal Procedure, though not adopted by New York until 1881—that is, thirty-one years after it was reported to the Legislature—was before that event, adopted by the eleven States of Kentucky, Ohio, Kansas, Nebraska, Wisconsin, Indiana, Minnesota, Arkansas, Nevada, California, and Oregon, and by the seven Territories of Dakota, Arizona, Idaho, Montana, Wyoming, Utah, and Washington. This answers the inquiry about the result of the New York Code of Criminal Procedure.

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The New York Penal Code, though not adopted by New York until 1882, seventeen years after it was reported to the Legislature, was previously adopted by the Territory of Dakota in 1866, and by the State of California in 1872.

The Penal Code and Code of Criminal Procedure have worked satisfactorily in New York. Upwards of two years ago I sent a circular to every judge of a criminal court, and every prosecuting officer of the State, inquiring how these codes had been found to work, and the answers received were uniform in their favour. I have no doubt that the whole body of citizens, lawyers included, would resist any proposal for their repeal. The Civil Code, reported to the Legislature of New York in 1865, though twice passed by both branches of the Legislature was not approved by the Governor, and has not yet become a law of that State, though it was adopted by the Territory of Dakota in 1866, and California in 1872.

The enactment of the political code is of lesser importance than any of the others, because the existing statutes cover nearly the whole ground covered by this code, and no special attention has been given to its enactment.

Why the enactment of the Civil Code has been hitherto defeated in New York it would hardly be worth while to explain in this paper. The real objection on the part of lawyers is to any codification of the common law, though by way of warding off discussion respecting the desirability of such a work they take objection to this particular code. Whether their objections are well-founded may best be answered by the papers hereto subjoined. It is worthy of note that, so far as I am informed, not a single lawyer who favours codification of the common law objects to the present work. I have indeed entire confidence that it will yet become the law of the great Atlantic State of New York as it has become the law of the great Pacific State of California.

That a codification of the law is in itself desirable should seem hardly to admit of question. It is desirable alike for

the judge, the lawyer, and the citizen,—for the judge, because it lessens his labour and gives certainty to his reasoning; to the lawyer, because it imparts to him the information which it is hard to seek and harder still to find, and saves him from profitless and time-consuming labour; and above all to the citizen, because it shows him the laws by which he is to guide his daily conduct. Strange indeed does it seem that any unprejudiced person should imagine that the laws of the land should not, if possible, be written down for the people of the land.

How the Civil Codes which California and Dakota have copied with few modifications from the one prepared for New York—how these codes are working where they exist in full force, and have been in force for many years, may best be learned from the papers which I beg to subjoin to this letter. Those which relate to California explain themselves; that relating to Dakota came from Mr. Church, now Governor, and lately Chief-Justice of that Territory, but before that time a member of the Legislature of New York, where he opposed the Civil Code. The writers of the letters are all of them men of distinction.

"San Francisco, California, 25*th September* 1877.

"Hon. David Dudley Field,

"Dear Sir,—Mr.——— has requested me to write to you my opinion as to the Codes of California, their working, their acceptability, &c.

"My opinion is, that, with the amendments adopted in 1874, they contain a body of laws better than those of any other people of British origin or political descent, and as nearly perfect as any that have ever been compiled for any people. In administration they work smoothly and well. There is no recalcitration against them, either by the courts or by the legal profession. On the contrary, they are highly esteemed and well received by both. By the people at large they are held in great repute.

"The Civil Code is a hand-book among business men. After careful consideration I put my students upon the Civil Code the first thing. 'Melius est petere fontes quam rivulos sequari.' It is not pedantic to use the quotation. For with us, hereafter, the Codes are the fountains and the well-springs of the law. The thousand volumes of Statutes and reports which preceded them, now belong only to its history and illustrations. We

congratulate ourselves that we have been the first to appropriate in so large a degree the work of yourself and of your distinguished associates.—I am, yours most truly, JOHN W. DWINELLE."

From JUDGE WALLACE, late Chief Justice of California:—

"*March* 22, 1885.—I think the Civil Code the most important and beneficial piece of legislation that has ever been enacted in California. It has effected more for our people than all other legislation taken together since the foundation of the State. I have never seen an unfavourable criticism of it which was, in my judgment, well founded. I believe that while at first there was some inclination in our profession to hesitate about the propriety of its adoption, our bench and bar are now, with remarkably few exceptions, unanimous in its commendation."

"TERRITORY OF DAKOTA, EXECUTIVE OFFICE,
BISMARCK, 28*th March* 1887.

"DAVID DUDLEY FIELD, Esq.,

"DEAR SIR,—I have had occasion to observe the workings of the Civil Code for more than a year, as a Judge of our Supreme Court, and I am free to say the old *prejudice* which I formed against it has been almost, if not entirely, removed. I am inclined to think I would vote for its adoption.—Respectfully, L. K. CHURCH."

DAVID DUDLEY FIELD.

PRIVATE BILL LEGISLATION.

IF any unprejudiced person takes the trouble to look at the lists of private bills which every winter are prepared for the next ensuing session of Parliament, he may well wonder why nothing less than a separate Act of the Imperial Parliament should be deemed necessary for each of them. There is a railway proposed for the West Highlands, and it involves, apart from any question of its feasibility and public advantage, a keen dispute between rival companies as to which shall be allowed to make it, and as to whether it should be allowed to encroach at a certain point into a district already in a partial way served by an existing company. The corporation of E. finds its water supply, or its main drainage, deficient—or, at least, its more stirring town councillors choose to say so—and the question is between them and the ratepayers rather than with the owners of property to be taken, as to the necessity for any new scheme, or for this scheme in particular. Again, an incorporated company desires a change in its constitution, affecting the ranking of its debenture-holders, or the priority of different classes of its shareholders, or the alteration of its field of operations. The interests of its shareholders, creditors, or of rival companies may be concerned, and without some change it may be unable to go on at all. Other instances may be figured; but in all, or almost all, while it is tolerably plain that the sovereign power of expropriation for public uses, or of granting special statutory privileges in extension or limitation of the common law is involved, this is exercised and expected to be exercised on principle and system dependent on the amount

of public advantage shown in the scheme or bill. Generally the real difficulty, where the tribunal is honest, does not arise in deciding the question of public policy whether the particular scheme is or is not for the public interest, or the conditions required to safeguard the general community. The difficulty arises in arbitrating between conflicting interests, as those of rival companies engaged in keen competition, or those of different classes of shareholders or creditors, or simply those of individuals as against corporations. In short, assuming that there is power in some duly constituted authority to grant statutory privileges of expropriation or others interfering with private rights, the work of deciding to whom, for what, and under what conditions, special powers are to be granted may truly be classed as quasi-judicial or administrative, rather than as legislative. This kind of work has been attached to the High Court of Parliament by historical accident, and not by any deliberate arrangement, as is evidenced by the fact that most European nations, with modern constitutions, leave such work to the executive, singly or in combination with the judiciary. It is not proper work for Parliament, any more than the hearing and trial of any other private cases. Our plan is the historical result, say the writers on British Public Law, of the constitutional right of the subject to petition Parliament for the redress of grievances; and Parliament long ago got into the way of putting its petitioners off, by referring them to the ordinary judges or, where the ordinary judicial power failed, by creating new Courts such as the Divorce Courts, or the Courts for election petitions. At the time of the great Railway constructions in the early forties, Parliament set itself to arrange its committees in semi-judicial fashion, so as better to cope with the business which flowed in upon it. More than one statesman then declared, that Parliament was undertaking work for which it was not fitted, and for which it was not elected or maintained. Various plans have been tried to reduce the work, the most successful of which has been the passing of general statutes, under some of which provisional orders

can be obtained from one or other of the Departments, subject to the approval of Parliament; under others, such as the Companies Acts, by which the statutory privilege of incorporation, with or without limited liability, can be obtained by registration, and under others, such as the Lands Clauses, Railways Clauses, and Companies Clauses Acts, by which the general conditions of expropriation are reduced to tolerable uniformity. With all these reductions and improvements, there still remains an annually varying but always considerable mass of administrative and arbitration work in the shape of private bills, requiring the time and attention of Parliament. The manner in which this work is done, its expensiveness and its remoteness from the localities concerned, have caused complaints for many years. Some notion of the extent of this business may be derived from the fact that the House or Court fees on private bills during the last ten or twelve not particularly good years amount to about £58,000 per annum, whereof £40,000 are clear profit, after providing for every special expense in both Houses caused by private bill legislation. The question now is, whether Parliament ought to continue to act as judge or arbiter for companies or corporations, or whether these juristic entities should be remitted like ordinary persons to the judiciary. There is not, in this country, any accusation or suspicion of corrupt management as regards private bill business, though much of wilfulness, want of sound judgment, and the other faults commonly found among amateur judges. The Joint Committee of Lords and Commons which reported in July last, decided by a large majority that the present system of successive Private Bill Committees of both Houses, with a double trial in a considerable proportion of cases, cannot and should not go on, and that a judicial commission should be established to take the place of these committees, to inquire locally into private bills, and to report to both Houses once for all, in lieu of the successive reports of each House's separate committees.

It is a great matter for those who are earnest in this reform

against vested interests in London and among the great companies which oppose it, to have got an opinion so clear and decisive from both Lords and Commons. Even the minority of the Joint Committee, who contend for maintaining substantially the present system, recommend a further extension of the power of granting provisional orders, and suggest that the local inquiry into such orders, at present left to be accomplished by the departments as best they may, should be conducted by a stronger tribunal than is the case at the present time. Lord Balfour of Burleigh, who drew up this minority report, thereby concedes really the principle of a Parliamentary Commission; and the main point of difference between him and the reformers is, that he would increase the present functions of the departments, and let them call in a "stronger tribunal" when wanted for provisional orders, while the majority prefer a stronger tribunal, suited for the trial of private bills as well as that of provisional orders. The consideration which leads to the hope that this report will not prove ineffective is derived, not only from the weight due to the Joint Committee which presented it, and to the evidence on which it proceeds, but from the notorious state of Parliament at present. The increasing difficulty of getting public business properly attended to, especially in the House of Commons, led Lord Hartington's Committee, in 1886, to report to the House that the improved arrangements for public business which it recommended could not be carried out unless the Commons were relieved of private bill business. The wisdom of this is evident to every one who considers at once the demands made on the Commons to man Private Bill Committees, and the shortness of the time available for these committees, now that the House has made its sittings earlier. The morning hours, whether or not they shall be occupied as formerly by sittings of the whole House, are required for committees on public business. The requirements of public business have not only increased, but the unwillingness of members of the House of Commons to serve on Private Bill Committees has become marked. They claim exemptions at

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the age of sixty, or because they are barristers or other professional men, or railway directors, or for any other plausible reason. In fact, as Sir John Mowbray, chairman of the Committee of Selection, pathetically narrates: "In one Parliament I knew a member who, whenever he was put on the panel or summoned by the Committee of Selection, went to Paris and telegraphed to us from Paris. We are met with every sort of dodge of that kind. Many members are in London, yet it is very difficult to find them, although they are in London, when they are wanted to serve on Private Bill Committees." In the altered conditions of public and parliamentary life, Members of Parliament are entitled to say with much force that they are not elected to settle the affairs of rival railway companies, or the local schemes of municipalities; nor is the time of Parliament to be given to the railway interest, while the public affairs of Scotland, and sometimes even of England, can get no adequate attention. There never has been any doubt in the Scottish public mind, since its attention was called to the subject by the action of so many of its most distinguished and trusted public bodies, that the present system of Private Bill Legislation is, as Mr. Balfour called it when he was Secretary for Scotland, "absurd, expensive, and antiquated." There cannot be much question that local trials would much reduce expense and encourage local enterprise. But whatever may or may not be said as to the comparative expense and trouble of attending day after day in Westminster on the short and intermittent sittings of chance Committees of Lords or Commons, there can be no doubt that trials, in or as near as may be in the locality primarily and directly affected by any private bill, would be highly preferable, by compelling the evidence and whole proceedings to be conducted before the watchful eyes of the local public whose interests are mainly concerned. Jobs, if jobs are ever perpetrated, to the sacrifice of local interests, are generated when local promoters or opponents are lost to view in the crowd of London or cornered in the lobbies at Westminster. The

Scottish opinion in favour of the local trial of private bills is clear enough and strong enough to persist in demanding from the Government the fulfilment of pledges given by a Queen's Speech and by more than one Minister. The reform will benefit England as well, but it is specially required in Scotland.

As to the hands to which the local inquiry into private bills is to be in future intrusted, the late Joint Committee, after considering various suggestions, found itself reduced to choose between two schemes. Mr. Courtney proposed that the Commission on Private Bills, once constituted by parliamentary authority under a general Act, should be supreme over the inception and progress of private bills from first to last. Its members should form, as it were, a separate department for private bill legislation, whose doors should be open at any time of the year to receive bills, and whose sittings should go on continuously like those of any other Court. It should grant or refuse private bills as Parliament does at present. Mr. Stanhope, on the other hand, was not disposed to go quite so far all at once in startling parliamentary pedantry. His Commission was to take the place simply of Private Bill Committees, and to report after the second reading, as they report at present. It is this view which the Joint Committee favour; but, as they justly remark, Mr. Stanhope's scheme once adopted might readily grow into Mr. Courtney's semi-independent department. It would certainly be a great advantage over the present state of things if private bills could be framed and lodged at any time during the year, and not, as at present, only in November; and one main advantage of the Commission would be lost if it could not hold its sittings continuously and until its work was done, independent of the session of Parliament. The difference between Mr. Stanhope and Mr. Courtney is, however, not practically important at present. The important thing is that Parliament should give up the effort to do the work of judge and arbiter on Private Bills, and should refer this work to a commission, which might also relieve the depart-

ments of local trials as to provisional orders. There is money enough in the £40,000 per annum of profit on the Houses' fees to pay for the highest talent, legal or technical, which may be required to secure the confidence of the country. The details of this Commission, as regards its composition and the statutory powers, and instructions under which it is to act, may be properly left over for further discussion, aided by all the information at the command of Government. We may add that the opinion expressed by the Joint Committee in favour of a Commission as against any scheme of devolution on local representative bodies is, according to a recent writer of authority, confirmed by the experience of the United States. All who may be inclined to question whether private bills should not go to some elected bodies equivalent to State legislatures should read what Mr. Bryce, M.P., says, in his late book upon America, of the deplorable results there attending upon leaving Private Bill Legislation to local legislatures. Private bills, according to Mr. Bryce, "are one of the scandals of the country. . . . They are a perennial fountain of corruption. Promoted for pecuniary ends by some incorporated company, or groups of men proposing to form a company, their passage is secured by intrigue, and by the free expenditure of money, which finds its way in large sums to the few influential men who control a State senate or assembly, and in smaller sums among the rank and file of members who are accessible to these solid arguments, and careless of any others." The private bill nuisance to be abolished in Great Britain is happily not so bad as that; but it is bad enough to require urgently the serious attention of Parliament both for its own relief, and for the careful commission of private bills to hands above suspicion.

R. Vary Campbell.

MUNICIPAL SOCIALISM IN SCOTLAND.

I AM courteously invited to contribute to the pages of this new *Review* some observations upon the cities and towns of Scotland regarded as municipal corporations. Without further preface, let me explain that this brief chapter of impressions and reflections is to be understood as the memorandum of an American visitor who has no thought of speaking as an authority or a critic. Perhaps the words "municipal socialism" should have preliminary interpretation. They are not used here with any reference to controverted theories or political doctrines, but rather as a convenient term under which to discuss certain of the numerous and increasingly complex functions of the large modern town. To speak in a popular and unscientific way, the word "socialism" as here used might be defined to mean the sum total of all those governmental activities which have been superimposed upon the negative or strictly necessary functions. But in practice it is extremely difficult to classify public functions and activities upon any logical scheme which proposes to set individualism over against socialism. The former "ism" holds it to be the duty of government to secure to the individual the largest liberty and immunity compatible with the reasonable liberty and immunity of other individuals. The means, however, by which this protection is to be made efficient cannot be the same in the simple agricultural community and in the great and densely-populated industrial city. How many of the new activities of municipal government—the activities usually regarded as socialistic—are but the application to existing conditions of the principles of individualism? The

most strictly defensive war has its "offensive-defensive" operations. Professor Sidgwick read at the Bath meeting of the British Association last September a paper of great value as a contribution to the theoretical discussion of governmental functions, in which he maintained that a very large part of the list of modern undertakings commonly deemed socialistic might be properly regarded as extensions of individualism. The recognition of Professor Sidgwick's analysis would clarify many a fruitless argument and set at rest many a groundless apprehension; but with these logical distinctions I am not now concerned. The development and progress of all those recent and varied activities of municipal governments, undertaken for the welfare of communities and their constituent members, may conveniently be termed "municipal socialism."

The characteristics, physical, intellectual, and moral, that are most distinctive of the Scotch people were developed and matured under conditions very different from those now prevailing for a large majority of the population. The rural element played the principal part in the traditional life of Scotland. But the Scotch have become an urban people. Perhaps nowhere else in the world are the social effects of the changed industrial conditions of the nineteenth century so visible as in Scotland. The towns are growing at the expense of the country districts in every part of the civilised world through the operation of common causes; but it is the Scotch towns that most strikingly exemplify this growth. At the opening of the century Scotland had a population of 1,600,000, more than two-thirds of which must have been rural. The total population to-day approaches 4,000,000, of which less than one-fourth is strictly rural, and more than three-fourths belong to towns and villages. Decidedly more than half of the town and village population is to be found in the eight principal towns. Allowing for the fact that the conditions of life in the smaller villages are those of the country rather than of the town, it may be fair to say that the proportions have been reversed since the opening of the

century, and that two-thirds of the people now live in towns. This change signifies so much that it may be said to amount to a social revolution of prime magnitude. And its significance is the greater because town and country life are more sharply contrasted in Scotland than in other English-speaking countries by reason of the extraordinary density of the population, even in the Scotch towns of moderate size. The population of an average English town would be found to occupy two or three times the area per thousand of an average Scotch town, while an American town would be spread over ground from five to fifteen times as extensive.

Such are the conditions with which municipal government in Scotland finds itself obliged to deal; and they might well furnish food for pessimism. Scotland has eagerly embraced the *régime* of the steam-engine and the factory system. In proportion to its numbers, it ranks incontestably first in the new industrial pursuits and achievements of the age. It has more than doubled its home population in two generations, while contributing its energetic sons and daughters by the hundreds of thousands to America and Australia; and it has increased its wealth manyfold. But its present population, in the larger part, is massed in towns under new and artificial conditions which would seem seriously detrimental to those wholesome qualities of body, mind, and spirit, which have made the Scotch so marked and superior a race. Is social decadence to follow as a consequence of commercial and industrial success? Rather, is not the energy which has won the day in other directions to turn itself with equal success to the solution of the social problems which now compel attention? The answer to these questions is to be found in what has already been done and what is plainly in prospect. Neither in Scotland nor in any other country need men despair of the social well-being, if they will but devote themselves to securing it.

The case in favour of the municipality as an important unit of administration could not be clearer than in Scotland, where the communities are so integral and distinct. Each

has unity as a social and industrial organism. Within the true bounds of that organism there is a sphere of operations for a municipal government having functions so many and important as to touch the individual and the family at a score of points for every single point of contact of all other governmental agencies. I speak of the "true bounds" because the actual municipal bounds may not include the whole industrial and social organism which constitutes the community. Great inconvenience always arises from the existence of such disparity. The Scotch towns are entering upon an administrative career which will be embarrassed and impeded if this question of municipal boundaries is to be neglected. The limits of Glasgow should be enlarged without delay; and even the proposed extensions are open to criticism as too restricted. Leith should be amalgamated with Edinburgh in government and name as it is already amalgamated in every other respect, and the enlarged incorporation should include a belt now exterior to both municipalities. Aberdeen and Dundee also should throw out the lines of municipal authority over a wider area. The American towns, which in most regards have much to learn from those of Scotland, are at least wiser in this matter of boundaries. As a rule, they annex territory in anticipation of its actual upbuilding; and the central authorities are thus able to control the formation of streets, to regulate the character of buildings, to lay out parks and open spaces, to control the extension of tram-lines and of water and gas-pipes from the town into the suburbs, and—quite as important as anything else—to have the benefit of taxing land values which are increasing solely through the progress and development of the municipality. In scores of ways unthought of fifty years ago, the organised municipality of to-day has a vital interest in supervising its own upbuilding; and Scotch towns will make an expensive mistake if they continue in the future to allow the line of municipal control to follow tardily the line of actual growth rather than to keep well abreast, or, better still, in advance of it.

The framework of Scotch municipal government, as established by the Reform Act of 1833, has fortunately shown itself to be highly satisfactory. As matters now stand, the corporation—carefully revised membership lists of which are made out each year by the municipal authorities—includes almost every person who could reasonably wish to cast a vote. The municipality governs itself by means of a grand elective committee called the Town Council, which resolves itself for administrative purposes into a number of special committees. The bailies or magistrates are simply councillors to whom their associates intrust certain additional duties. The provost is a councillor who is designated by his associates as their presiding-officer, and the chief dignitary of the town. Nothing could be more simple. The English system is similar, yet slightly more complex and, by so much, inferior. The American system, which sets up a popularly elected executive called the mayor as an administrative rival of the council, and which makes large use of special commissions and other appointive or elective local functionaries not amenable to the council, dissipates responsibility, and opens many doors to inefficiency and corruption. The pertinence of these allusions is obvious enough. Upon the structural excellence of a government must very largely depend the success or failure of its administrative undertakings. If one will but compare the functions of the Scotch municipality fifty years ago with those of to-day, he will see that, while they have become within that period at least ten times as numerous and important, the system remains essentially the same; and that system will suffice, presumably, for the cultivation of the further fields of municipal enterprise that are to be entered upon in the coming half-century. General control remains in the hands of the council as a whole, while each department is actively supervised by a council committee, and is, as a rule, administered in detail by a permanent official who is an expert in his line, and is responsible for his department to the council. So efficient is this simple method of local administration that it bids fair to prevail

even more completely in the future than at present. The question will arise whether anything is really gained by maintaining, at least within municipal areas, separately-elected school boards, and a separate parish government for the care of the poor, and by maintaining the traditional anomalies of the parochial voting system, and the experimental anomalies of the school-board voting system. And the question is likely to be answered in the negative. The utility of these separate authorities is chiefly hypothetical, while the account against them is considerably more real and tangible.

The municipal undertakings to which I shall direct more particular attention are those for the amelioration of populations which industrial progress has attracted to the towns, rather than those which have themselves stimulated that progress. Yet a few observations may be permitted upon this second class of undertakings. The key to the history of Glasgow, as a modern industrial community, is the Clyde. Glasgow as a municipality has transformed the Clyde from a mere rivulet with mud banks into an artificial channel for navigation by the largest vessels. This one achievement of municipal energy, which has hardly a parallel elsewhere, is what has truly made Glasgow the second city in the British Empire. Private initiative would never have accomplished this. One is tempted to speculate upon the consequences of the development of Clyde navigation, followed by a large foreign trade, the opening up of the coal and iron mines of the Clyde valley, and the emergence of one great industry after another. It is enough to say that the effects of the Clyde navigation have extended themselves to other Scotch towns, and have been potent in the development of mines and manufactures. Again, the provision by the Glasgow municipal authorities of an inexhaustible supply of pure water at a low price has made it possible for an important group of industries to remain and expand, whereas they would otherwise have been obliged to go elsewhere. Such are instances of the means cities may use to promote their own growth; and the Scotch

towns are not unlikely to employ them variously and vigourously in the future.

The reference to Glasgow's water supply naturally suggests the topic of monopolies of local service; and Scotch experience with these monopolies has been especially valuable. In a past, not very remote, it was thought no part of the business of a town government to supply the people with water. The point is now universally conceded. An abundant supply of pure water is a necessity for which private means are inadequate. Glasgow has taught the towns of the United Kingdom an important lesson in this respect by showing them that the very best is the cheapest. A public authority has the advantage over a private company in being able to distribute the cost of a permanent enterprise over a much longer period of time, and in being able to secure money at lower rates. No private company could have brought a supply of water from the Highlands to Glasgow without charging double the current rates for domestic use. The saving to the city in the expenses of the fire department alone, owing to the direct pressure in the pipes is, it is believed, almost equal to the interest upon the cost of the water works. The indirect savings to the people arising from the superior purity of the water are estimated at a very large annual amount. Summing up Scotch experience upon this question, it becomes perfectly clear that every town can afford an excellent public water supply, and that no town can afford to be without it. The amount of water *per capita* supplied daily to the people of different towns and not wasted by them has come to be regarded as a very important item of intermunicipal comparative statistics, having no little bearing upon the question of relative social advancement. In the nature of the thing, the supply of water is a monopoly; that is to say, if left to private enterprise, there can be no effective competition. Furthermore, the sources of a large supply are usually beyond the domain of private control, while distribution requires the use of the public streets for conduits. Con-

siderations of the public health, together with the fact that the authorities themselves are from year to year increasing their consumption of water in the various municipal services, all unite to make the argument for the water supply as a public function practically unanswerable. Nowhere have these considerations been more fully appreciated and accepted than in Scotland. (*a*)

It was the complete success of the municipalities as purveyors of water that led to their assumption of the gas supply. The arguments for the public supply of water are more imperative and universal. They are recognised everywhere in America, while of the hundreds of American towns which use gas for street illumination, only two or three have ventured to make the gas business a public function. But the circumstances in Scotland and America are quite different. In America the great majority of the people use kerosene oil (refined petroleum) as a domestic illuminant. The population being much more scattered than in Scotland, the cost of distribution of gas is materially increased. In Scotland, gas is almost universally essential. The high latitude, and the prevailing gloom of the long winter season render a cheap, safe, convenient, and brilliant artificial light, such a blessing and benefit as no language can adequately describe. I do not hesitate to say that as an agent of civilisation in high latitudes, a cheap and abundant illuminant stands almost unique. The public gas undertakings of Scotland are proving themselves eminently successful from the point of view of municipal finance and economical administration, and still more brilliantly successful when considered in their social results. Within a few years the Glasgow authorities have succeeded in more than doubling the quantity of gas sold and in enormously increasing the number of users, while the population has increased by a relatively small percentage. The Edinburgh corporation

(*a*) [This is true mainly of the larger towns. The efforts of the Board of Supervision to compel smaller burghs to adopt a water supply have been persistent but not generally successful.—Ed.]

which has recently purchased the works of the two private companies that have heretofore supplied Edinburgh and Leith, will unquestionably be able within a year or two to reduce the price to consumers and to put increased quantities within the reach of the poor, while it has already been able, as a measure of police, for the protection and comfort of the population, not only to improve public street illumination, but also to imitate Glasgow and Dundee in extending the public lighting service to private courts and to the common stairs of all tenement houses.

It is a remarkable instance of the progress of the most commendable kind of socialism that the authorities of Glasgow should have undertaken the task of lighting the common stairs—a task whose magnitude will be appreciated when I say that its expense for gas and wages is greater than that of lighting the streets. So far as I am aware, no other towns of importance anywhere have assumed this function; but the example will prove contagious, certainly in all the Scotch towns where the bulk of the population is housed in tenement flats. If I mistake not, it is already in contemplation in the city of Edinburgh and several of the towns throughout the country.

Another extremely interesting socialistic outcome of the assumption of the gas business by the municipal authorities is the attempt by supplying stoves and fixtures at a low rental, and by keeping them in order and repair, to encourage the use of gas as a domestic fuel. Edinburgh is about to enter immediately upon this line of enterprise since its recent purchase of the old gas companies' plants, and Glasgow has been engaged in it with a considerable measure of success for two or three years. It is an impression which I have not verified that Dundee and Aberdeen are also selling and leasing gas stoves. Convenience and economy are undoubtedly going to make gas the ordinary domestic fuel of the future; and, as purveyors of gas, the authorities would seem to be justified in providing such facilities as will hasten the innovation; but whether they can wisely attempt in the

future to compete with private enterprise in supplying stoves and utensils, whether by manufacture or under the contract system, must remain for experience to determine, the presumption being in favour of private enterprise. But the important point here is this: that the fuel supply of Scotch towns, following the water supply and the illumination supply, is fast taking the form of what I may term a "monopoly of local service," and that, as such, it is already passing into the hands of the municipal authorities for manufacture and distribution. It is further to be observed, that as soon as the demand for fuel gas becomes sufficiently large it will be manufactured separately and at much lower rates than the differently constituted illuminating fluid, and will be distributed in separate pipes. In this connection, also, it is to be observed that if electricity should supersede gas as an illuminant, the existing gas-works would be available for the fuel supply, and would not therefore, as some persons have predicted, lose their value.

The third monopoly of local service that has attained practical importance is that of tram-lines, or street railways. And here, again, Scotland's chief commercial city has had experience of great interest and value. Glasgow refused to give up any portion of the control of the public streets to a private company, and insisted from the very beginning upon the municipalisation of the tram-lines. Thus the lines were laid down upon considerations of social convenience and advantage, and with reference to the work the authorities then had in hand of relieving the congested population centres. While American, English, and Continental towns were showing themselves dull to appreciate the value of exclusive street privileges as municipal assets, and were giving away the tram-line right to private companies, Glasgow showed itself admirably awake to the municipal interests. While leaving the business of working the tram-lines to a private company as lessee, Glasgow perceived the wisdom and advantage of treating the rails and tracks as a part of the street, to be owned, as all other parts of the street are,

by the community itself. This plan simplifies the relation between the municipality and the operating company, and gives a more tangible appearance to the city's contribution to the enterprise,—that contribution being in fact not only the lines of metal rails, but also and especially the advantages of route along the principal highways of a crowded city. The Glasgow lines were leased upon the condition that the company should pay interest and sinking fund charges upon the cost of laying the lines, should keep the lines in repair, and should pay a moderate rental per mile for the use of the streets. It is the best plan that has ever been devised; and Manchester, Salford, Birmingham, and other English towns have imitated it to their advantage. Financially it would have been still more successful had the corporate limits of the municipality embraced the entire community. The suburban extensions of the lines lay outside the town and were made by the operating company. There were other conditions of a notable kind, besides those of money payment. These were of a distinctly socialistic nature. The authorities required that a penny a mile should be the maximum charge to passengers, that on numerous designated routes of greater length than a mile the fare should not exceed a penny, and that morning and evening cars should be run at half-price for working-men. At that time tram-car fares elsewhere were at least twice as high. The Glasgow contract of 1872 was the most important innovation that had ever been made in the direction of municipalising, in the socialistic sense, the local transportation of passengers. A new contract is to be made in 1889 in anticipation of the expiry of the present lease in 1894; and the lines will become a source of large net revenues, inasmuch as the interest and sinking fund payments will have been practically extinguished.

Edinburgh, with less foresight, gave the use of its streets for a term of years, without compensation in any form, to a private company. It might at least have been required that at the end of the term the city should come into free possession of the lines in good repair; but this was overlooked.

XUM

However, the corporation will have the exclusive right to buy the lines and materials of the Company at a "knock-down" valuation; and it seems to be agreed that this will be done at the expiration of the grant,—a date now almost at hand. I am informed by gentlemen who speak with authority that there will be a strong movement in the Edinburgh Council in favour not only of the acquisition of the lines, but also of their direct operation as a department of the municipal government. Other departments, especially those of street cleansing and garbage removal, have obliged the Scotch cities to become horse-keepers on a large scale, and there is really no reason to suppose that an enterprising and honest city government could not operate a horse railway system with efficiency, and to the satisfactory end of relieving the rates. But Glasgow, with an acceptable lessee ready at hand, and with the prospect of excellent money terms in a renewed lease, would hardly be justified in assuming direct management. Edinburgh's course, it is superfluous to say, should be governed by its own circumstances; but, generally speaking, it might be well for cities to wait for the excuse of a new motive power to signalise their entrance upon the work of common carriers. No doubt exists as to the early introduction of the new power. Several scores of electric tram-lines are already in operation in different parts of the world, and cable-lines are a thoroughly established success. Scotch conditions being taken into account, as well as Scotch views on the subject of the municipalisation of monopolistic services, it may be asserted with some confidence that when the horse service is superseded on the tram-lines by a power distributed through the streets from a common centre, whether the electric or the cable system should be adopted, the whole business is likely to pass into the hands of the authorities. Indeed, it requires very little imagination to foresee great municipal electric power "plants" by the side of the municipal gas-works. The Scotch municipalities of the future are to be purveyors of motive power as well as

purveyors of water, of illuminants, of fuel, and of street transportation. For new systems of transmitting power are subjecting this commodity to the same economic principle of monopoly as prevails in the other cases. The machinery of thousands of small workshops in Birmingham is supplied with power from a common centre by means of pneumatic tubes; but electric wires seem to be superior to compressed air for this purpose; (*a*) and the generation and distribution of electricity whether for street-lighting, for the operation of tram-lines, for the carrying on of the constantly increasing sum total of mechanical processes in the various municipal departments, or for the supply of workshops and the revival thereby of small industries, will inevitably pass into the hands of the municipal authorities.

But it is quite foreign to my present purpose to speculate upon the new monopolistic services of the future, and to construct imaginary municipal utopias. There is nothing dreamy or doctrinaire about the Scotch treatment of these matters. A certain school of socialists would have the community assume the supply of various commodities in order to make the supply free. They would tax the provident and industrious in order that the rest of the community might have free water, free light, free fuel, and free rides. A very conspicuous advocate of the plan to make land rentals pay all the burdens of the State and the municipality is on record as advocating the acquisition of the street-car lines by the authorities of New York in order to make riding as free as walking. This is not the Scotch idea. There are good financiers in Scotland. Each one of these monopoly services is made to stand upon its own basis, to pay its way fully and completely, and to provide for its own maintenance and extension. Beyond the point of complete self-support, profits are distributed in the form of diminishing charges as the relative cost of service diminishes. Thus water and

(*a*) [The hydraulic main system is now extensively used in London; Captain Shaw, the Fire Superintendent, has recently declared it to be of the utmost value for purposes of fire extinction.—Ed.]

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gas charges have gone down steadily, but without injustice to the ratepayers. It is a fair question how far the profits of these services should be thus distributed, and to what extent it should be the policy of Scotch towns in the future to make the monopolistic services earn net revenues for the benefit of those other municipal services, sanitary and the like, which are not productive of income and are now supported by rates. It is at bottom, of course, a question of the incidence of taxation. Should the municipality own street-railway lines for the sole benefit of those who patronise street-railways, or rather for the benefit of the whole community? Local circumstances must affect any general rule; but to me it would seem clear that these monopolies should be expected ultimately to yield large revenues, and that the plan of keeping their incomes down to the line of self-support should be opposed. On the other hand, considerations of the social good would seem to require that the prices of water and gas should be kept somewhat below the line of the maximum yield of revenue. I believe that the Scotch towns will in the future find it wise to use their productive monopolies as the sources of large net revenues; thus appropriating forms of wealth which owe their existence to the social fact of large towns, for the maintenance of those charges of police, sanitation, &c., which in like manner grow out of the social fact of dense urban populations. It may be added that, theoretically, there would seem very little valid objection against the plan of making the municipality the monopolistic proprietor of the land it occupies (full compensation having been made to private ground landlords), in order that the future increments of land value, arising from the energies and progress of the whole community, might be devoted to those social improvements which are required by the circumstances of the community. Yet it should also be remarked that the financial benefits to accrue from such measures have been greatly exaggerated by some of their enthusiastic advocates.

The most important of the non-productive municipal services are those which may be grouped under the general

term of public sanitation. All such measures are recent, for sanitary science is as yet only in its infancy; but they have made good progress in the Scotch municipalities, and are there shaping themselves into a Scotch sanitary system that merits wide attention. It would be quite beyond the purpose of this article to review the code of sanitary legislation for Scotland and Scotch towns which has grown up within a few decades. The system is not yet ideal or complete; but it is practical and efficient. It includes an organisation for the discovery, isolation, and control of infectious disease with a view to the prevention of epidemics; an organisation for the discovery and abatement of nuisances; an organisation for the draining, cleansing, and scavenging of towns; and an organisation for the inspection of the food supply. In Glasgow these matters all come under the supervision of one large committee of the Council, while a Medical Officer has executive authority in everything affecting the public health. A superintendent of cleansing organises and carries out the large work of daily scavenging, while a chief inspector has control of the various kinds of sanitary inquisition. Scotch towns have discovered that the epidemics which in former days visited them in their frightfully overcrowded and unwholesome tenements and spread throughout the community, are preventible. Glasgow has the most commodious and attractive municipal fever hospital in the world; and the vigilant and unremitting search for cases of infectious illness has been rewarded by the practical disappearance of small-pox, typhus, and other such malignant diseases; while the abatement of nuisances has begun to show marked results in the diminution of cases of other febrile diseases. In connection with this branch of the health work, the sanitary wash-house and the disinfecting staff deserve mention. No crowded town can afford to neglect any means which sanitary science places at its disposal for the stamping out of infection; and the Scotch communities under Glasgow's lead are making commendable progress in this direction. It surprises the stranger to find that Scotland is still without a law

requiring private physicians to report cases of epidemic disease among their patients. (*a*)

Nearly a thousand men are employed by the Glasgow cleansing department in sweeping the streets; sweeping and cleaning private courts, passages, and tenement stairways; removing all domestic refuse of every character; cremating the non-manurial part; and preparing the great bulk of the cleansings for shipment to the country as manure. Edinburgh has a similar system. The cold, heavy soil of Scotland can make profitable use of all the street sweepings and ash-bin refuse that the towns can send out. It is pleasant to be able to observe that the cleansing question is settled for Scotland, and that it simply remains for all the Scotch towns to adopt and adapt the Glasgow and Edinburgh system, making it as thorough as possible. Public scavenging can probably never be made self-supporting, but the Scotch towns may hope to recoup nearly half the cost of cleansing by the sale of manure; and public scavenging has become a necessity irrespective of cost in towns so densely populated.

Almost without exception the larger towns of Scotland have access to the sea; and until some cheap system is discovered for the manurial utilisation of sewage, their best course would seem to be that of precipitating the sludge and barging it out to deep water. In these matters of drainage and sewage disposal the Scotch towns are rather slow in acting "according to their best lights;" but the new order of things is not to be expected in a day. Glasgow cannot with impunity neglect this pressing affair of sewage disposal any longer.

The complete municipalisation of markets and slaughter-houses, and the custom of centralising in the public markets the wholesale trade in meats, fish, fruit, and provision of all sorts, as in Glasgow, Edinburgh, and some other Scotch towns, cannot be too highly commended as advantageous to the public health. The meat of no diseased animals can find

(*a*) [This, however, has been the law in Edinburgh for the last nine years, and it is now embodied in the proposed new General Burghs Police (Scotland) Bill.—Ed.]

its way to the homes of the poor, and the whole business of food inspection is greatly facilitated. The registration of dairies and retail milk and meat shops, and the inspection of their arrangements, is also of great benefit as a health measure. The Scotch law of evidence as regards the sale of adulterated or unwholesome food articles, should be simplified in the interest of consumers. The Public Health Acts should also be so amended as to give municipal authorities control over the sources of milk supply, so far as their sanitary arrangements are concerned. The authorities should be competent to exclude milk coming from farms whose arrangements are not approved by the municipal health officer. The legal standard of quality in milk is, also, entirely at fault, and permits universal dilution. Food inspection of all kinds should be made more efficient by increasing and reorganising the forces of inspectors. It would seem possible to conduct the markets and slaughter-houses in such a way as to make them productive of sufficient net profits to pay all the expenses of the most inquisitive and relentless food inspection. A considerable revenue could be derived from the arbitrary monopoly of abattoirs, without imposing any undue burden.

The question of the housing of the poorer half of the population of industrial towns has within a few years assumed prominence as one of legitimate public concern; and it is worth while to remember that Scotland furnishes the first if not the most important chapter in the history of a movement destined to work a vast transformation. Nowhere else in the English-speaking world has overcrowding and insanitary house-building been carried to such shocking and dangerous extremes as in Scotland. Glasgow had the courage to enter upon a scheme of wholesale demolition, street-widening, and general renovation in the congested central districts, where some scores of thousands of people were living at the rate of a thousand per acre under circumstances of indescribable degradation. In the face of every criticism that has been passed upon it as put into execution, and in the face of the fact that it fell far short of the necessities of the situation, that scheme

is to be pronounced a brilliant success. Out of it have come the Artisans' Dwellings Acts, and its courage in showing the way, has emboldened a number of other towns in England and Scotland to enter upon projects for the opening up to light and air and traffic of the reeking slums where unsparing demolition is the cheapest as well as the most humane remedy. Scotch experience in these matters has made it reasonably clear that, as a general rule, demolition should be the work of the public authorities, while reconstruction should be left to private enterprise under strict regulation as to all such details as materials, construction, ventilation, lighting, size of apartments, ingresses and egresses and fire escapes, and so on.

It is extremely important to remember that if all buildings, including enlargements, erected in Glasgow and other Scotch towns since the year 1800, had been erected under proper regulations, and if proper regulations as regards tenancy had existed, there would have arisen no necessity for heroic and drastic remedies. Past negligence makes these measures necessary. It is greatly to be feared that in some cases while the authorities have been tearing down unsanitary buildings in old districts, the evil has been renewing itself by improper construction in new districts. Glasgow is now to a limited extent trying the experiment of building tenement houses on sites that it has cleared, and is thus entering upon the functions of a house landlord. But it would seem a thing of prime importance to perceive clearly that so far as this matter of housing the people is concerned, the proper business of municipal authorities within a future which concerns the present generation, is to be that of regulation and not that of the builder or the landlord. It is appalling to think of the crime, misery, and degradation resulting from the fact that one-fourth of all the families of Scotland live in a single small room. Dr. Russell of Glasgow in his lecture on "Life in One Room" has helped us to realise the horror and danger of overcrowding. The tens of thousands of "houses" in Glasgow containing less than 2000 cubic feet of space are ticketed, and regularly inspected by

night to prevent overcrowding. But while much has been done, much remains to be done. The condemnation of old buildings, the prescription of the arrangements of new buildings, and the public regulation of house occupancy can work a gradual transformation. Scotland owes it to herself and to her future to lay hold of this problem with a grim determination never to cease until her entire population is decently housed. Such an achievement is as possible as many another which is on record to Scotland's credit.

In connection with Glasgow's great undertaking for the renovation of the slums are to be mentioned several remarkably successful innovations in the socialistic direction. The most important of these is a series of common lodging-houses, built and operated by the municipal authorities, and having accommodation for two thousand persons nightly. They are model establishments, are patronised to the extent of their capacity, pay their way entirely, and are valuable as a police measure in reducing the evils of vagrancy. The regulation and inspection of common lodging-houses in other towns under the Scotch law is very good, at least in theory. Glasgow has managed perhaps better than any other large town in the world, circumstances being considered, to bring its floating population under the eye and control of the police authorities ; and a very sensible diminution of crime and disorder has resulted. Under competitive necessity, the privately managed lodging-houses of Glasgow have improved their quarters, lowered their charges, and become transformed from haunts of disorder and danger to instruments of decency and order.

Under the same general impulse Glasgow established a magnificent system of public baths and wash-houses. The baths, with their fine swimming ponds, conduce greatly to the health, decency, and recreation of the younger population, while the wash-houses afford the wives and mothers of poor families the most admirable facilities for laundry work at merely nominal prices. The social situation justified these undertakings, although they are not as yet fully self-supporting. Perhaps it would be better to say that they are

temporarily justified as public ventures *because* not fully self-supporting. In their nature they belong to the class of enterprises that can perhaps best be relegated, in the future, to the domain of private co-operative association. But, at present, the very poorest, who most need these advantages, are not in a position to join in co-operative enterprises. Edinburgh has also established public baths, and the example is finding general imitation.

It is interesting to observe that Glasgow maintains as a part of its health service a corps of lady inspectors who go about among the poor families to inculcate domestic cleanliness and to give kindly suggestions in matters of domestic economy. With a view to making the great steam washhouses self-supporting, the Glasgow authorities have entered incidentally upon the general laundry business, and are serving families of all ranks and conditions at the current prices. The precedent is not entirely good. The slight financial advantage does not justify this encroachment upon the domain of a humble vocation that lies quite outside the reasonable sphere within which municipal activities are multiplying.

The municipality is very properly taken as the unit for administration of the Education Acts. The space at my disposal will permit no discussion of the education problem in detail; but I may say in a word that the vigour with which Scotch towns have recently entered upon the work of popular instruction is most auspicious and gratifying. Accommodation for all children in the public schools has been followed by a compulsory act; while the fairly successful night-schools and the new "Technical Schools (Scotland) Act 1887" show the determination of the Scotch people to make their educational system what the condition of the industrial masses requires. In no other way can a modern town so surely promote its industries and promote the prosperity of its whole people as by a wise educational system; and nowhere in the world are the propriety and the necessity of an advanced and bold educational policy more obvious than in the Scotch municipalities. If that policy should become so advanced and

bold as to include a breakfast or a dinner for poor children attending school, in its zeal for the proper physical development of the future workmen and the future mothers of Scotland, the cost might ultimately be saved out of the poor rates. For, if modern philanthropy and social science have made one thing more clear than another, it is that preventive and educational agencies are much cheaper and more effective than remedial and punitive agencies; and that if society should take better care of the children it would be relieved of much of its burden of dependent and delinquent adults.

In all such matters as parks and play-grounds, public libraries, reading-rooms, art galleries, scientific and historical museums, and other kindred undertakings of modern municipalities for the recreation and information of the masses, the Scotch towns have made good beginnings, but for the most part have not shown themselves more advanced or zealous than the towns of other countries. Glasgow's repeated rejection of the Free Libraries Act would seem inconsistent with that city's record on other questions relating to the public welfare. Nowhere in the world are children more inadequately supplied with space for play-grounds than in the Scotch towns; and nowhere, it may be added, is the necessity so plainly visible.

Of the municipal control of the liquor traffic and of questions pertaining to what may be called the moral administration, important as these matters are in their bearing upon the social well-being of communities, I shall not attempt to say more than this—that under new conditions Scotland ought to be able to maintain without loss or decadence the old-time virtue and moral wholesomeness of the Scotch people. The past cannot be restored, and there remains nothing to do but to adjust the social order to those conditions of life which the new industrial *régime* imposes. The Scotch towns are, then, to be commended for having, as it would appear, accepted the situation and determined to work out all its problems to a successful conclusion.

ALBERT SHAW.

JURISDICTION FOUNDED BY ARRESTMENT OF MOVEABLES IN SCOTLAND—MR. PARNELL'S ACTION AGAINST *THE TIMES*.

THE action raised in the Court of Session in Scotland by Mr. Parnell against *The Times*, has attracted so much attention both at home and abroad, that a short description of the issues raised in it will no doubt be interesting both to the professional and the general reader. The purely legal points involved are of difficulty and importance, and both English and Scottish lawyers cannot fail to be interested in the objections raised by the defenders to the jurisdiction of the Scottish Court, and the scrutiny to which our practice of founding jurisdiction against a foreign defender, by the arrestment of his moveable property in Scotland, is being subjected in consequence.

Mr. Parnell sues *The Times* for damages (estimated at £50,000) for libel, in respect of the publication of, and comments upon, the letters attributed to him in their now notorious articles upon "Parnellism and Crime." In his condescendence (the paper in which, according to Scottish practice, the pursuer states the grounds of his action) Mr. Parnell first of all complains of the publication in *facsimile*, in *The Times* of 18th April 1887, of a letter dated 15th May 1882, and of a leading article describing it as "from Mr. Parnell, written a week after the Phœnix Park murders, excusing his public condemnation of the crime and distinctly condoning if not approving the murder of Mr. Burke;" and in the next place, of *The Times*' publication of a full report of the trial, *O'Donnell* v. *Walter*, &c., and

particularly of the speech of the Attorney General for *The Times* in that action, and of leading articles thereon, from which he quotes various passages. The letters, he states, are false and forged, and were not written or signed by him or with his knowledge or authority, and he accuses *The Times* of having falsely, and calumniously, and maliciously, represented in their articles that he had written and sent these letters, and that he had in them condoned and approved of the murder of Mr. Burke and instigated an attempted murder of Mr. Forster when Chief Secretary for Ireland. This is the substance of the charge; the details of the facts upon which it is based, are too fresh in public memory to need recapitulation. The defence on behalf of *The Times* is that the letters are genuine, and the editorials only fair and legitimate comment upon matters of public interest; and, in the statement of facts forming part of their pleadings, the defenders repeat the substance of the charges made in "Parnellism and Crime," alleging, among other things, that during the years 1879 to 1886 inclusive, or part thereof, Mr. Parnell "countenanced and condoned a system of murder and outrage in Ireland," and explaining that these charges, which they say are true, and do not depend for their proof upon the letters alone, were made and published by them in accordance with what they considered to be a public duty. It is noticeable that in this defence, *The Times* raises a much wider issue than Mr. Parnell submits to the Court. Accordingly we find the further objection taken that Mr. Parnell's action is an attempt to evade the inquiry now proceeding under "The Special Commission Act 1888," and to limit the present issue between him and them to the sole question of the authenticity of the letters specially founded on by him. Now, no doubt the scope of the commission is wider than that of the action. The duty of the Commissioners as defined by sect. 1, sub-sect. 2 of the above-named Act (51 & 52 Vict. cap. 35), is to "inquire into and report upon the charges and allegations made against certain members of Parliament and other persons in the course of the proceedings

in an action entitled *O'Donnell* v. *Walter and Another*"—words which are certainly capable of covering, and doubtless will in course of time, be found to include, an inquiry into the authenticity of the letters forming part of these allegations. But there appears nothing in the Act which can be considered as depriving, either directly or by implication, the person or persons against whom the charges and allegations have been made, of the legal right to sue the party making them for damages. And, on the other hand, the inquiry relegated to the Commission comprehends only the charges and allegations made in the course of proceedings in a certain action. Statements so made, if pertinent to the action, and not made maliciously, are generally held to be privileged and not to give ground for damages. But the libel upon which Mr. Parnell grounds his present claim, was not uttered by *The Times* in the course of the legal proceedings at all, but in the ordinary course of its business. In truth, therefore, the issues involved in the action raised in the Court of Session are quite separate and distinct, from those which form the subject of inquiry before the Commission, though the latter may, and do in part, include the former. If the Commission shall, within a comparatively short space of time, decide that the letters published by *The Times* are genuine, Mr. Parnell will probably give up the attempt to obtain a verdict in his favour from a Scottish jury; and if, as seems possible, that jury shall sooner be called upon to give its opinion, *The Times* may be in a position to triumphantly rehearse before it the proof of the authenticity of the letters which it intends ultimately to submit to the Commission.

These considerations, however, show the importance to both litigants of the preliminary defence which has been stated, and may, perhaps, explain the unusual anxiety exhibited by the defenders to avoid the jurisdiction of the Scottish Court. In considering that plea, it is necessary to inquire more particularly who the defenders really are, and what they really represent. The action is popularly described as directed against *The Times*, and so no doubt it is. But as that news-

paper is neither a physical nor a jural person, Mr. Parnell has sought to render it liable to him by suing Mr. Walter as proprietor and Mr. Wright as printer and publisher of it. Neither of these gentlemen is resident in Scotland, or amenable on ordinary grounds to the jurisdiction of the Scottish Courts, and accordingly, the pursuer has had recourse to the long-established usage of our Courts to found jurisdiction against foreigners by placing a legal embargo called an arrestment *ad fundandam jurisdictionem* or *jurisdictionis fundandæ causa*, upon their funds or other moveable property within Scotland. Arrestment, it may be explained, is the legal process by which in Scotland a creditor attaches in the hands of third parties, money due, or moveable effects belonging to his debtor, for the purpose of being applied, or, in Scottish legal language, "made forthcoming" in satisfaction of his claim. Its use is not confined, like attachment of debt in England, to judgment creditors, but it is available to secure a claim as well as in execution of it. And the warrant for it may be contained either in the summons or initial writ in ordinary actions (on what English lawyers might call *mesne* process), or granted in the special form of letters of arrestment. Its effect is to interpel the debtor from making payment or delivery to the creditor until the debt due, or to become due, by the latter to the arrester is paid or satisfied. But when arrestment has been used in security merely, it may be loosed or removed on caution being given to make the debt or subjects arrested available to the arrester as accords of law. The arrestment *ad fundandam jurisdictionem* is confined in its effect to the purpose expressed by its name. What might be the consequences should the arrestee disregard it is, as will immediately be seen, a somewhat doubtful question, but it admittedly has the effect of founding jurisdiction, and for this purpose, and this purpose alone, it was employed by Mr. Parnell. In so using it, he followed the ordinary practice, and a reference to his procedure will sufficiently explain the system. He first of all presented to

the proper official (the Bill Chamber Clerk) a Bill, as it is called, addressed to the Lords of Council and Session, explaining that "John Walter and George Edward Wright, are indebted to him in the sum of £50,000 damages, that they are foreigners not residing in Scotland, but having debts and effects belonging to them in the hands of several persons in Scotland, which they intend to uplift and withdraw therefrom to his prejudice, and that it is therefore necessary that he should have letters of arrestment *jurisdictionis fundandæ causa*," which he accordingly prayed their Lordships to grant in common form. The "letters" are a writ in name of the Sovereign proceeding upon the same narrative as the bill, and containing a warrant to the proper officers to "fence and arrest" (to quote from the writ used in the present case) "all and sundry goods and gear, debts and sums of money, and all other moveable effects pertaining or addebted to the said John Walter and George Edward Wright, wherever or in whose hands soever the same may or can befound, to remain under sure fence and arrestment *jurisdictionis fundandæ causa*." In practice the bill and letters are prepared and presented by the solicitor at the same time; and if they are found to be in form, the bill is at once indorsed by the clerk with the order *fiat ut petitur*, and becomes the warrant for the issuing of the letters, which are thereupon impressed with the signet or seal of Court and delivered to the solicitor for execution. In Mr. Parnell's case this procedure took place upon 11th August 1888, and on the same day a messenger-at-arms delivered to two firms of advertising agents in Edinburgh, a notice or schedule of arrestment of all sums of money, &c., due by them to the defenders.

It may be here observed—to make a slight digression—that the notice of arrestment usually names a sum sufficient to cover the value of the debt supposed or known to be due to the foreigner, but the words used are quite indefinite, and it is one of the curiosities of the process that their exact effect is not clearly determined. In general and till a few years ago it was supposed that their effect

was to impose a *nexus* upon the debts or effects actually in the arrestee's hands, so as to prevent him parting with them except at his own risk, without judicial sanction. And the practice formerly was to loose or remove such an arrestment only after caution (or security) had been found *judicio sisti—i.e.*, that the defender would appear and defend the action. But in 1870, in deciding the case of *Trowsdale's Trustee* v. *Forcett Railway Company*, 9 M'Ph. 88, Lord Moncreiff remarked that "an arrestment *ad fundandam* does not fix the subject arrested within the jurisdiction, for *the arrestee may safely part with it*, and it so far differs from an arrestment in execution." And, whether in consequence of these remarks or not, the loosing of such arrestments by judicial sanction has now, it is believed, fallen entirely into disuse.

But whatever consequences the arrestee may brave should he disregard an arrestment *ad fundandam jurisdictionem*, it is clear that the process effectually creates jurisdiction against him. The summons describes the defenders, as persons "against whom arrestments *have been* used *jurisdictionis fundandæ causa* by virtue of Letters of Arrestment dated, &c.," and it is usually signeted and issued for service, on presentation of the letters of arrestment indorsed by the messenger-at-arms with a certificate that he has duly served the arrestment. But from the recent case of *Walls' Tr.* v. *Drynan*, 1888, 15 R. 359, it would appear that this formality is no longer necessary, and that the summons may be signeted even before arrestment, though it cannot be competently served until after jurisdiction has been so constituted by the process just described. Service of a summons against persons not resident in Scotland is made by delivery of a copy of it at the office of Edictal Citations in Edinburgh, and in the case of parties resident in England or Ireland, by sending them a copy of it by registered letter. In the present case, the proceedings and citation described, secured the appearance of Mr. Walter and Mr. Wright, but they both deny that jurisdiction has been founded against them, and an inquiry was ordered

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into the facts, and evidence led before the Court upon this question. No decision has yet been pronounced, but the evidence publicly adduced discloses that while Mr. Parnell has arrested two sums of £1, 7s. and £11, 19s. due by the arrestees to the proprietors of *The Times* for advertisements inserted in that paper upon their order, it is by no means certain that these sums are due to Messrs. Walter and Wright or either of them. The proprietorship of *The Times* appears to be vested in a great number of individuals, the descendants or other successors of the founder of the newspaper, and the division of interests is so minute as to extend in one instance to a seventh of fifteen-seventieths of one-sixteenth of the whole. For convenience' sake Mr. Walter appears to have been for some years returned as proprietor under the Newspaper Libel and Registration Act 1881, and the return for 1888 bears his name "for himself and all other, the proprietors of such paper." But his individual share, though its actual amount is not discoverable from the list of owners now produced in the process, must be comparatively a small one; and the defenders maintain that, not being exclusive proprietor, he is not liable to be sued in actions relative to the paper. No evidence appears to have been led to show Mr. Wright's interest, if any, in the ownership of *The Times*. If he has none, it will be impossible to say that jurisdiction has been founded against him by the arrestment used. But the two defenders do not distinguish between their relative positions in this matter, but simply state generally that nothing has been arrested in Scotland which is, properly speaking, due to them, and consequently that no jurisdiction has been founded against them in our Courts.

To the competency of the proceeding to found jurisdiction in itself they do not take objection; nor does it appear, upon examination of the origin and practice of the process, that any such objection would now be likely to be successful. It was declared by the House of Lords in 1858, in *Lindsay* v. *The London and North-Western Railway Co.*, to be a

competent mode of creating jurisdiction against a foreigner, not otherwise subject to the jurisdiction of the Courts of Scotland. When and how it was first introduced into Scotland is not easy to fix with any degree of certainty. It is usually said to have been borrowed from the Dutch law, and this view of its origin is confirmed by the fact that it appears to have come into existence after the time of Stair, who does not mention it, and before that of Erskine, and probably in the end of the seventeenth and beginning of the eighteenth centuries, and in the course of the development of our foreign trade with the Netherlands. It appears to have been introduced essentially as a mercantile jurisdiction, out of favour to commerce, that creditors might sue more easily and cheaply in their own domicile. The Dutch jurist Voet, the authority commonly cited on the subject, gives that account of it, and this view is confirmed by the case of *Scruton* v. *Gray*, in 1772, M. 4822, where it was held inapplicable to an action of declarator of marriage against a foreigner. The Scottish Courts, indeed, appear from a very early period to have exercised jurisdiction over persons and effects within their territory even though only temporarily so; and when England was the only or the chief foreign country with which we had any degree of intercourse, there existed, under the name of "Border warrants," a method of obtaining a judgment against an Englishman by arresting his person or effects, whenever either happened to be found in Scotland. The attitude towards foreigners of our law and lawyers in early times may be easily imagined from the pithy report of the case of *Curl* v. *Watson*, in 1527, M. 4825; "Ane stranger being persewit within this realme befoir ony judge for ony civil cause or actioun, as for debt, aucht and sould find cautioun *de judicio sisti et judicatum solvi*." Mr. Ross, in his "Lectures," p. 449, says that the first step in any action of old was attachment of the person's goods to force his appearance in Court and secure obedience to the judgment. And the readiness with which our forefathers applied the to them familiar process of arrestment to the purpose of extend-

ing the jurisdiction of their Courts is not surprising, though it cannot easily be traced step by step now. In early times, of course, the object of the action was usually, if not invariably, to attach effects actually within the jurisdiction of the Court. And accordingly, in the early case of *Young* v. *Arnold*, 1683, M. 4833, which is the authority cited by Erskine for the practice of arrestment *ad fundandam jurisdictionem*, we find that the Court allowed a Scottish pursuer to arrest the goods of his adversary, a factor or agent at Rouen, till he found caution *judicio sisti et judicatum solvi* in Scotland (although, as the report bears, "Young, if he had ought to crave of Arnold, should pursue him in France"), for the naive reason—*tutius est incumbere rei quam personæ*. As society became more settled and confidence in law and order increased, the establishment of jurisdiction over the absent foreigner became gradually of more importance, and in course of time came to be the main purpose of the arrestment. The practice of requiring caution *judicatum solvi* also fell into desuetude, and the arrestment having served its purpose, was loosed on caution *de judicio sisti*—to appear and defend—solely. This change was necessarily gradual but, in the case of *Lindsay* in 1858, when the whole history of the process was under consideration, the use of arrestment for the sole purpose of creating jurisdiction was mentioned as having then existed for upwards of one hundred years. In a case which occurred in 1836 (*Ferrie* v. *Woodward*, 9 S. 854) its effect was declared in an opinion given by the whole Court to be, "to fix the moveables (which would otherwise be held to follow and be attached to the person of the defender) in this country; and that being done, and an action raised against the proprietor, he is held bound to appear to defend himself in the action, and to save, if he can, his property from the effect of the claim and decree against him." And on the authority of a case (*Douglas* v. *Jones*) which occurred in the same year, it was laid down by Lord President M'Neill in the case of *Lindsay*, already referred to, that the Court did not recognise the idea that in

founding jurisdiction the value of the subject arrested was in any degree to be the measure of the effect of the decree. "Everything said on the subject," his Lordship remarked, "has always been hostile to that notion, and I do not believe that any Scotch lawyer would say that that is the meaning of an arrestment to found jurisdiction, or that that is to be the limit of it." . . . "The object of the arrestment is merely to fix the subject here so as to give the Court jurisdiction, and then when the decree comes to be pronounced, it receives full effect in a foreign Court, to the same effect as any decree pronounced in a case which the Court has full jurisdiction to deal with." In the judgment of the House of Lords (3 Macq. 99), by which this decision was affirmed, the arrestment of moveables was described as an undoubted source of jurisdiction possessed by the Courts of Scotland, and there can therefore be no doubt, however anomalous it may appear, of the existence of the institution to which Mr. Parnell has appealed. The Courts of Scotland moreover do not, like those of France and some other countries, refuse to entertain questions between parties competently before them irrespective of their nationality or residence; and although the spectacle of an Irishman pursuing an Englishman in the Court of Session may be unusual, there is nothing in it contrary to the spirit or practice of our law. If, therefore, Mr. Parnell's arrestment be effectual the Court of Session will not inquire into his motives in seeking a Scottish tribunal for the settlement of his differences with his English adversary, and, in exercising its jurisdiction, it will only be careful to see that no hardship is inflicted upon a foreign defender by having the case tried in Scotland, greater than would be caused to the foreign pursuer by its declining to try the question.

In one important particular—viz., the value of the property necessary to be arrested in order to found jurisdiction,—the practice in Scotland, although so common, remains still somewhat unsettled. In an old case, it was stated that property duly attached, however small, would be sufficient to confer jurisdic-

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tion, and one of the judges is reported to have jocularly said that a box of toothpicks at a penny a-dozen would be enough. In the case of *Scruton* v. *Gray*, already mentioned, the pursuer attempted to found jurisdiction by arresting an old desk which the defender had left behind him at his lodgings. The jurisdiction was negatived, as has been explained, on the ground that it could not competently be so founded in an action regarding *status*, but so far as direct decision goes, the old desk, equally with the box of toothpicks, would appear to avail to found jurisdiction,—at all events in an action of debt,—provided only it is worth something. In the case of *Shaw* v. *Dow & Dobbie*, 1869, 7 M'Ph. 449, where a debt of £1, 8s. 6d. was arrested, the point was further considered. The Lord President (Inglis), in sustaining jurisdiction, is reported to have said:—"Unless the thing arrested be really of no value at all, I think the smallness of the amount is no relevant objection to the foundation of jurisdiction." This vague state of the law appears to suggest that no harm has been done by the jurisdiction thus created. If the sum arrested is so small that the defender does not think it worth while to appear in the action for the purpose of preserving it, a decree in absence will do him no harm, for, being *ex hypothesi* a foreigner, it can only be enforced against him by the Courts of his own country, and these, as will be afterwards pointed out, will not give effect to a judgment which, in their opinion, imposes upon him no legal obligation to satisfy it. If, on the other hand, he does appear, he can only complain of the inconvenience of defending himself in a foreign Court, and the effect which the Courts of Scotland usually give to the plea of *forum non conveniens*, practically secures him against any injustice in this respect.

It must be admitted, however, that jurisdiction founded upon the arrestment of moveable property is maintainable rather upon grounds of expediency than upon principle. Englishmen and Irishmen, who found jurisdiction against foreigners, including Scotsmen, only by means of what they

consider the more logical, as it may be admitted to be the more effectual, mode of personal or substituted service in certain classes of actions, complain of it as a hardship and as an irrational exception to the principles and practice of their own and other civilised systems of jurisprudence. So far, indeed, as the Scottish Courts claim the right to pronounce a decree which shall affect more than the goods arrested within their territory, the jurisdiction claimed for their arrestment in Scotland would appear to be unique. The custom of "foreign attachment," so-called, in London, enables the Court of the city to deal only with the funds of the debtor actually found within the city, and the object of the process seems analogous to that of an action of furthcoming, to enable the creditor to make the effects in the hands of his debtor's debtor—the garnishee or arrestee—available in satisfaction of the debt of his claim.

The "trustee process" of several of the United States of America appears to be similarly limited as the arrestment *ad fundandam* in Scotland. In most of the European States a judgment obtained by *saisie arret*, only enables the creditor to sell, in satisfaction of his claim, the goods actually seized. In France and Italy, foreigners not resident in the country, may have their goods, found within the territory, arrested by judicial process, and applied in satisfaction of their creditor's claim; and Germany appears to be the only continental country of importance in which a ground of jurisdiction at all commensurate with the Scottish, is based upon the arrestment of moveable property. Section 24 of the Civil-Prozess-Ordnung, the code which since 1879 has regulated jurisdiction in the German Empire provides—"That in actions for patrimonial claims against any person who has no domicile in Germany, that Court in whose territory there is property belonging to him, or where the particular article sued for is situated, has jurisdiction; . . . a provision which would appear to operate in the same way as an arrestment to found jurisdiction in the case of foreigners or Germans

domiciled abroad, and the jurisdiction so established, is not declared to be limited to the value of the property in the territory, and the grounds upon which the Court claimed to exercise it were of little importance, while that claim implied no more than the Court could itself enforce. In the eye of modern international law, the propriety of founding so wide a jurisdiction as is claimed by the Scottish Courts upon the arrestment of moveables, is certainly questionable. So long as the effect of the decree pronounced by a Court of law was confined to the territory over which the Court held sway, the jurisdiction remained, in the quaint language of Lord Kames, a "mighty simple affair." But with the development of international civility, and the recognition of one another's decrees by Courts of independent jurisdictions, it becomes important that no Court should claim to pronounce a decree which would not be given effect to by the Courts of another country. The modern meaning of jurisdiction may, therefore, be said to be the right of a Court to pronounce valid and enforceable decrees—*i.e.*, decrees which will be recognised as such both at home and abroad; and the principle upon which this recognition will be granted depends, according to modern ideas, upon this, that the decree in question constitutes a legal obligation upon the defender to obey it. The modern doctrine of this recognition may, perhaps, be best illustrated by the judgments pronounced by Lord Blackburn in the cases decided in 1870, by the Court of Queen's Bench, of *Godard* v. *Gray*, and *Schibsby* v. *Westenholz*, L.R. 6 Q.B., pp. 139 and 155. Both of these cases arose out of attempts to enforce French decrees in the English Courts. In the first, the plaintiff sued upon a judgment *condemnator* pronounced by a French Court, against parties domiciled in England, and the defence was, that, in pronouncing the decree, the French Court had interpreted an English charter-party contrary to English law. The mistake was plain, and was not practically disputed, but the defendants were duly cited to the French Court, and had defended the

action, and, in giving effect to the decree, the Court, in the first place, disclaimed any title to act as a court of review of the foreign judgment. Adopting the words of Lord Colonsay in an earlier case (*Castrique* v. *Imrie*, L.R. 4, H.L. 414), Lord Blackburn said: "It appears to me that we cannot enter into an inquiry as to whether the French Courts proceeded correctly either as to their course of procedure or their own law, nor whether, in the circumstances, they took the proper means to satisfy themselves with respect to the view they took of the English law, nor can we inquire whether they were right in their views of the English law. . . . We enforce a legal obligation, and we admit any defence which shows there is no legal obligation, or a legal excuse for not fulfilling it;" and Justice Hannen remarked "that the authorities oblige us to hold that the defendants by appearing in the suit in France, submitted to the jurisdiction of the French tribunal, and thereby created a *prima facie* duty on their part to obey its decision," put his decision upon the ground, that, it being the duty of the defendants to put the English law correctly before the French Court, they must take the consequence of not having done so successfully. It would thus appear that recognition might be claimed for a judgment of the Court of Session proceeding on an arrestment *ad fundandam jurisdictionem*, if, in point of fact, the arrestment had compelled the appearance of the defender. But in the second case referred to, the judgment of the French Court was refused execution in England; and the reason given illustrates the probable fate of an attempt to extend the jurisdiction founded upon arrestment claimed for the Scotch Courts, to the extreme for which some of its partisans contend. Taking advantage of the peculiar provisions of French law, the plaintiff in that case, a Dane, sued the defendants, resident in London, before the Tribunal of Commerce at Caen, and recovered judgment in absence against them. The mode of citation provided by French law in such cases is to serve the summons on the Procureur of the Government, whose practice is to forward the summons

thus served to the Consulate of the country where the defendant is resident, with directions to intimate it if practicable. This appears not to be prescribed by the French law, but is done by the Government, voluntarily, and simply from a regard to fair dealing. In the case in question the defendants appear to have had notice and knowledge of the summons in time to appear and defend the action in the French Court, but they did not do so, and the question raised and discussed in the English Courts was, whether the provisions of the French law, thus duly observed, imposed a legal obligation upon the defendants to obey its decree. In answering this question in the negative, Lord Blackburn makes this remark very relevant to our subject:—"It would rather seem that whilst every tribunal may very properly execute process against property within its jurisdiction, the existence of property, which may be very small, affords no sufficient ground for imposing upon the foreign owner of that property, a duty or obligation to fulfil the judgment." Applying those principles to the subject now being dealt with, it appears likely that the tribunals of a foreign country would not enforce the execution of a judgment of the Court of Session against a defendant not resident in Scotland, and who was only subject to its jurisdiction in consequence of the arrestment of a small debt owing him there. There is therefore no reason to apprehend injustice from the retention of this ground of jurisdiction in Scotland against foreigners. The mutual recognition of the decrees of the Courts of the United Kingdom, is, on the other hand, under consideration, regulated by an Imperial Statute. The Judgments Extension Act 1868, and the rights of Englishmen and Irishmen have, in this matter, been protected by excepting decrees in absence in Scotland founded upon this arrestment from the summary execution provided by that Act. Little or nothing, therefore, can be said against the Scottish system on the ground of hardship in its operation. It may appear somewhat illogical indeed, and even as has been said, absurd, but it had its origin in utility, and in the face

of the comparatively restricted grounds upon which jurisdiction in Scotland is based generally, its usefulness cannot be denied. The English law, which bases jurisdiction principally on personal service, is certainly simpler and capable of easier extension and adaptation to modern circumstances. Its very elasticity, indeed, has rendered the Courts of England formidable antagonists to our own. Only by strenuous national efforts had the jurisdiction so easily assumed by them on Scotsmen been repelled and we can still the less, therefore, afford to give up so useful a ground of jurisdiction. The whole subject of jurisdiction should probably be made the subject of an Imperial Statute for the United Kingdom, but till this is done, the jurisdiction of the Scottish Courts should obviously be maintained in its integrity.

G. Wardlaw Burnet.

THE JUDICIAL SYSTEM OF GERMANY.

Part I.

THE reputation of the philosophic jurists of Germany has long been deservedly high, but until a comparatively recent date the provision made in that country for the application and enforcement of the law fell very far short of the completeness of its theoretical development. The genius of the people has always been speculative and metaphysical rather than practical; and, while the scientific jurists were discoursing loftily upon the eternal principles of Law and Justice, or spinning wondrous webs of legal sophistry, the country groaned under many harsh and unequal laws and a judicial system which, while lending itself readily to the powerful and unscrupulous as an instrument of oppression, was of little value as a means for the redress of wrong or the punishment of the really guilty. Leibnitz, writing of the condition of the law in his time, described it as "multitudine, obscuritate, imperfectione legum, varietate tribunalium, disceptationibus peritorum obtenebratum et ad miram incertitudinem redactum;" and until the middle of this century the evils to which he alludes had been intensified rather than mitigated. There were few branches of the law that did not give occasion for grievous complaint, but there was probably no department in which reform was more urgently called for than in that of judicial organisation and procedure. Looking to the comparatively recent introduction of our own great legal reforms, it hardly becomes us perhaps to assume any airs of superiority, or to extend a superfluous compassion

towards Germany for its long endurance of what must, in the light of present arrangements, be regarded as an intolerably vicious system. Great, however, as were the evils from which we have in time past obtained happy deliverance, they find their counterpart, and more, in the judicial system of Germany during the first fifty years of this century. The right of appointment to judicial offices, even in the highest grades, was largely vested in private individuals, and their nominees were, as might have been expected, corrupt and subservient. The jurisdiction of the Courts was ill-defined and conflicting, the judges were often badly trained and sometimes quite incapable, while the procedure was in general highly technical, clogged with formalities, and unintelligible except to those who had made it a matter of special study. All pleadings had to be written, delay was great, and the expense of recourse to legal remedies so heavy as to amount, in many cases, to practical prohibition. The inquisitorial system under which criminal prosecutions were conducted operated most unfairly against the prisoner; and, indeed, as a recent writer puts it, "the daily, nay, the hourly, procedure was a cunningly contrived system for securing convictions, with little regard to the guilt or innocence of the accused." Moreover, the secrecy of the proceedings afforded a ready cloak for oppression and injustice, and rendered redress at all times difficult, and in many cases quite impossible.

While the administration of justice throughout the greater part of what is now modern Germany was, during the first half of this century, so seriously defective, the evils referred to were not absolutely universal. Upon the left bank of the Rhine, in Rhenish Prussia, Rhenish Bavaria, and Rhenish Hesse — provinces which were at one time subject to French rule, and retained, to some extent, French institutions—there had existed since their conquest a judicial organisation and procedure comparatively free from reproach. Based upon the Code Napoleon, though slightly modified by provincial law and adapted in some measure to local institutions, the Rhenish systems were in the main simple and

economical, readily applied, and generally effective. They enjoyed, accordingly, a great measure of public confidence, and the attention of reformers was mainly directed towards them, when, in the struggles for unity of 1848, the project of a general procedure code, to be adopted by the German-speaking peoples of Central Europe, was first mooted. Like many other projects of that troubled time, though with more to commend it than most, the proposal proved abortive. The agitation, however, was not without effect, and the question of reform was taken up by various local legislatures in turn, with the result that systems of judicial reconstitution and procedure, all more or less resembling those in force in the Rhenish provinces, were adopted by Hanover in 1850, Baden in 1864, Würtemberg in 1868, and Bavaria in 1869. Codification of the law of exchange was accomplished in 1848, and of the general commercial law in 1869; and the successful achievement of tasks of so great magnitude and difficulty still further stimulated the public demand for a general procedure Code. Commissions were appointed first by the German Confederation, and thereafter, on its dissolution, by the North German Confederation, to prepare schemes for adoption in the federated States, and in 1870 a draft code was actually issued. The outbreak of the war with France interfered with its consideration, but the establishment of the Empire, which followed the victorious conclusion of the campaign, gave to the project even greater prominence than before, and more than ever justified its necessity. It was recognised that identity of law and the substitution of imperial for local institutions afforded the surest guarantees for the preservation of national unity, and the work of establishing uniformity in the administration of all the great departments of the State was boldly taken in hand and vigorously carried out. Reform of procedure was one of the first subjects grappled with, and Commissions were successively appointed, which brought to bear upon the task much learning and much labour, resulting in the publication in 1876 of a complete scheme of judicial organisation and a

draft code of civil procedure. These underwent severe and long continued criticism both in the Reichstag and in the Bundesrath, but were ultimately adopted, and received the Imperial assent under the name of the "Gerichtsverfassungsgesetz" and the "Civilprozessordnung." It was enacted that they should come into force in all parts of the Empire not later than 1st October 1879, and simultaneously with a code of criminal procedure (*Strafprozessordnung*) and a Bankruptcy Code (*Konkursordnung*), which were then in preparation and were shortly afterwards published. During the interval sundry supplementary enactments were prepared and issued. Of these the *Rechtsanwaltsordnung* provided for the reorganisation of the Bar and the administration of its corporate affairs, while the various *Gebührenordnungen* regulate the fees payable to counsel and witnesses, and to officers of Court in connection with judicial proceedings. These enactments constitute the existing body of law establishing the constitution and regulating the procedure of the ordinary Courts in Germany.

The scope of the Civilprozessordnung and relative enactments is limited to matters which fall to be dealt with by the ordinary Courts in the exercise of their usual jurisdiction, and the procedure in cases involving appeal to any extraordinary jurisdiction, so far as this still remains competent, is either regulated by special statutes or left to be dealt with by the federal legislatures. The whole organisation of administrative Courts and officials is retained, and important questions arising under the patent and poor laws, the laws regulating the post-office, the railways, and other branches of the German Civil Service, the numerous insurance laws, and many maritime cases, are still judicially disposed of by administrative or other special tribunals. The Consular Courts were reorganised at the same time as the ordinary tribunals, and now exercise jurisdiction in matters appropriate to them, and such other Courts as have been instituted or sanctioned by imperial legislation for the settlement of particular classes of action are also preserved. Such are, for example, the

Gewerbe Gerichte, or Trade Courts, of Rhenish Prussia, Alsace and Lorraine, and Saxony, and the Gemeinde Gerichte of Würtemberg and Baden, which are municipal or commune Courts, and exercise a petty jurisdiction in civil matters. On the other hand, the private and patrimonial jurisdictions formerly exercised are, with but few exceptions, abolished, while the numerous rights of privilege and exemption from ordinary jurisdiction, formerly pleadable, are for the most part swept away. The rights of exterritoriality, however, which were formerly available to the members of the diplomatic staff at the several provincial Courts are retained, and the plea of exterritoriality may be further stated by members of the Bundesrath, who are not subject in civil matters to the jurisdiction of the Courts of Berlin, although they may be in residence there. It is further specially enacted that the exercise of jurisdiction in secular matters by any mere ecclesiastical Court shall be devoid of civil effect—a provision rendered necessary by the extent to which clerical interference, particularly in consistorial matters, had been carried, and the anomalous and intolerable results to which the usurpations of the clergy had led. Matrimonial causes, for example, arising in Hesse Darmstadt were taken, within comparatively modern times, before the Court of the Bishop of Mayence, thence on appeal to the Archbishop of Freiburg, and from him to the Pope—all of them sitting in tribunals outwith the territory where the cause originated, and exercising an *imperium in imperio*, inconsistent with public policy, and incompatible with the supremacy of the State. All Courts are now declared to be State institutions, and from the State alone is their authority derived.

The Courts of Germany are of imperial authority, and all form part of one great organisation. They are accordingly bound to render one another every necessary assistance in the administration and execution of the law, even though the application made to them be based upon the provisions of some purely provincial statute which has only local effect,

and may even be inconsistent with the law applied by the Court appealed to. It is, however, only in exceptional circumstances that such applications have to be made, as it is an essential principle of the new organisation that every German is subject to the authority of all the Courts of the Empire, whatever be the State to which he primarily belongs, and wherever his residence or domicile, to the extent of being obliged to answer their writs competently issued in accordance with their rules of jurisdiction. The citations and decrees of every German Court may accordingly be executed against the defender or debtor directly, and without the necessity for any application being made to, or warrant obtained from, the Court of his territory. Yet, while the judicial authority is thus imperial in its range, the Courts nevertheless remain in close touch with, and directly subject to, the various local legislatures. The writs of all Courts, with the exception of those of the Reichsgericht, run, not in name of the Emperor, but in name and under authority of the State to which they belong. The Procedure Code, moreover, leaves numerous details to be settled locally. Such matters as the number of Courts to be established in each State, the distribution of business among them, the local limits of their jurisdiction, and the remuneration of the judges and other legal officials, are settled by the provincial legislatures, while the right of appointment to vacant offices in provincial Courts is vested in the various Federal Governments.

The Civil Courts of ordinary jurisdiction are four: The *Amtsgericht*, the *Landgericht*, the *Oberlandesgericht*, and the *Reichsgericht*.

The first of these, which is the lowest in degree, consists of a single judge: the other Courts are collegiate. Speaking roughly, there is one Amtsgericht for every 10,000 persons, while each Landgericht has jurisdiction over about 250,000, and each Oberlandesgericht over about 1,500,000 persons. At the head of each collegiate Court stands a president, who is entrusted with the general administration and

management of its corporate affairs, and who presides at any general meeting of the members. Each Court is divided into sections, known in the Landgericht as *chambers* and in the Oberlandesgericht and Reichsgericht as *senates*. Civil cases are assigned to certain sections, and criminal to others. The chambers of the Landgericht are composed as a rule of three judges, the senates of the Oberlandesgericht of five, and those of the Reichsgericht of seven judges, including in each case the divisional president. In each section the president pronounces the judgment of the Court. Individual judges do not express their opinions, nor does the minority give the reasons of its dissent. The composition of the chambers or senates and the class of cases with which they are to deal are settled at the beginning of each session by the *Præsidium*, a council consisting of the president of the whole Court, the presidents of the chambers or senates, and one or more of the senior ordinary judges of the Court. The arrangements then made are only alterable upon very pressing grounds. The presence of a full bench is necessary for the hearing and deciding of every case, and the penalty of nullity is attached to any violation of this provision. The Court may, however, as with us, depute minor functions, such as the taking of a proof, to one of its number. When the sense of the judges is that they may be able to give a decision immediately after the case has been heard, the Court is cleared in order that they may deliberate in private, and entrance is again permitted when judgment is to be pronounced. In cases of difficulty judgment is of course reserved. The jurisdiction of any judge may be declined on grounds similar to those pleadable in our Courts, and the judge is bound to propone his own declinature when the grounds of it are relationship to the parties or interest in the cause; in other cases it must be pleaded.

Under the new organisation the judicial office is held in high repute, and, whatever may have been the case in former years, the judges are now men of learning and ability, and it is indeed rare to hear any imputation against their

independence or integrity. It is not possible or necessary to give here any detailed account of the course of study now required from all who aim at obtaining a place in the judicial corps of Germany. A brief sketch of it, however, may not be uninteresting. The legal education and training of the judges and counsel throughout the empire is now identical. The minimum course of study for the judicial office is fixed by the Gerichtsverfassungsgesetz, and it is adopted in the Rechtsanwaltsordnung as the standard for the bar, subject in both cases to such amplifications and to such regulations in point of detail as may be introduced by the various Federal legislatures. The preliminary requisite is a three years' course of study of law at a university, after which the first public examination (the subjects of which are those that have been studied at the university) must be undergone. If the candidate is successful in passing this, he is attached to an Oberlandesgericht, where, during the next four years, he is engaged in a valuable course of preparatory training. During a portion of this time the candidate (or *Referendar* as he is called) is employed in practical work under the direct supervision of one or more of the judges of the Oberlandesgericht, and he is also attached in turn to a Landgericht and to an Amtsgericht within the territory, in order that he may make himself acquainted with the procedure and practice of these Courts. He is also bound to work for a longer or shorter period with one or more of the counsel in practice at the various bars, and also with a public advocate, clerk of Court, and notary, all of whom are under obligation to give him, so far as possible, an insight into their various duties in return for the gratuitous services which he renders. After passing his final examination (testing his practical rather than his scientific knowledge), the candidate, who is then known as an *Assessor*, is eligible for a judgeship at one of the inferior Courts, or for the position of public advocate, or he may begin practice at once as a counsel. The choice of career once made is of course generally adhered to, but a change can be readily enough effected

from one branch of the profession to another, and, though not frequent, is by no means unknown. Vacancies in the higher judicial offices, however, as they occur, are almost invariably filled up by the promotion of inferior judges, and do not, as with us, become the reward of the successful pleader or fortunate politician. It is argued, and with considerable force, that a special training is required for the due discharge of judicial duties, and that such a training cannot begin too early; while a further argument is that the man who has all his life been accustomed to take from the bench a judicial and impartial view of the cases which came before him in the inferior Courts, is more likely to make a good judge of appeal than the brilliant counsel, whose success at the bar is due to his power of convincing the Court, and perhaps also himself, of the justice of any side for which he may have been retained to plead. On the other hand, no doubt, it is urged that the knowledge of the world and of human nature which is acquired in the course of a long practice at the bar is invaluable on the bench, and that such a knowledge cannot be readily gained by a man who has all his life been compelled to occupy the more or less isolated position of a judge. The German practice is, however, said to produce admirable results, and in theory has certainly a good deal to commend it. The judges are appointed for life, receive fixed salaries and no fees, and are pensioned upon their retirement in accordance with a scale fixed by the Federal legislatures.

The Bar of Germany forms a large and important organisation, and though there are of course many points of resemblance between its constitution and that of the Bar in our islands, it offers in regard to others a very marked contrast. All counsel, no matter what the Court before which they intend to practise, undergo exactly the same training, and the German term "Rechtsanwalt" (which is equivalent to our "advocate" or "barrister") is applied to the counsel before all the Courts, from the highest to the lowest.(*a*)

(*a*) [The term "*Advokat*" is also used as synonymous with *Rechtsanwalt*.—Ed.]

Moreover, so far as contentious work is concerned, no distinction is known in Germany between solicitors and pleaders. The work done by the notary is non-contentious, while the Rechtsanwalt is approached directly by the litigant and conducts the whole case by himself. Occasionally, however, one sees individuals who combine the functions of both Rechtsanwalt and notary, particularly at the seats of inferior Courts, but such a combination is exceptional. The regulations for admission to the bar are simple. Upon passing his assessor examination at the end of his probationary period, the candidate transmits to the Minister of Justice of his State an application in which he prays for a license to practise before some particular Court (which he specifies), within the territory. The application is reported on by the Executive of the Anwaltskammer (a sort of Bar Committee), and if there is no legal ground for refusing the application, a license as requested is forthwith issued. The application can only be refused upon statutory grounds, such as want of civil status, conviction for crime, incompatible employment, bankruptcy, or incapacity proceeding from bodily or mental infirmity. It cannot be refused upon the ground that there are already sufficient counsel in practice before the Court selected, but it may be refused to any one who stands in close relationship, by blood or marriage, to any judge of the Court.(*a*) It is essential that some particular Court should be specified in the application, and to that the candidate must in general confine himself. Counsel before an Amtsgericht, however, may, upon application, receive permission to practise before the immediately superior Landgericht, and counsel before any collegiate Court may, upon special application, and if the public interest seems to require it, obtain authority to practise before any of the higher collegiate Courts whose seat may be at their residence. Special rules are applicable to counsel before the Reichs-

(*a*) [This wholesome rule seems formerly to have prevailed in England, to the extent of excluding sons of judges from holding briefs on circuit where their fathers are on the bench.—Ed.]

gericht. Applications for admission in their case are addressed in the first instance to the Imperial Chancellor, and are then considered by the Præsidium of the Court upon report of the imperial Answaltskammer. The powers of the Præsidium as to admission are arbitrary, and applicants may be rejected at discretion. The number of counsel in practice before the Reichsgericht varies at present from twenty to twenty-five, and they are all debarred from practising before inferior tribunals.

Every counsel, whether practising before the imperial or the inferior Courts, must be in residence at the seat of the Court to which he belongs, and when he is authorised to practise before two or more Courts his place of residence must be that of the lower. He must, however, have a properly qualified representative in constant residence at the seat of the higher Court or Courts, and in questions of costs he is not entitled to recover from a defeated party any additional expense which may have been occasioned by his non-residence. Counsel in Germany (except those before the Reichsgericht) may delegate many of their duties to substitutes. The most usual representative is naturally a brother counsel, but in minor matters the employment of Refendars who have been engaged for at least two years in preliminary service is permitted, and in cases before the Amtsgericht the conduct of the whole suit may be intrusted to a Referendar, and he may even address the judge on behalf of his principal. The so-called *Anwaltszwang*, however, which prevails in the higher Courts, necessitates the employment of fully qualified counsel in all the more important steps of process. Any counsel who means to leave his place of residence for more than a week must make provision for his proper representation during his absence, besides intimating his intention to the Court to which he belongs and to the Amtsrichter of his district.

J. J. Cook.

Current Topics.

Signor Pascal Stanislas Mancini.—The sorrow of Italy at the loss of one of the greatest of her sons will be shared by the whole civilised world. Wherever the study of the laws of peace and war has been held in honour, above all wherever thoughtful men have been wont to express their abhorrence at the reign of the rifle under which Europe now groans, Mancini has long been "*clarum et venerabile nomen.*" He was born in 1817, and as a young man practised with brilliant success at the Neapolitan bar. After the Revolution of '48 when he was compelled to leave Naples on account of his sympathy with the revolutionary party, he became Professor of International Law at Turin. In 1860 he returned to Naples, and since then has devoted himself to the public service of his country. Mancini was successively Minister of Public Instruction, Minister of Grace and Justice, and from May 1881 to July 1885, Minister of Foreign Affairs.

That his fame was not bounded by Italy is shown by the fact that he was President of the Conference which met at Ghent in 1873, and at which the Institute of International Law was founded. Of the Institute itself Mancini was the first President, a position which he held from 1873 to 1875.

It is not too much to say that no Italian of our time (Cavour excepted) has done so much to restore Italy to a proud place among the nations of Europe. It is interesting to notice that one of Mancini's first publications was entitled "The Foundations of the Philosophy of Law and especially of the Law of Punishment." It appeared in 1842. The last work of his busy life was when only a few weeks ago, he lent all the weight of his learning and all the warmth of his eloquence to help in carrying through the Italian Chambers the new Penal Code, by which capital punishment has been abolished.

An account of Mancini's work, as a jurist and statesman, from the pen of an eminent Italian contributor, will, it is anticipated, appear in our next number.

Feudal Casualties. — No attempt has been made during the last session of Parliament to remedy the grievance which a blunder in the Conveyancing Act of 1874 has entailed on owners of lands

and houses in Scotland, with reference to the casualties or fines payable to feudal superiors when their vassals die. That Act was designed to simplify conveyancing; and, among other ways, it did so by extinguishing such estates of mid-superiority as were defeasible at the will of the vassals. But one result of this conveyancing reform, not foreseen by the framers of the Act, has been to enlarge the pecuniary rights of superiors at the expense of their vassals. The existence of an estate of mid-superiority to which the heir of the last vassal could make up a title, even when the vassal had parted with the substantial right of property, formed a feudal barrier against the over-superior's demand for a casualty of composition—*i.e.*, a whole year's rental of the vassal's property, including all buildings erected and improvements made by the vassal. When, therefore, the Conveyancing Act removed this barrier, proprietors found themselves exposed to claims for a year's rental instead of a small fine in name of relief duty for the heir's entry with the superior, unless such a confiscatory claim happened to be expressly excluded by the original feu-right. Several years passed before the provisions of the Act were authoritatively construed to have an effect so inequitable, and some further time elapsed before any attempt was made to provide a legislative remedy for the growing grievance. Ultimately, in the broken session of 1886, the Lord Advocate and the Solicitor-General for Scotland, members of the Liberal Government then in power, succeeded in passing through the House of Commons, but not through the House of Lords, a Bill to restore superiors and vassals to the same pecuniary position as they occupied before the year 1874. This Bill was taken up by the Lord Advocate and the Solicitor-General of the succeeding Conservative Government, in the session of 1887, and was piloted by them through the House of Commons, with a few additional clauses containing some minor amendments of the Conveyancing Act. But, unfortunately, in the House of Lords the Bill encountered the opposition of a formidable feudal superior, the Duke of Argyll, who persuaded the House to reject the main provisions of the Bill, and pass only the clauses containing the minor amendments referred to. It is, however, difficult to suppose that there are any vested interests in the legislative blunder of 1874 which can permanently prevail against the sense of justice of Liberals and Conservatives alike; and we trust that the Bill will be taken up by the present Government at the beginning of next Parliamentary session. The matter is becoming urgent, for not only are fresh claims emerging as vassals die, but speculators are beginning to buy up estates of superiority, for the purpose of discovering and enforcing claims which former superiors have forgotten or forborne to press.

The Incorporated Law Society of England.—This important professional society, which now contains 5120 members, held its annual meeting for 1888 at Newcastle. It is interesting to notice the practical questions

which are chiefly troubling the minds of English solicitors. Land transfer, the future of the County Courts, the fusion of the legal profession, these seem to oust all other subjects. The general feeling of the English solicitors seems to be that they have had quite enough of conveyancing reform in the meantime, they wish to rest and be thankful. They have, no doubt, had very large instalments of reform, with which in more recent years the name of Lord Cairns is honourably associated, including a reform of solicitors' remuneration in 1881; and it is peculiarly exasperating to a conveyancer to have his styles upset from time to time. But the objections entertained in England to compulsion and publicity in dealing with land are not very intelligible to Scottish practitioners. Still less intelligible is the system of official trustees or trust companies which has been suggested for the protection of beneficiaries interested in land. The address of the President at Newcastle would indicate that the profession in England is only slowly coming round to accept the principle of registration without guarantee of an indefeasible title. As regards the County Courts, in spite of the changes introduced by the Act of 1888, there are still complaints of cost, delay, and inefficiency. The initial fees are said to be comparatively heavy, the corruption of bailiffs has created discontent, but still an extension of jurisdiction is asked. At present £50 is the limit in most cases, and the power to grant relief by way of damages in cases of fraud or mistake has been extended to £500. The removal of causes to the High Court is guarded by very stringent rules about costs; and appeals will now be by way of motion instead of on special case. We have little doubt that in course of time these primary Courts will have an universal jurisdiction. It is noteworthy that the County Court judges have just been made eligible, like Queen's Counsel, to act as judges of assize. Into the vexed question of fusion of barristers and solicitors we shall not enter, except to recommend the perusal of the Report made in 1885 to the Irish Law Society upon the actual practice in colonies and foreign countries in this matter. From that document it will be seen that great varieties of practice exist under the general name of fusion, to some of which very little objection can be stated. It is said that there are in England 8000 barristers and between 14,000 and 15,000 solicitors.

Association for the Reform and Codification of the Law of Nations.—The fourteenth conference of this Association, which had been fixed to take place in New York last autumn, had to be abandoned owing to the fact that a number of the leading office-bearers and members were prevented by various causes from crossing the Atlantic. This is to be regretted, as the preceding conference, held in London in July 1887, had been one of great success, and fruitful of promise of practical reform in several important matters of international law. But no doubt it requires a strong incentive to

induce one to give the time and incur the expense necessary for a voyage to the United States; and it may be questioned whether in a purely voluntary association, in which the great majority of the members are Europeans, and many of them engaged in active business, it is possible to hold the conference at so distant a centre as New York.

In this connection we have to notice the loss the Association has sustained by the deaths during the past year of two of its prominent members, Professor Leone Levi and Mr. Henry Richards. Both of these gentlemen were distinguished philanthropists and advocates of the cause of International Arbitration—having been indeed original founders of the Society for promoting that great object. To Professor Levi lawyers are also indebted for his valuable contributions to the literature of commercial and private international law.

Driving a Coach-and-Four through an Act of Parliament.—In the year 1869 an Act of Parliament was passed, creating and incorporating a public trust for supplying water to Edinburgh and adjacent districts, and transferring to the trust the undertaking and powers of the Edinburgh Water Company (32 & 33 Vict., chap. cxliv.). The trustees are the Lord Provost of Edinburgh, the provosts of Leith and Portobello, and twenty-two commissioners who are elected by the town councils of those burghs, and are generally, if not invariably, members of these councils. For some reason or another—into which it is unnecessary to inquire—Parliament deemed it requisite to insert a special clause (section 13), prohibiting the appointment by the trustees of any person who had within twelve months been a trustee or a member of the said town councils respectively, to any office or emolument in the gift of the trustees. The gentleman who held the office of treasurer to the trust died on 11th January 1888. It then became the duty of the trustees to select and appoint the best man to be got for the office, not being one of themselves. Instead of following this plain path of duty, the trustees, on 25th January 1888, held a meeting at which a motion was proposed that the office of treasurer should be allowed to remain vacant for a year, in order that it should then be conferred on a gentleman who was at the time both a member of the trust and a member of the Town Council of Edinburgh, but who would in the meantime resign his membership, in order to evade the prohibition contained in the Act of Parliament. Such a proposal was obviously in flagrant violation of the spirit, if not of the words of the Statute, yet, strange to say, it met with general acceptance, only two or three trustees protesting against it. The gentleman referred to soon thereafter resigned his membership of the trust and of the council; and the trustees are now waiting for the expiration of a year, in order to appoint him, the office in the meantime remaining without its proper head. We cannot think that such proceedings evince a just conception of the fiduciary duties arising out of municipal office in Scotland, and they must not be allowed to pass without comment.

The Trustee Act, 1888. — This Act, although deprived by the caprice of a single Member of Parliament of its valuable investment clause, is still of general interest to trustees, whose liabilities have been, if anything, extended by some recent decisions of Courts of law. In the words of Lord Herschell's memorandum, the intention of the Act is "to facilitate the transaction of business by trustees, and to afford them protection in some cases where under the present law they may innocently incur liability." The Act does not directly apply to Scotland. The facilities for business, apart from powers to invest, are mainly those given by sections 2 and 3, which were suggested by the cases of *Bellamy*, L.R. 24, Ch. Div. 387, and *Dunn*, 28 Ch. Div. 586. Trustees may now appoint solicitors and bankers to receive consideration money without themselves attending personally to do so; they may also sell land under what are known in English law as "depreciatory conditions," unless the price is thereby rendered inadequate. It is thought that neither of these provisions would be necessary in the present state of the common law of Scotland. The more important and interesting provisions of the Act, however, are those relating to the protection of trustees. Section 4 enacts that a trustee shall not be held liable merely because he lent money to the extent of two-thirds of the value of house or agricultural property, provided always he was acting on the report of some person reasonably believed to be a proper valuator. This section, in so far as it deals with valuators going from a distance, is based on *Fry* v. *Tapson*, 28 Ch. Div. 268. In Scotland, the Courts never adopted the artificial distinction between house property and land in the matter of valuation, and trustees are now beginning to find out that land may fluctuate as well as house property. Section 5 enacts that where a trustee is liable, not in respect of the class of security taken, but in respect of the amount improperly advanced on a particular security, the security is to be deemed good for the sum which might have been properly advanced, and the trustee is liable only for the difference. This doctrine would require legislation in Scotland, as at present the liability of a trustee in such circumstances is to replace the whole investment in the trust. We confess that this appears to be the safer as well as the more logical rule. Of course, in the case of gratuitous trustees, logic must be tempered with mercy, but loans on insufficient security are really the greatest danger of trust-estates, much more so than unauthorised loans, and the trustee should certainly take the whole risk of such a security. Again, the Act of 1888 authorises the Court, where a trustee has committed a breach of trust at the request and instigation of a beneficiary, to impound the interest of that beneficiary for the indemnity of the trustee. There is a difference between the case of request and the case of acquiescence; and in the case, of course, of beneficiaries *sui juris* it would seem that the common law of mandate in Scotland would afford relief to a trustee from personal liability to third parties, though not perhaps from claims at the

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instance of other beneficiaries. Another section of the Act of 1888 authorises trustees to insure buildings to the extent of three-fourths value, without the consent of the parties entitled to the income. This does not require a statute in Scotland. Much more important is the enactment that trustees may plead the statute of limitations against breaches of trust, except where these are fraudulent. This is contrary to the trust law of Scotland, but the change is certainly right and wholesome. Nothing is gained by attacking trust management at so great a distance of time as has frequently been done in Scotland under the law laid down in *Burns* v. *Burns' Trustees*, 19 D. 637, 651. Delicate questions will always remain as to the burden of proof in such cases; trustees might have to show that there was no fraud, but there is no sufficient reason why they should not have the universal protection of time.

Reviews of Books.

Circuit Journeys by the late Lord Cockburn. Edinburgh: DAVID DOUGLAS, 1888.

HARRY COCKBURN, well-known to all who are acquainted with the struggles in Scotland over the first Reform Bill, as the intimate friend and political associate of Francis Jeffrey, was appointed a Lord of Justiciary in 1837. His first Circuit was to the West in the spring of that year, and his last to the South in spring 1854. He sat alone at Ayr on 20th April, plaintively noting it as a sign that his friends did not yet consider him in his dotage; and he was dead six days afterwards. As the Judges on Circuit in his time rolled about from town to town leisurely and luxuriously in their carriages, visiting the notables on the way, feasting with the civic dignitaries, and making excursions to picturesque or famous localities both within and without their official districts, they had every opportunity of observing the physical features and the habits and manners of Scotland, and it early occurred to Lord Cockburn to place on record his varied observations, with a view to creating a standard of comparison by which we might be enabled at any future time to measure the changes in Scottish life. This labour of love he carried out regularly and perseveringly, and these "Circuit Journeys" form a most complete and graphic diary of the whole of his Circuit experiences from first to last. From these we can at once estimate the advances we have made. It would be difficult now to find a parallel to a scene of revelry witnessed by Cockburn in his boyhood, in which "sixteen or so" distinguished members of the Scottish aristocracy, including the Duke of Buccleuch, Henry Dundas (Home Secretary), Robert Dundas (Lord Advocate), and Hepburn of Clerkington, figured amongst the *dramatis personæ*. Those powerful magnates were all living within a few miles of Middleton, but preferred to their own luxurious mansions the wretched little inn, in which there was scarcely room for them to sit. "We found them," says Cockburn, "roaring and singing in a low-roofed room with wooden chairs and sanded floor. . . . They were all happy and glorious enjoying their unchecked boose." It is also very significant of a striking change in Scottish habits in another direction, that in 1841 the landlord and landlady of the "Bute Arms," the principal hotel in Rothesay

(Cockburn seems very particular in giving her full share of credit to the lady), refused to let two of his friends have any dinner in the inn, because it was the Sabbath-day, and drove them to appease the pangs of hunger in a temperance coffee-house, into which, by the good-nature of a compassionate apothecary, they managed to smuggle a bottle of sherry, "wrapped up and labelled with all the laboratory marks as bitters." Things also have altered for the better for the judges themselves, since the time when they were compelled to sit and try cases in Glasgow "literally on the top of a staircase," separated from the street only by a folding door, and when their "only place for robing and taking refreshment was in a closely adjoining water-closet."

One valuable feature of this book is its clear and accurate likeness of Lord Cockburn, unconsciously painted by himself. One of its most striking points is his intense admiration of natural beauty, and his wonderful power of describing it. His picture of the Cuchullins from Loch Scavaig is absolutely perfect. It is the work of a consummate artist, and the whole landscape stands out as clear and distinct as if cut in ivory. But the scene is as cold as ice. It is not softened by the tender mist of the imagination; human sympathy and emotion are absent; and the filthy hovels of the natives are denounced chiefly as marring the effect of the physical *tout-ensemble*. On one subject only he rises into white heat. Against the aristocratic sinners, who neglected to preserve their ancient castles or ruined churches, he flashed up into scathing indignation. "No foul beast," he exclaims, "ever trod a pearl in the dirt" so unconsciously as the Argylls did the sacred monuments of Iona; the Breadalbanes would pay £500 for a hearth-rug, but not a sixpence to preserve the splendid ruins of Kilchurn; Lord Fife "was a poor, insensible ignorant wretch;" and a proprietor who had peeled extensive woods and allowed the trees to stand disfiguring the landscape, was, as his Lordship by some miraculous clairvoyance informs us, "suffering for it in a hotter world. Spare him not, devil! Give him his own faggots."

His portrait of himself as a lawyer and judge is painted with equal accuracy. In matters that only required sound judgment and practical common sense his intellect had all the clearness of his physical descriptions. On the question, for instance, discussed at that time, Whether children should have the option of giving or refusing evidence against their parents, he was well fitted to give a sensible opinion. But he was devoid of speculative power; he was constitutionally disinclined to laborious legal or social inquiries; and he was not fitted by the nature of his mind for philosophical investigations, even where they arose directly out of his own immediate duties. A criminal to Cockburn was simply a person who had acted in a way which subjected him to criminal punishment. This appeared to him quite a sufficient solution. How it came about that his Lordship was sitting in scarlet and ermine upon the bench, and Bill Sykes in handcuffs in the dock, never occurred to him as a question at all. The problems of crime with which we are now struggling, and that as yet with little success,

mainly because we are frightened by ethical considerations from treating them scientifically, were entirely unknown to him. Accordingly, he had necessarily little sympathy with, or feeling for, the hapless beings brought before him. They were "villains," "miscreants," "heartless dogs," or "scoundrels," and the one thing needed was to punish them with exemplary severity. He complains of the "prevailing aversion to capital punishment." He is anxious to extend the periods of transportation, and is hostile to the abolition of that mode of punishment, as well as to the attempt to reform criminals by penal servitude in well-regulated prisons. With regard to theft he says that he "does not at present believe that reformation is possible." This "genial" man was certainly not noted for mercy to evil-doers. In a case at Perth when an English workman, who had come into Scotland, was tried by him for bigamy, he pleaded in mitigation that he was not aware that the law was different from that in England, where a man who has *bonâ fide* married again after seven years, not hearing where his wife was, or knowing whether she was dead or alive, was free from punishment, Lord Cockburn announced that he would give him six months' additional imprisonment, to impress upon Englishmen the mistake they were under. On the mode of sentencing, Cockburn presents us with some curious contrasts. The then old and almost extinct generation of judges, in passing sentence, abused the convicted prisoners, even those who were to die in a few days, in the most emphatic Billingsgate. Some others of the younger seniors in Cockburn's time reminded the convicts of their sins in the popular phraseology of Scotch theology, and, after the fashion of the day, warned those who were doomed to die, to have recourse in time to the Divine mercy. Cockburn, as he boasts, appealed entirely to the criminals' sense of worldly self-interest, and assured those who were to live that honesty was the best policy. He did not see that his own methods of appeal were no better than those religious addresses which he satirises, and were perhaps even less likely to move those to whom they were addressed. On this topic his references to Lord Moncreiff, father of the amiable and cultured judge who, to the regret of all, has just retired from his position on the bench, are the most painful portion of the book. Cockburn entirely failed to form a correct appreciation of old Lord Moncreiff's mental standpoint, as well as of the religious, political, and social influences under which it was developed, and he would have equally failed to comprehend the theological phenomenon of the Argylls, the Balfours of Burleigh, and other family pillars of the old Scottish orthodoxy.

Another point which clearly shows the limited character of Cockburn's intellectual vision was his failure to grasp the scientific conception of insanity. He was a resolute adherent of the old Scotch legal notion of insanity as a condition of mind that could not exist without some illusion on matters of fact, and he was utterly unable to appreciate the large body of medical and scientific evidence already existing in his own day upon the subject. In the case of *M'Lean*, a fisherman from the Lewis, tried by Cockburn in 1838 for the murder of his wife, where the

defence was insanity, his prejudices on this point came fully into play, and almost led him to the abetting of what might be called judicial murder. It was proved, amongst other important facts, that the prisoner, a sober and fervently religious man, was under the groundless belief that his wife desired his death, and had once at least attempted to stab him. He had constructed a wheel, with a large upright spike or knife at the end of each spoke, and in the centre of this machine he said his prayers. He was once seen to come out of his hut in a state of absolute nudity, dip a blanket in the river, and wrap it round his body. He announced that he had discovered the perpetual motion, and was building a boat in which to put it into action. His uncle's son was also shown to be affected with a similar insanity. These facts ought to have warned the judge to probe this whole matter to the very bottom, but, on the contrary, he told the jury that "there was not the slightest foundation for the defence of insanity," and thus obtained a verdict of murder. Fortunately the Home Secretary directed an additional inquiry, and other most important facts were elicited. It was found that each spike of the praying wheel was meant to represent one of the commandments, and that M'Lean believed that he would fall and be impaled upon the particular spike representing the special commandment he might disobey. His adoption of the wet blanket was made for the purpose of expiating the sins of the people, and he had actually applied to his landlord for so many pounds of loadstone to produce the perpetual motion in the boat he was constructing. These and other circumstances left no doubt of the insanity of the prisoner, who obtained a respite of his sentence, and was dealt with as a lunatic, which he undoubtedly was. Cockburn was also liable to error from other causes. He was constitutionally averse to hard, judicial work, and often lighted upon the right judgment by a kind of instinct or inspiration. He was somewhat too venturesome on the bench. He himself describes his carrying through a whole circuit with nothing but mere copies of the indictments and none of the necessary official papers, a freak which might have led to the ultimate escape of all the persons convicted.

His estimates of his fellow-judges, and of the advocates then rising into practice, are most emphatic where he most detests. Eskgrove is dashed off as "a great lawyer, and a testy, avaricious, ludicrous, and contemptible old man;" Craig is described as a "decorous blockhead;" and in speaking of the new courthouse at Glasgow, he says that "the only bad fact he knows for it is that John Hope (Justice-Clerk Hope) had taken chief charge of the place." In the "Journeys" are many sketches of lawyers now dead and lawyers still living, but they are slight and insufficient, and he seems to have best appreciated quiet young men who made pleasant companions at circuit dinners, and gave least trouble in getting through the business.

Men still living could bear testimony to the accuracy of these "Journeys," and add many anecdotes of Lord Cockburn, if that were needed, to those contained in this book, but probably it is desirable that these should be kept a little longer. Cockburn, as he walked up the Parliament House in

the latter years of his life, was an individuality that could never be passed by unnoticed. His fine luminous eye and humorous, sagacious face, his somewhat rustic build, his partial stoop, his not fashionable style of garments, his clouterly shoes, and his walk—reminding one more of the Pentland Hills than the streets of Edinburgh—formed a most striking and characteristic figure. His nonchalance upon the bench when a Lord Ordinary, his light and brief touches of one or two prominent points in a case, and his rapid flight from his judicial seat on frosty mornings when he brought his skates along with him, were more than punished by the tortures which he afterwards suffered when placed in the Second Division beside such rigid and indefatigable judges as Medwyn, Moncreiff, and Hope. These "Circuit Journeys," jotted down by so humorous a pen and interpreting the ideas of so remarkable a character, when taken up from time to time, will be found to supply a perennial source of combined instruction and amusement.

CHARLES SCOTT.

Juridical Styles, Vol. III. Forms of Process in the Supreme Courts of Scotland. Third Edition. Edinburgh: BELL & BRADFUTE, 1888.

The Juridical Society of Edinburgh was founded in the year 1773 by twelve young men, who were desirous of training themselves for the practice of the legal profession. At first, a threefold duty was undertaken by the members of the Society. Every member in his turn was appointed to prelect on a portion of "Erskine's Institute;" members were selected to act as counsel and solicitors in carrying imaginary lawsuits through the various stages of procedure, before the other members of the Society, who pronounced a decision on each particular case; and questions of law, previously announced, were discussed *viva voce* by such members as chose to do so; one member being appointed to give in a written opinion. Of these three modes of conducting business only the last has been continued to the present day.

Not long after the institution of the Society, it was resolved that every ordinary member who should have attended the Society for three years should become an extraordinary member, and, as such, be exempt from compulsory attendance and participation in the business of the Society. One result of this was that the Juridical Society soon acquired, and has since retained, a twofold character, which is sometimes puzzling to outsiders. In the first place, it is a legal debating society, composed of twenty or thirty young men, who are perhaps occasionally more addicted to high jinks than to high thinking; (*a*) but, in the second place, it is an influential organisa-

(*a*) That the ordinary members have not always been frivolous is shown by the minutes of a meeting at the beginning of the present century, when the Society, deprived of its former premises in Writers' Court, occupied a dancing-school in Clyde Street. The minutes state that "the high character of the Society would exempt it from any of that unworthy impression which some persons have apprehended as likely to arise from its meeting in a place usually devoted to purposes so much less grave."

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tion, composed of about three hundred lawyers, including judges, sheriffs-counsel, and that corporation of solicitors called writers to the signet. In its latter character, the Society owns commodious premises, containing a law library, has instituted courses of lectures on legal subjects, has been addressed by eminent jurists, and has distinguished itself especially by publishing edition after edition of a compilation of Styles, with explanatory notes, forming a complete system of conveyancing and of forms of process in the Supreme Courts of Scotland.

The first compilation of Styles was made as early as the year 1777, but it was not printed, having been intended only for the use of members. This, however, formed the basis of the first published edition, to which all the members of the Society devoted much time and labour. The first volume, relating to heritable rights, appeared in 1787; the volume relating to personal or moveable rights not till 1794; while the volume relating to signet letters (*i.e.*, summonses and other writs requiring to be authenticated by the Sovereign's signet or seal, kept in Edinburgh) appeared in 1790.

Subsequent editions of the first volume were published in 1811, 1826, 1855, and 1881; and of the second volume in 1821, 1826, 1865, and 1883; but there was only one subsequent edition, published in 1828, of the volume relating to Signet Letters, till a few weeks ago, when a third edition of the volume appeared under the more appropriate title of "Forms of Process in the Supreme Courts of Scotland." The sixty years which have passed since the publication of the last edition have rendered obsolete almost every Style that it contained, and have introduced many new forms of process; so that the new volume is, in almost every respect, an original work. The Committee entrusted with its preparation have thus had a task of more than usual difficulty; and it is not surprising that they have taken more than usual time. Of the Committee originally appointed, now more than twenty years ago, only three members appear in the list (prefixed to the volume) of the members, eighteen in number, actually engaged in the preparation of the work. The rest have either died or devolved their work on younger men who have from time to time been added to the Committee. We suspect that the true explanation of this state of things is to be found in the fact that the work has been done "all for love and nothing for reward," the profits going into the coffers of the Society. But if this be so, the legal profession of Scotland owes a double debt of gratitude to those who have borne the burdens of others.

The forms of process comprised in the present volume consist of summonses and petitions in the Court of Session, diligences, proceedings in the Bill-Chamber, proceedings in Exchequer causes, proceedings connected with Jury Trials, proceedings in Teind and Church Courts, proceedings in the Court of Justiciary, and proceedings under the Valuation and Election Acts. Prolegomena and explanatory notes accompany each class of Styles, almost forming a manual of Court-practice. The value of such a book must be

tested by experience, but our examination of the volume leads us to believe that the work has been well and accurately done. The only defects we have found are faults of omission. We see no reason why there should not have been added to each summons an outline of the appropriate condescendence and pleas in law, and even a suggested defence. Again, a few forms of Special Cases for the opinion of the Court, under the Act of 1868, might, with advantage, have been given. We are, however, not disposed to find fault with the Committee for omitting all indictments or writs instituting criminal proceedings, as such writs are drawn by Crown officials, not by ordinary practitioners. Taking the volume as a whole, we have no hesitation in commending it as a most valuable contribution to the legal literature of Scotland.

Rechtsstudium und Prüfungsordnung, von Dr. L. GOLDSCHMIDT, ordent. Professor der Rechtswissenshaft an der Universtät Berlin, &c., &c. Pp. 451 (ENKE, Stuttgart).

This work has been before the public for some little time, but no one who wishes to understand the present state of legal education in Germany can afford to neglect it. It is the fruit of ripe experience. Practical lawyers, always apt to dismiss with a sneer works on legal topics emanating from a University, will hear with respect the opinions of one who was for many years a member of the Supreme Court of Commercial Law for the German Empire.

The learned author discusses the whole subject from every point of view—speculative, historical, political, social—with that fine passion for thoroughness which makes the works of the German scientific writers of the present the despair of their foreign rivals, and, not seldom, it must be confessed, of their readers also.

In order to understand the grave charges made against the present system, especially in Prussia, it may be convenient to state in a few words the nature of the preparation for his profession, which the young Prussian lawyer must undergo. The most striking difference between the German, and either the French or the English law curriculum, is that it in no degree depends on the particular branch of the profession which the candidate intends to follow. To become an *avoué* in France, or a solicitor with us, a period of five years (which, however, is in both countries reduced to three in the case of graduates), must be spent in the office of a practitioner. On the other hand, in Germany the theory has been authoritatively enunciated that the student shall, at the end of his career, be equally qualified to become advocate, judge, solicitor, or crown-prosecutor. As Prof. Goldschmidt justly observes, a ten years' course would hardly suffice for this result, nor is the object itself worth striving for.

The method adopted for producing this many-sided man of law is to begin with a three years' course at a University, at the end of which the student

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passes, or ought to pass, an examination conducted under Government authority, and becomes a Referendar. He is then occupied in practical work for the State for four years, as a rule without remuneration, and finally is allowed to present himself for his final examination, which is mainly of a practical character. If successful, he may then enter on whatever branch of the profession he prefers. If he chooses the safe but not very well-paid occupation of a judge, he is sent perhaps to a village or market-town as a judge of first instance, from which position he may rise by merit to the highest judicial posts of the empire. In theory the system sounds well enough—four years' practical training after three years' study might, if wisely ordered, be the best possible introduction to the profession —but, if we may believe Professor Goldschmidt, it produces far from satisfactory results. In the first place the Prussian State allows the student to spend one of the three years during which he is enrolled at a University in acquiring the knowledge of military discipline which is to fit him, if need be, to fight the battles of the Fatherland. Any one who knows the severity of this training will not need to be assured that during its course the student has neither time nor energy to give to pandects or German law. This reduces the student-period to two years. Next, and this is the real grievance of the professors, the Referendar-examination is so easy and so unacademic in its character, that the student thinks, and thinks rightly, that six months' or at most a year's cramming will enable him to pass it, and consequently absolves himself from the necessity of hearing the learned discourses which the professor has prepared for him. It is true he must put down his name at the beginning of the semester as a member of a certain number of classes, and must pay the professors' fees, which he generally regards as lost money. But his acquaintance with the professor may begin and end with this little affair of enrolment, as the calling of rolls or attempting in any way to check the attendance would be regarded by every German student as an intolerable invasion of the time-honoured right of doing nothing *si bon lui semble*, a right which he somewhat euphemistically dignifies with the name of freedom of learning (*lernfreiheit*). Indeed many of the so-called "corps," or other student-societies to which the young jurist generally belongs, bind him over by strong penalties to attend no lectures at least during his first year. If here and there a corps-student inspired by an unsanctified love of Themis, as it would appear to his fellows, attends now and then a lecture, he slinks by by-roads to the class-room, as to a place which he cannot be seen to enter without loss of reputation. All this, no doubt, has its humorous side, but a professor may be excused for not seeing it.

Having spent his first year in leading the roystering, happy-go-lucky life which he loves, and unbent his mind after the long years of drudgery he went through at school, our young jurist, his mind all unsullied with the pandects, is for his second year, as before explained, a man of war. The third year is darkened by the shadow of the approaching Referendar exami-

nation, and the student, urged by necessity, has recourse not even now to the professors but to the "Einpauker." In him we recognise an old friend, the "Crammer," that cheerful spectre which the examination system has everywhere conjured up, and is now powerless to exorcise. Aided by this gentleman's shrewd "tips" our student passes his examination, leaves the university with regret, and enters on his period of practical preparation. Of course we are far from denying that among the thousands of law students in Germany there are some who take their University life more seriously, but if any one is disposed to think that our picture is purely imaginary let him read the rectorial address of Professor von Liszt, delivered at Marburg in 1886, and quoted by Dr. Goldschmidt at page 17.

We give one sentence:—"The majority of our young jurists leave the Temple of Science, which they—concerned as they are simply to pass a necessary examination—have degraded into a mere petty shop (*Krämerbude*), without any sound scientific attainments, with such miserable remnants of the general education they acquired at school as they have been able to save, without any love of science, which they look down upon as antiquated theorising worse than useless for their examination, without any attachment for their teacher, whom they have perhaps seen only twice in the semester —viz., when they have to present their matriculation-book (*i.e.*, on the first and last day of term), without comprehension, and therefore also without enthusiasm for the great questions of the day which are stirring our people. Philistines, in spite of their three-coloured ribbon (*i.e.*, the mark of the student), abandoned hopelessly to the spirit of the mechanic (*dem Handwerkergeist anheimgefallen*)."

If a University Rector, himself an acknowledged authority in juridical matters, can use words like these, it is surely high time for the all-powerful Prussian Government to bestir itself. A distinguished teacher of natural science is said to have accosted a student in his laboratory with these words, "What do you want here? You know nothing, can do nothing, do no work—better turn law-student." In fact it is notorious that for some years the Government and the legal profession itself have attached next to no weight to the University curriculum, and have relied on the four years' practical training as the real education of the young lawyer. This training is according to a system peculiarly German, which has undergone repeated revision, and varies considerably in the different states. The following is the scheme at present in vogue in Prussia. The young Referendar spends six months as assistant to a local judge (*Amtsrichter*), then a year at a districts appeal Court, four months with a crown-prosecutor (*Staatsanwalt*), six months with an advocate, another year with the local judge, and finally six months at a Court of higher appeal (*Oberlandesgericht*). Almost everything is here matter of chance. If his superiors have an interest in pushing him forward the Referendar may learn a good deal. If, however, as is too often the case, their only interest is to throw on him as much mere routine-work as they can get him to take off their hands, he gains merely a superficial know-

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ledge of the forms of process. In very few cases can he make up his lack of accurate and scientific legal knowledge.

The following measures of reform are suggested by Prof. Goldschmidt. First, a radical change in the Referendar examination, making it much harder, and giving opportunity for specialisation. Secondly, the extension of the university course to four years, which may be reduced to three years and a-half if the student gives satisfactory proofs of diligence. Thirdly, not to allow the year of military service to be reckoned in. Fourthly, to reduce the period of practical training, and to allow the Referendar to devote most of it to the branch he intends to follow.

Professor Goldschmidt concludes his most interesting book, which, however, we venture to think might be greatly condensed, by a review of legal educational methods in other European countries. He is perhaps unduly severe on the English Universities, not quite recognising that neither the Honours' School of Jurisprudence at Oxford nor the Law Tripos at Cambridge aim at qualifying the young graduate to commence at once the practice of his profession. In the freer and keener competition of our society, self-interest is a stronger incentive to diligence than any examination system, however cunningly devised. We may notice in passing his error in describing the new Victoria University at Manchester as a mere examining body. He speaks with warm approval of the law-graduation scheme in Edinburgh, paying a well-merited compliment to Professor Muirhead. We conclude by heartily commending Dr. Goldschmidt's volume to all who are interested in the subject of legal education.

F. P. WALTON.

Notes pour servir a l'histoire littéraire et dogmatique du droit international en Angleterre, par ERNEST NYS, Professeur à l'Université de Bruxelles. (Première partie.) Bruxelles: Librairié Européenne, C. MUQUARDT, 1888.

M. Nys has imposed a debt of gratitude on students of International Law in the United Kingdom by his publication of this brief yet suggestive sketch of the history of this branch of law in England. While the scientific study of law is neglected if not despised in the Scottish Universities (Edinburgh alone excepted), we presume we must be dependent on the industry of Continental or American professors for works such as this. The list of authorities is singularly complete, and the sketch of the doctrines contained in them is artistically proportioned.

The only omission which might, we think, be noted is some more explicit reference to the *Rotuli Scotiæ* and other Roll publications, the statutes at large, and the Scots Acts. The relations between England and Scotland during the period treated by M. Nys, from the Norman Conquest to the Peace of Westphalia, are full of interest for students of

International Law. The Border warfare, and the attempts made on both sides to repress lawlessness, the thin distinction between peace and war, the system of passports, first to individuals and afterwards to nations, for purposes of trade, education, and travelling may all be read in these volumes, and the documents therein contained throw a flood of light on the intercourse between two peoples subjected to different governments, and of closely related nationality.

Perhaps exception may be taken to the general historical formulæ which M. Nys has laid down. Isolation, in one aspect, is true of the ancient world; but what can we say of the treatment of the Chinese by the United States and Australia at the present day? What is the significance of the almost universal protection of native trade by civilised States? What is the significance of the movement everywhere against *pauper* immigration? And, on the other hand, however far we go back do we not find mixed populations? Not even the Egyptians and Chaldeans were of pure blood. Considering the physical difficulties to be overcome, the voyages of Phœnicians, Greeks, and Carthaginians, and the great expeditions of Thothmes, Shalmaneser, Cyrus, and Alexander, were more wonderful than anything that is possible for their successors in the 19th century. A formula of isolation is certainly a very inadequate expression of the history of such peoples and monarchs. If the Greeks and the Phœnicians, the Romans and the Carthaginians fought for commercial supremacy, and divided the sea between them for purposes of trade, the Italian Republics did the same in the Middle Ages, while the English, the Dutch, and the Portuguese, as M. Nys shows, did the same in the 16th and the 17th century. Is this not the policy of the civilised states of Europe at this moment in Africa?

So again of the Middle Ages. With Bishop Stubbs, M. Nys says it was an Age of Law. But was it not so because the Romans had gone before? Could anything be more formally legal than the *jus feciale* described by Livy? And is it not just those ideas, if not the very words used, which have been filtered through Latin literature into Mediæval Feudal Law? We find *legal* ideas in the very earliest treaties, though no doubt imperfectly separated from religion. Even feudalism and the mediæval institution of *commendation*, which, as Professor Freeman points out, formed a species of International Law, have their counterpart in the relations of tributary States and peoples of the oldest monarchies of which we have any record.

The reader of M. Nys' work can hardly fail to notice that English writers for the most part treat International Law, so called, as a department of the law of England relating to foreigners within the realm and the conduct of Englishmen abroad. Lord Stair, who should have a place in the sequel of M. Nys' work, devotes a section of his "Institutes of the Law of Scotland" to this very subject, and throughout his work the references to the analogies of municipal law and the law of nations are not infrequent. It is doubtful if

the substitution of the idea of a law between States as quasi-persons has done as much to advance as to retard the working out of particular doctrines to practical and equitable results. But perhaps M. Nys will find space to indicate, if not discuss, these and similar topics in the continuation of his work, which we anticipate with the liveliest pleasure.

W. G. M.

Digest of the Scottish Law of Conveyancing—Moveable Rights. By JOHN CRAIGIE, M.A., LL.B., Advocate. Edinburgh: BELL & BRADFUTE, 1888.

This is a useful little treatise on the law relating to the Conveyancing of Moveable Rights. The author some time ago entered upon the field of legal literature by the publication of a book upon heritable or real property conveyancing, the utility of which has been proved by the fact that a new edition has been called for within a period of two years.

After a careful perusal of several chapters of the present book, we are of opinion that it will be found not less useful than its predecessor. It is intended, as the author says in his preface, mainly for the use of students, and for this purpose it is to be recommended. It will also, however, be of benefit to practitioners, as a terse and succinct statement of the law on the subject.

As regards the form of the book and arrangement of the subject-matter, there is little to cavil at. But why does Mr. Craigie call his work a *Digest?* That is quite a misnomer. It is a text-book, with nothing of the character of a digest about it. *Manual* or *Hand-book* would be the proper designation. We must also record our distinct objection to the antiquated mode of citing authorities, which has been adopted—viz., their insertion in the middle of the text. It tends to distract the reader's attention, and sometimes occupies space unnecessarily. On page 3, for instance, we notice that the references to "Fraser on Husband and Wife," occupy about one-sixth of the whole page. The proper mode of citation in a legal work is by foot-notes.

So far as we have had occasion to test it, the statement of the law is accurate. Occasionally there is a slight want of distinctness in the enunciation of some proposition, leaving the reader in doubt as to whether the full bearing of the law on the particular topic has been grasped; but this is perhaps due to the desire to curtail space. Page 171—where securities by way of sales are dealt with—may be referred to as an instance in point. We note also that on page 169 the author has in dealing with the Mercantile Law Amendment Act, fallen into a slight error. He says that a seller cannot, since that Act, plead retention against a sub-purchaser "unless in respect of—(*a*) non-payment of the price in whole or in part; or, (*b*) non-performance of the conditions of the contract of sale." But this would

exclude retention by the seller in the event of a general debt being due to him by the sub-purchaser himself. The Mercantile Law Amendment Act certainly does not interfere with retention in such a case.

But these slight blemishes detract little from the merits of the book, which, as we have said, is to be recommended for the purpose it has in view.

H. G.

Mr. Black's Handbook of the Parochial Ecclesiastical Law of Scotland (Edinburgh: Wm. Green & Sons, 1888) gives in a clear and interesting way a good deal of information as to Parochial Church Government. The author treats first of the parish, explaining the terms, somewhat puzzling to the uninitiated, "landward," "burghal," "parishes *quoad sacra*," "Gaelic parishes," &c., and afterwards gives an outline of the law relating to heritors, churches and churchyards, manses, stipends, kirk-sessions, and presbyteries. He concludes with a sketch of the "legal position of dissenting churches." The book is a useful compendium, and some of the information it contains is not very accessible elsewhere. It should be a convenient guide for ministers, elders, and clerks to heritors.

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Notes on Decided Cases.

The Criminal Procedure (Scotland) Act 1887.—Lord Kingsburgh's Criminal Procedure Act seems to be working on the whole smoothly. In *Goodall's* case, 15 Ret. (Just.) 82, Lord M'Laren laid down the wholesome rule that the magistrate who takes the declaration of an illiterate person charged with a serious crime must tell him he is entitled to consult an agent before making his statement. In *Lyon's* case, 15 Ret. (Just.) 66, it was decided on obvious grounds of justice that a prisoner who has pleaded guilty before the Sheriff, and has been remitted for sentence to the High Court, cannot there withdraw his plea. In *Bewglass'* case, 15 Ret. (Just.) 45, notwithstanding the regret of "old Justiciary hands," an extremely short and untechnical indictment of "riotous conduct and breach of the peace" was sustained against objections. But at one time it seemed likely that a great conflict of judicial opinion was about to arise, and that some of the chief advantages of the Act would be destroyed. In *Dingwall's* case, 15 Ret. (Just.) 69, a majority of the High Court suspended a conviction upon the ground that the indictment, which was in substance one of obtaining money on false pretences, did not contain the words "false and fraudulent," which were rightly held to be of the essence of the crime. The Statute says in so many words that such terms are not to be expressed, but always implied, where they are a necessary ingredient of the crime charged. From this decision the author of the Statute, Lord Kingsburgh, dissented with not a little vigour in the case *Parker* v. *Barrie*, Nov. 6, 1888, 26 Sc. L.R. 39. The grave difference of judicial opinion thus ascertained to exist led to the case of *H.M. Adv.* v. *Swan*, Dec. 10, 1888, being argued before the whole Justiciary Bench, with the result that *Dingwall's* case was practically overruled, and *Parker* v. *Barrie* and *Macleod* v. *Mackenzie*, May 14, 1888 (before Lord Trayner) practically upheld, and the opinion was expressed by a majority of eight to one that Sections 5 and 8 of the Statute must be read together, and that such words as are enumerated in Section 8 are properly omitted from the indictment, even where they are essential to complete the description of a crime. No other reading of the Statute is consistent with the statutory schedules. There was probably much common sense in the

speech of Lord Young dissenting; it might with advantage have been addressed to Parliament when considering the Bill in Committee, but it is with deference thought to be in a great measure extra-judicial. It must be kept in view that in the case of *H.M. Advocate* v. *Swan* opinions were expressly reserved by some of the judges as to the effect of Section 5 upon the relevancy of an indictment where two sets of technical phrases might be sensibly implied, and the crime charged would vary according to the implication suggested. Such a point probably reserved itself, as it was not raised in the case of *Swan*, and it is not altogether free from difficulty. One can, however, conceive of few indictments which, apart from the use of merely technical expressions, would not clearly indicate what construction was to be placed upon the particular facts out of which criminal liability arose—*e.g.*, in a case of fire-raising, whether it was wilful or only careless to criminality. In *Parker* v. *Barrie*, Lord Kingsburgh pointed out that, according to the theory of the statutory schedules, such a distinction should be expressly made by the public prosecutor. The Procedure Act, having weathered this storm, will probably be recognised as a fairly useful reform which has sensibly diminished the expense and inconvenience of prosecutions in Scotland.

Insurance.—Two questions in the law of Fire Insurance—one of considerable importance—seem to have been settled by the judgment of the House of Lords in THE GLASGOW PROVIDENT INSURANCE COMPANY *v.* THE WESTMINSTER FIRE INSURANCE COMPANY, 14 R. p. 947, and 15 R. (H.L.) p. 89.

The first, a question as to the construction and effect of a policy of insurance would not have seemed doubtful but for the opinions expressed in regard to it by the minority of the judges in the Court of Session. The second, which related to the proper mode of estimating the amount of fire damage, and consequent loss to the insured, is of much greater difficulty.

In regard to the first, it was decided that a policy of assurance by a bondholder in ordinary form, to which the owner is made a party in respect of his right of reversion only, is to be regarded primarily as an assurance by the bondholder, and not by the owner. The effect of making the owner a party to the policy, is not to make the policy his, but to take away the insurer's right of recourse against him on payment of the loss, and to keep the policy alive for his benefit after the debt is extinguished. Apart from this, such a policy is held to be an assurance of the bondholder's separate and distinct interest, and it makes no difference that the premiums are paid by the owner, and the sum insured allocated among the various items of the insured property, as if the insurance were for the owner's interest.

As to the second point, it was held negatively that the amount requisite to reinstate the insured premises in case of damage by fire, is not necessarily

the measure of the actual loss. It was the assumption of this "false and arbitrary" measure of the actual loss, which vitiated the reasoning of the minority of the judges in the Court of Session. From the opinions of the judges in the House of Lords, it is to be inferred that the proper rule for estimating the actual loss, is to take the difference between the market value of the insured subjects before and after the fire. The salvage left by the fire is not to be taken, in estimating the actual loss, at its value for purposes of reinstatement, but at its value independent of what use it may be put to, —that is to say, its market value.

Thus where there is in a policy an option to reinstate, or pay the amount of the actual loss, these are not to be taken as equivalent obligations. "The sum necessary to reinstate is one thing; the loss if there be no reinstatement is another." From this it would follow, that if reinstatement had actually taken place, the answer to the claim by a postponed bondholder would not logically have been that he had suffered no loss, which might or might not have been the case, but that the insurer's alternative obligation to reinstate had been already fulfilled.

It is worth while noticing that the proposition mainly relied on by the minority of the judges in Scotland, to the effect that where different interests in the same subjects are insured, the aggregate amount of the sums recovered upon a loss by fire, can never exceed the amount of the fire damage was neither affirmed nor negatived by the judgment of the House of Lords. It seems difficult to say that this proposition is not a logical deduction from the principle of indemnity, admittedly applicable to each separate insurance, and from the equally clear proposition, that the value of the separate interests in a subject can never exceed the total value of the fee-simple. It is certainly true in the case of total loss, provided it be taken with the complimentary doctrine of subrogation, as explained in the English authorities referred to, in the opinion of the Lord President and concurring judges; and it is difficult to see why it should not apply in the case of partial loss, subject to the same conditions, and if the actual amount of such loss, estimated in the way explained, be taken. The apparent exception in the case of insolvency, referred to in the same opinion, is rather an exception to the doctrine of subrogation, than to this rule. In that case the right of recourse of the insurer is cut off by the intervention of the bankruptcy laws, by which the sum out of which he would have otherwise been recouped, is carried away to the general body of creditors. In point of fact, the insurance of a creditor's separate interest in the security subjects, is indirectly an insurance of his debtor's solvency, which may, therefore, fairly be taken as one of the risks insured against.

Wm. Harvey.

Usage as Interpreting Contracts.—It is somewhat provoking that the Second Division of the Court did not take the opportunity which was presented by the case of JOPP'S TRUSTEES *v.* EDMOND *et e con.*, January 11, 1888, 15 Ret. 271, to develop the law relating to clauses of relief from public burdens. The doctrine of "supervenient legislation" has not yet been placed on a rational basis; and this case brought up some new points, and others, which, though not new, might have led to the reconsideration of existing authorities. There was the question whether the Police Assessment laid on under the County Police Act 1857 was a public burden in the sense of an obligation of relief contained in a long tack, entered into in 1788. There was the question whether the principles laid down in the case of *Steuart* v. *Earl of Seafield*, March 1, 1876, 3 Ret. 518, where the obligation was confined to "schoolmaster's salary," would prevent the application of a general clause of relief, dated prior to 1872, to the schoolrate laid on under the Scottish Education Act. There was the question whether the decision of the House of Lords in *Dunbar's Trustees* v. *British Fisheries Society*, July 12, 1878, 5 Ret. 221, might be taken as governing the liability for modern road assessments under such clauses generally, or must be limited by a reference to the particular circumstances existing in the County of Caithness when the first proper road assessment was laid on. In one sense the first of these questions may be said to have been substantially disposed of in the leading case of *Scott* v. *Edmond*, 12 D. 1077, but it may be doubted whether some of the decisions mentioned have not overlooked the real continuity of local institutions. In some Scottish counties, for instance, there was a police force prior to 1857. The Second Division of the Court, however, declined to consider any of these questions, which had been properly decided by the Lord Ordinary. They declined to construe the obligation, because they found that for thirty years subsequent to 1854 both parties interested had acted upon a particular construction of it. A plea to this effect had been repelled by the Lord Ordinary, apparently on the authority of *Hope* v. *Lumsdaine*, 9 Macph. 865. That was a decision on the construction of a feu-charter, and certainly not on the competency, or incompetency, of construing such a charter by the usage of parties. There was no plea founded on usage in that case, although the facts presented a substantial case of recent usage. In *Jopp's Trustees* v. *Edmond*, the view taken by the Court was stated to be—"I think we must hold that the contracts should be construed, as the parties themselves construed them for a long course of years." This is no doubt a common sense course of putting an end to litigation, but there is not much authority to support it, and it is a little difficult to assign its precise legal category. There was no legal ambiguity in the document before the Court, and, therefore, the actings of parties seem to be strictly irrelevant. The difficult plea of *mora* and acquiescence applies to money claims past due, and hardly to

the continuing obligations under a written contract. Prescription of course was out of the question. Had there been ambiguity, there is very little precedent for appealing to usage except in the case of ancient documents construed by ancient, though perhaps not strictly contemporaneous, usage. Thus, in *Bruce Carstairs*, January 23, 1773, M. 2333, which went to the House of Lords, the feu-contracts being dated about 1650, a course of payment was continued from 1729 to the date of action, or about fifty years. The report says that "in any recent question upon it, the construction would rather have been with the defenders." The same period of fifty years had elapsed from 1766 in the case of *Masters of Dundee* v. *Wedderburn*, 8 Shaw, 547. It was described by Lord Gillies as a long and marked acquiescence in a particular interpretation of a feu-contract, but whether the plea sustained was one of bar or of construction does not appear. In the case of *Heriot's Hospital*, 4 W. & S. 101, there was a uniform practice for sixty years upon contracts dated about 1650, but Lord Wynford said that it was unnecessary to consider the admissibility of such evidence in a question of construction. In the case of *Ainslie* v. *Magistrates of Edinburgh*, 2 Dunlop, 64, which is sometimes referred to on this subject, although its peculiarities were pointed out in *Wilson* v. *Magistrates of Musselburgh*, a period of sixty years from 1763 had elapsed. All such cases may be easily distinguished from the decision under notice. It must be assumed there was ambiguity, the contracts were in most instances ancient, the period of usage was always far beyond prescription. The general reasons for what has erroneously been called *contemporanea expositio* are well stated in Dickson, by Grierson, sec. 1087. The chief reason is that the lapse of time makes it difficult otherwise to ascertain the meaning of parties. That does not apply to contracts entered into in the nineteenth century, especially if unambiguous. It may, however, be desirable to extend the principle of the law of prescription so as to bind parties who have acted on a particular interpretation for forty years, or for a shorter period. It seems impossible, without touching the doctrine of legal error, to treat such actings as a series of admissions subsequent to the contract. In any case we should know a little more clearly what we are about in dealing with this class of cases.

W. C. S.

Landlord and Tenant.—CRAIG *v.* MILLER, July 20, 1888, 15 Ret. 1005, in which the whole Court was consulted, decides a question alike interesting to the lawyer and important to the community. The tenant of a common lodging-house, holding under a seven years' lease, was held to have no claim for damages against his landlord on the ground that the latter had, subsequent to the granting of the lease, converted a neighbouring tenement,

which belonged to him, into a rival lodging-house, and thereby injured the tenant's business. There was no condition in the lease bearing on the matter, and there was no sale of good-will. It was contended on the part of the tenant that it is an implied condition in all contracts of lease, that the landlord shall do nothing to directly diminish the value of the subject which he has leased. On the other side it was maintained that in mutual contracts no conditions of a vague and indeterminate character can be held to be implied. The latter argument prevailed. A condition which is implied in a contract, must, to use the words of the Lord President, "be susceptible of clear and accurate expression." The reasoning in the argument for the tenant failed, when it was shown that the limits of the restriction sought to be imposed on the landlord were wholly indefinite. If the landlord might not set up a rival lodging-house next door, was he equally debarred from opening one in the next street? We think that the profession will view with approval the result of this decision, which is based on sound principles. The Court should always be chary of extending the doctrine of implied conditions in contracts, beyond what is necessary for explicating the rights of parties in accordance with *bona fides*. The case must be regarded as overruling the decision in *Smith* v. *Cameron*, March 25, 1879, decided by Lord Craighill (Ordinary), and it also weakens the authority of the early case of *Campbell* v. *Watt*, Hume's Decisions, p. 788.

Sale.—Macdonald *v.* Westren, July 19, 1888, 15 Ret. 988, raised an important general question as to the effect of the familiar mercantile contract of "sale or return." The decision establishes the doctrine that where goods are delivered by a manufacturer or wholesale merchant to a retail dealer on a contract of "sale or return," the property of the goods does not pass till they are sold by the retailer, and the manufacturer or merchant is entitled to revindicate them upon the dealer's bankruptcy. Perhaps this proviso should be added—provided nothing have been done by the dealer before the bankruptcy to declare his intention to keep the goods. Prior to this judgment, it was the general opinion in the profession that goods delivered under a contract of this description passed in property to the contingent buyer (so to call him) unless he returned them or intimated his rejection of them within a *reasonable time*. This opinion was mainly due, it is thought, to certain strongly expressed *obiter dicta* in the well-known pawnbroking case of *Brown* v. *Marr*, 1880, 7 Ret. 427; but it was also in accordance with the rule which has apparently been established in England. In his treatise on the Law of Sale (3rd Ed.), p. 592, Mr. Benjamin states the English law on the subject to be that goods on sale or return, if not returned within a reasonable time, become the property of the appellant.

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This case of *Macdonald* now definitely decides the opposite, and although, of course, it is always to be regretted that in the construction of a mercantile contract the Scottish Courts should have to pronounce a judgment not in accordance with the rule established in England, there can be little doubt that the grounds of the decision before us are both logical and in conformity with the general principles of Scottish law affecting conditional sales. As pointed out by Lord Young, it is for the convenience of trade that a retail dealer should be allowed to keep goods of manufacturers in his shop for sale to customers, without incurring any liability to the manufacturers for the price till he manage to get them sold. The dealer becomes a sort of agent for the producer; and, since creditors must be held to be aware of practice of trade in such matters, no question of reputed ownership can arise. There is this also to be said in favour of the judgment before us, that it avoids the necessity of determining what must frequently be, under the English law, a matter of difficulty and dispute in individual cases—viz., what is "reasonable time" for return of the goods.

Retention of Papers.—The decision of ROBERTSON *v.* ROSS, Nov. 17, 1887, 15 Ret. 67, was received at the time with some surprise, but on further examination it will appear to be an extremely delicate one in principle, and not necessarily to involve any "new departure" as was suggested by one of the judges. The proposition that an estate factor or agent may lawfully retain estate papers—*e.g.*, leases, placed in his hands for the business of the factory—until he is paid the balance due on his factorial account, is not *prima facie* repugnant to legal principle or to common-sense. In fact it would be an anomaly in the established doctrines of mutual contract if the principal were entitled to obtain decree against the factor on his obligation to redeliver documents, while himself delaying to perform the counter obligation to pay the money balance. Difficulties have often occurred in ascertaining whether the performance of one obligation in a mutual contract is a condition precedent to the performance of another, or whether the parties have agreed to rely on the remedy of damages, and it has been attempted to lay down some general rules upon this subject (see notes to *Cutter* v. *Powell*, Smith's Leading Cases, vol. ii.; and Lord M'Laren's Note to Bell's Com. i. 445). It would be of advantage if these principles were applied to the conflicting decisions as regards the retention of rent under current leases. But where, as in *Robertson* v. *Ross*, a contract has been terminated, there is less room for disputing the strict mutuality of obligations. Of course, this always becomes a question of reasonable implication on the particular contract. There seems to have been a superstitious view that no

such implication could possibly arise in the case of documents. It is true that the law of Scotland does not recognise the English doctrine of equitable mortgage by deposit with notice, which was incidentally referred to in *Scottish Provident Institution* v. *Walker*, Nov. 20, 1888, 26 Sc.L.R. 73. But whatever may be said of some of the *dicta* in *Christie* v. *Ruxton*, 24 Dun. 1182, there is nothing in the decision of that case inconsistent with a right to retain documents as between the parties to a contract. Lord Neaves observes: "Whatever plea may sometimes arise by way of personal exception against the party himself who may have deposited the deeds and may have bound himself not to ask them back, except on certain conditions, it is thought that no real right thence arises which can be available against another party." Admitting, however, the fineness of the distinctions capable of being drawn, there seems reason for questioning the observation (Lord Rutherfurd-Clark in *Robertson* v. *Ross*) that, if the law laid down there, and in *Meikle & Wilson* v. *Pollard*, Nov. 6, 1880, 8 Ret. 69, is sound, "we should never have heard of the law-agents' hypothec as an exceptional right. We should never have heard of it at all, for there would have been no necessity for its existence." The law agents' right of lien or retention of documents is merely an example of the right to retain which is applied in many circumstances, and probably much more often in the case of goods than in the case of documents. Except in the case of mutual contract, under which possession of documents is got, it must of course be always difficult to imply any agreement for the retention of mere documents of title, not of substantial value apart from the property they represent.

W. C. S.

How to Divide a Surplus in Liquidation of a Company.—The question raised in the case of the BRIDGEWATER NAVIGATION COMPANY, L.R. 39, Ch. Div. 1, presents the more unusual problem, in company law, of how to divide a surplus. The primary interests were large, for the price at which the Bridgewater Canal was sold to the Manchester Ship Canal Company under the statute of 1885 was £1,710,000, and the total amount of paid-up capital was £650,000, leaving, after meeting debts and expenses, a very handsome surplus. The statute did not provide for the manner in which, on the sale of their undertaking, the Bridgewater Company should divide the proceeds among the shareholders. Accordingly, the money having been paid, the Bridgewater Company placed itself in voluntary liquidation, and the principle of distribution was made the subject of discussion in the liquidation.

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The authorised and subscribed capital of the Company was £1,300,000, divided into 130,000 £10 shares, thus :—

		Nominal Capital.		Paid-up Capital.
(1.)	100,000 Ordinary Shares.	£1,000,000.	£3, 10s. paid-up.	£350,000.
(2.)	30,000 Preference Shares.	300,000.	Fully paid-up.	300,000.
	130,000.	£1,300,000.		£650,000.

more graphically represented in diagram, thus :—

Preference. £300,000.	Ordinary. £1,000,000.
£10 paid-up. £300,000.	£6, 10s. uncalled. £650,000.
	£3, 10s. paid-up. £350,000.

The judgments, both of Justice North in the first instance, and of the Court of Appeal (Lords Justices Cotton, Fry, and Lopes), involve the following points :—

(1.) That the preference conferred on the preference shares was only in regard to dividend—viz., 5 per cent., no other advantage being stipulated in the resolutions passed when these shares were issued.

(2.) That the surplus assets, being increment or enhanced value of capital, not profit realised in carrying on the Company's business, did not fall to be paid like annual dividend to the ordinary shareholders (after paying 5 per cent. on the preference shares); but fell, in terms of the Companies Act 1862, § 133, "to be distributed amongst the members" (both preference and ordinary) "according to their rights and interests in the Company."

(3.) That the preference and ordinary shareholders, "standing upon precisely the same level" (L. J. Fry, p. 28), are to participate in the surplus in proportion to the *amount paid up* on their shares—*i.e.*, in the nearly equal proportion of 6/13ths to preference, and 7/13ths to ordinary shareholders—that being, as above shown, the proportion which the paid-up preference bears to the paid-up ordinary capital; but disregarding altogether the £650,000 of subscribed capital for which the ordinary shareholders were liable, but which was uncalled. The amount paid up was taken as the standard of the shareholders, "rights and interests in the Company," because it appeared from the Company's articles "that the profit is to be divided when it is a going concern, and arising from the business, in accordance with the sums paid upon each share" (L. J. Cotton, p. 25).

This third point appears to us open to grave doubt. Can the "rights

and interests" of the shareholders in the Company, be determined without taking into consideration the £650,000 of subscribed capital, for which the ordinary shareholders were liable, and upon whose credit, therefore, to that extent, the Company traded? The principles recognised in the Scottish case —*The Oakbank Oil Company* v. *Crum*, reported in 9 Ret. 198, and in the House of Lords, 10 Ret. (H.L.) 11, and L.R., 8 App. Ca. 65—seem to apply. It was there decided that when dividends are payable to members "in proportion to their shares," it does not matter that some shares are partly, and some fully, paid. The number of shares, whether consisting of money paid or of money at call, was held to be the standard in calculating dividends; and rightly, because, apart from the precise words used, a company trades as well upon the credit of uncalled capital, as upon capital paid up. Indeed, investment companies make this a prominent feature, by undertaking not to issue debentures beyond the amount of the uncalled capital, In the present case, no doubt the rule prescribed by the Company's articles of association for calculating dividend, was the amount of capital paid up; but it was admitted that the surplus in question did not fall to be distributed as ordinary profit or dividend, and that the shareholders were entitled to the surplus of enhanced capital "according to their rights and interests in the Company." But the amount paid up does not represent the whole rights and interests of the *ordinary*, though it does those of the *preference*, shareholders. If the expression, "in proportion to their shares," secures the recognition of uncalled capital, it is very difficult to see how such capital can be ignored under the more comprehensive expression, "according to their rights and interests in the Company."

Would not the true proportion have been reached by one or other of the following modes of calculation?—(1.) From the surplus let the £650,000 of uncalled capital be credited to the ordinary shareholders, and then let the remaining surplus be distributed among the whole shareholders, preference and ordinary, in proportion to the number of their shares; or (2), From the surplus let the whole paid-up capital (£300,000 + £350,000) be paid back to the preference and ordinary shareholders respectively. All the shares would then stand on the same level, with nothing paid on any. The remaining surplus might then be divided among the whole shareholders, preference and ordinary, in proportion to the number of their shares.

The practical result is precisely the same whether the levelling up or levelling down process be applied; but as compared with the method sanctioned by the Court both recognise the "rights and interests" of shareholders in subscribed but uncalled capital, which the Court has ignored. It may be said that the defect in the modes suggested is that they attribute the same value and importance, in estimating shareholders' "rights and interests in a company," to uncalled as to paid-up capital; but on the principles referred to in the Oakbank Company's Case is this inequitable? In any view that criticism would only point to the necessity

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of appreciating the two kinds of capital relatively to each other on some equitable principle, not to the total extinction of one of them.

It is very desirable that this question should be submitted to the review of the House of Lords.

J. C. L.

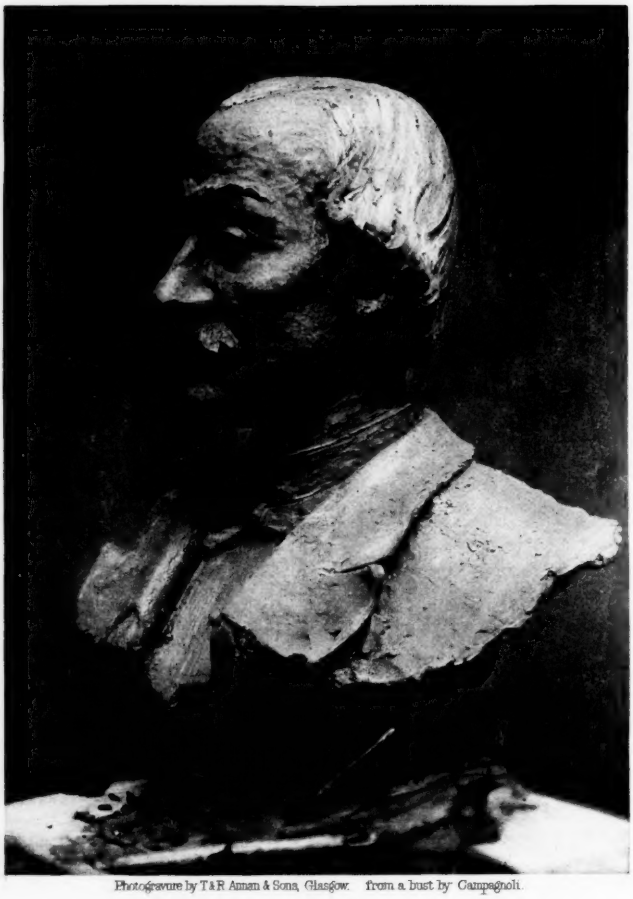
Validity of Bye-Laws.—The vigour of local self-government in our colonies is well illustrated by the decision of SLATTERY *v.* TAYLOR, March 24, 1888, L.R. 13 App. 446, on appeal from the Supreme Court of New South Wales. In that case it appeared that the borough of Petersham had made a bye-law prohibiting all interments within a hundred yards of any house in the borough. They did so by virtue of a general clause in the Municipalities Act 1867 of the Colonial Legislature, giving power to regulate interments and to provide for the health of the municipality. This bye-law had the effect of absolutely closing a private cemetery which had been used by the Roman Catholics of the neighbourhood for a quarter of a century. The appellant (the owner by purchase of a grave) buried his wife after the date of the bye-law coming into force, and was convicted of a breach of the bye-law, and that conviction has been upheld by the Privy Council. It was objected to the validity of the bye-law that it destroyed private property without compensation, but the Court said such a result seemed almost necessarily within the purview of the Municipalities Act. It was further objected that power to regulate did not imply power to prohibit, but this objection was also repelled as inconsistent with the effective execution of the statutory power. Lastly, it was objected that the bye-law was unreasonable, chiefly because it made no provision, as is generally done in England, for those having special claims; and because it made necessary a hundred yards belt of vacant ground all round the cemetery, otherwise a private owner might set down a house, with the effect of stopping all future burials. This objection was also repelled. The Privy Council laid down in weighty words that the old jurisdiction of testing the reasonableness of bye-laws, made by manorial bodies or under ancient charters, must be very carefully handled when it is applied to the bye-laws of completely representative and frequently elected local administrative bodies. The borough council in New South Wales is supposed to represent the feelings and interests of the community, and it is elected annually. Further, the bye-law in question was laid upon the table of both Houses of the Colonial Parliament, and required the assent of the Governor of the colony. The Privy Council admitted that, even under such guarantees, a bye-law might be conceived so fantastic and capricious that a court of justice would be entitled to treat it as unreasonable. But they did not take that view of the Petersham bye-law. No doubt, if it had been inspired to any extent by sectarian or class injustice, the subject would have been ventilated in Parliament, or protests would have been lodged with the supreme executive authority. This judicial reasoning pro-

ceeds on a somewhat ideal view of the working of representative institutions, but it is the only safe course for the judges to pursue. The benefits of municipal government can be obtained only by submitting a good deal that is valuable to the common sense and good feeling of the community in which one lives; and the position of a colonial governor is still sufficiently independent to afford a real protection to local minorities.

W. C. S.

Colonial Appeals.—The greatness of the British Empire is nowhere shown in a more interesting light than in the reported decisions of the Privy Council. In almost every quarter of the world justice is administered in the name of the Queen, but according to a great variety of local law and custom. Here, then, is an ample field for the student of comparative jurisprudence; and here, also, are the means provided for drawing closer the colonies and the mother country by establishing a substantial unity of legal institutions. To such an end it is at least the first step to ascertain the differences which exist. Again, these decisions are often full of political instruction. They often exhibit political forces working under simpler conditions than are attainable at home. Within the last year an extraordinary variety of questions has engaged the attention of the Judicial Committee. In *Grand Junction and Midland Railways of Canada* v. *Corporation of Peterborough*, and in *Redfield* v. *Corporation of Wickham*, they had to consider the relation of the Dominion Parliament and the Provincial Parliament in the matter of railway legislation, and particularly the power of the Dominion Parliament to declare any railways to be for the general advantage of Canada. *Osborne* v. *Morgan* raised a question as to the nature of the "miner's rights" in Queensland—*i.e.*, licenses granted by the warden of a gold-field under the authority of the colonial governor, as opposed to the Crown leases of the mines. In *De Montfort* v. *Broers*, from the Supreme Court of the Cape of Good Hope, the Committee had to determine the position under the Roman Dutch law, as expounded by Van der Keessel, of a residuary legatee, subject to a certain trust, with reference to compromise and release of the executors. In the *Attorney-General of the Straits Settlement* v. *Wemyss* they had occasion to condemn the Crown in damages for interfering, by reclamation works on the foreshore, with the plaintiff's access to the harbour of Penang. In *Tennant* v. *Howatson* they had to consider the working agreements, under which commission merchants advance the expenses of getting the crop and making the sugar upon the sugar estates of Trinidad, and whether a bill of sale on the growing crop of sugar was void for want of registration. In *Abd-ul-Messih* v. *Farra* they had to decide upon the domicile for succession of a member of the Chaldæan Catholic Community, born in Turkey, and, living permanently in Cairo, where he acquired the status of a

protected British subject, and whose estate was being distributed by the Supreme Consular Court of Constantinople. *Rolland* v. *Cassidy* and *Singleton, Dunn & Co.* v. *Knight* were cases in which questions arose as to the jurisdiction of *amiables compositeurs* or arbitrators, and as to the implied authority of partners arising under the Civil Code and the Procedure Code in force for the Province of Quebec in Lower Canada. In *Agency Company* v. *Short* the English Limitation Act of 1837 was applied to the possession of land in New South Wales. In *D'Amico* v. *Trigone* the Committee had to consider the nature of a Maltese *primogenitura* or entail of lands, and the power of a Maltese baron to impress the character of a "majorat" upon his barony in virtue of certain Pragmatics of the Neapolitan kings. Such are a few examples of the extent and diversity of the jurisdiction exercised in that dull little room in Westminster. The list contains no specimen of Indian Appeals, which in themselves frequently open up the consideration of the subtle, complicated systems of the Hindu and Mohammedan law. With such materials to work upon, it should be the boast of British lawyers that they can take an unprejudiced and cosmopolitan view of legal principles and institutions.



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Pasquale Stanislao Mancini.

PASQUALE STANISLAO MANCINI.

IN his valuable monograph on Vico, Professor Flint, of Edinburgh University, has called attention to the condition of Italy in the period of its decline—towards the close of the sixteenth and beginning of the seventeenth centuries.

The Renaissance was then shedding its last rays upon the canvasses of Guido Reni, Caracci, and Salvator Rosa. Antonio Serra was pointing out the productive powers of industry in his treatise on *The causes that may produce abundance of gold and silver in countries where no mines exist.* Bandini was heralding the doctrines of the physiocratic school, whilst Genovesi proclaimed boldly the superiority of *honest labour* over the productiveness of mines, and raised his voice in favour of freedom of internal trade, the abolition of the laws against usury, and restriction of the number of convents. Beccaria was working out the theory of the division of labour, and Verri that of production and reproduction. Vasco was upholding and Ricci combating the doctrine of poor law relief, and Ortes was establishing the law of population which *keeps stationary or increases and diminishes in proportion to the amount of wealth.* All this was like a sunset, yet a sunset which resembled a dawn.

Southern Italy had always been distinguished from the other parts of the Peninsula by the philosophical acumen which it had inherited from the school of the Eleatics, and the Pythagoreans, and which had been revived by Thomas Aquinas, Telesio, Campanella, and Giordano Bruno. The period was a fruitful one, for from the time of Bruno's

violent death to the birth of Vico only sixty-eight years elapsed. Whereas Pythagoras had applied his system to the organisation of the State, and Aquinas applied his to that of Christianity, Vico gave himself to the ideal and eternal relation of history. The writer who exercised the most powerful influence on Vico's mind was Hugo Grotius, who has been justly termed the great jurist of humanity.

It is necessary to pause a little to consider what was the condition of juridical studies amongst us, before and after Vico. In the early period of the Neapolitan monarchy, almost all our professors of jurisprudence came to us from the schools of Lombardy, or at least received their education there. But in the fourteenth century, the law schools of Northern Italy having begun to deteriorate, the Neapolitan teachers attained to quite as high a position in the public estimation as those of Lombardy. And since feudalism had a much stronger hold in the Southern provinces than in the rest of the Peninsula, it was but natural that the feudal law claimed the greater share of the attention of the first Neapolitan jurists. To such eminence did they attain therein, that for several centuries the works of the Neapolitan schools were the guide and light of all European jurists on this subject. "The study of this branch of jurisprudence," writes Giannone, "was amongst us so extensively cultivated and held in such esteem, that our jurists excelled all those of other nations either at home or abroad, and even at this day we have an especial pride in claiming that nowhere else is so much known or written about feudal doctrines as by our own jurists. Experience, too, has proved that the most difficult and intricate questions that have arisen on this subject have never been treated more acutely, nor with greater accuracy and learning, than by our own writers. No other part of Italy can boast of having had so many writers on the subject, as the Kingdom of Naples." (*a*)

Roman law, too, received fresh light from the erudition of

(*a*) Civil History of the Kingdom of Naples.—Bk. xiii. ch. 3.

Francesco d'Andrea, Gian Vincenzo Gravina, Domenico Aulisio, and Gaetano Argento, who introduced among us the method used by Alciatus and by Cujacius. The connection between the several branches of juridical science which was incomplete, was perfected by Vico, bringing together, as he did, fact and idea, philology and philosophy.

With the French conquest came French laws. The Civil code of France was declared to be law on the 1st January 1808; the provisions relative to divorce, however, being for certain reasons suppressed, and registration of facts affecting civil status being left in the hands of the parish priests. In vain did Francesco Ricciardi, the minister of Joseph Bonaparte, seek to introduce several important modifications, especially in regard to the rules of succession, dowries, and paternal jurisdiction, and some extension of the law relating to leasehold property (*emphyteusis*). The High Chancellor, Cambacères, acting in the name of the Emperor, refused to have any such alterations made.

Naples obtained successively from France its Code of Civil procedure, the Commercial Code, and finally the Penal Code. The latter of these came into force on the 23rd April 1812, superseding the laws, equitable as they were, of the 20th of May 1808 on crimes and penalties, and of the 22nd of May 1808 on inferior criminal jurisdiction. However, only the part relating to criminal procedure has remained in force, the French "Code d'instruction criminelle" having never been applied, seeing that it contained provisions for trial by jury which it was not thought desirable to introduce.

The wide differences existing between our legislation and that of the French, soon revealed themselves in relation to the Criminal law and its procedure. A great legislative reform which had been meditated since 1814, but had been deferred owing to the political complications that had supervened, took place in 1819. The following is the opinion passed upon this measure by two eminent foreign writers:—"Celui de tous nos codes," wrote Dupin, "qui a subi le plus de changements est le code pénal, et toutes

les modifications, qui ont été faites, ont été dictées par des vues de philanthropie et d'humanité. Il n'est aucune des améliorations qu'on discute maintenant à la chambre des pairs, qui n'existe à Naples depuis 1819 et même sur une base plus large. En effet non seulement on a aboli la mutilation du poing, la marque, et dans plusieurs cas le carcan; non seulement on ne frappe plus de la peine de mort les coupables de fausse monnaie, de faux papiers nationaux, et de vol, mais on a gradué avec beaucoup de sagesse les peines relatives à la complicité, à la tentative, à la réitération, à la récidive." Eschbach remarks:—"Les lois pénales se rapprochent du Code pénal français en plusieurs points, mais s'en éloignent beaucoup en plusieurs autres. Il y régne une plus grande douceur que dans notre législation criminelle, et déjà le Code napolitain contient les améliorations que l'on n'a réalisées en France que par la loi du 28 Avril 1832."

The Neapolitan legislators carried out the programme propounded by Pasquale Liberatore, who, in his *Essay on the Criminal Jurisprudence of the Kingdom of Naples from 1814*, exposed the shortcomings in this direction of the French Code, drawn up as it was in the very height of Imperial despotism. From that period Criminal Law became the chosen study of Neapolitan jurists, as is testified by the works of Canofari, Raffaelli, Armellini, De Marco, Romano, Lanzilli, Orazi, Muscari, and notably of Roberti and Nicolini.

Amidst this array of talent appeared PASQUALE STANISLAO MANCINI, who, when a youth of eighteen years of age, entered upon his career at the Neapolitan bar with the most brilliant prospects. This was in the year 1835. Two years afterwards he began to make a reputation for himself in the literary world. He discussed with versatile genius all the current questions in the public journals, and founded a monthly review under the title of *Hours of Solitude*, the name of which he changed in 1842 to that of *Library of the Moral, Legislative, and Economic Sciences.*

And here it must be observed that towards the end of

the foreign domination in Naples, as also during the first years of the new dynasty, Neapolitan culture had been almost entirely confined to the economic and legal sciences. When, however, society felt the re-organising effect of the French *régime*, culture became more varied. Mazzocchi, Rosini, and Avellino, enriched archæological studies; Carlo Troya from a new critical standpoint wrote the history of Italy in the Middle Ages; Stefano Cusani introduced amongst us the doctrines of the Scottish School of Philosophy; Pasquale Galluppi combated Kant's system, and Vincenzo di Grazia that of Hegel; Savario Baldacchini and Pietro Paolo Parzanese were successfully cultivating the Muses; the Duke of Ventignano was writing tragedies and plays; and Antonio Ranieri, for the first time in Europe, introduced the society novel when he gave us his "Orphan of the Annunziata."

But neither the bar nor literature were sufficient to absorb Mancini's devouring activity, and he commenced to teach Criminal Law and Procedure. Private instruction was the system which had been traditional amongst us. The monopoly of education granted by Frederick the Second to the university founded by him in 1224, was of little value: the university itself never having acquired much public esteem, partly on account of the constant changes of government, and partly perhaps too on account of the restless character of the Neapolitans. Regular attendance at the university classes and at the hospitals was required only from the students of medicine. In the other Faculties each one was at liberty to study where he chose, and to present himself for examination without any particular period of study being required. This, indeed, proved to some extent a safeguard against abuse in the choosing of university professors (too frequently appointed on questionable grounds), and was useful also in kindling emulation in the search after truth.

The youthful Mancini was warmly greeted by his students, to whom he communicated some of his own ardour, and he soon took his place amongst men like Roberto Savarese,

Giuseppe Pisanelli, Giovanni Manna, Antonio Scialoja, Basilio Puoti, Luigi Settembrini, and Francesco de Sanctis, all of whom exercised so great an influence on our political regeneration.

But it was by the publication, in 1841, of his Letters to Count Terenzio Mamiani on the Philosophy of Law, and more particularly on the Right of Punishment, that Mancini's name first became known throughout Italy. This work soon ran into a second edition, which was published in 1844 with an appendix of five letters of Mamiani; and it was again republished with the title of *The Fundamental Principles of the Philosophy of Law, and more particularly of the Right of Punishment, being letters of Terenzio Mamiani and Pasquale Stanislao Mancini, to which are appended four speeches of Terenzio Mamiani on Sovereignty, and with a preface by Prof. P. S. Albini, Leghorn.* The problem of criminal punishment is connected with a more general question, to wit, the fundamental idea of goodness, and, through it, with that of the principle of all truth. Mamiani does not shrink from treating the subject from such a lofty point of view; and he establishes the existence of absolute good, for participation in which the whole universe is ordained according to the capability and peculiar organisation of each being in it. The correspondence of all means to their end, devised and willed by God, forms, in accordance with His will, the supreme moral order. Human actions must therefore be judged according as they are, or are not, subject to this order, inasmuch as they are intellectual manifestations of it. Law is defined as *a solemn and obligatory command*, inasmuch as it is the manifestation of moral order. Between law and the responsible being there is a relationship, whose two opposite terms are *right* and *duty*. The highest condition of permanent moral order being the equal retribution of the good and the bad, there arises that notion which is innate in every heart—the notion of justice. Justice is *an authoritative distribution of good and evil according to the merit and demerit of works,*

whence is derived the theorem: *Good requites good, and evil requites evil.* Man does not follow after evil except under false appearances; and therefore the office of human justice is a hallowed one when it reveals in its operation the falseness of such appearances, and re-establishes the moral law. To avoid, however, the risk of this definition being taken in too extensive a sense, the author adds: "Social order is the complex whole of social facts duly regulated, that is, of all such as tend to accomplish the greatest individual and common good under the rule of moral order; and every infraction of its laws (which are the very essence of good) also becomes of necessity harmful to social order, in respect that it renders impossible the attainment of its end out of the common and absolute paths of good. It is, then, a duty of society, considering the case quite apart from *possibility* and *convenience* of judgment, to prevent, as far as it can and as best it can, the violation and disturbance of the supreme moral order, which likewise involves the injury and disturbance of the social order." Hence it follows that every moral evil in the abstract clearly belongs to the province of human justice, and society has a perfect right, when it is *possible* and when it is *proper* for it to do so, to punish a violation by any one of its members of any law or duty, either towards God, or towards himself, or towards his fellow-beings.

Mancini enters with a wealth of reasoning into this discussion. He takes his inspiration from Vico and says:— "The elements of all divine and human knowledge are threefold—*knowing, willing,* and *acting*—of which the sole guiding principle is the mind, whose eye is *reason illuminated by God. God is infinite in knowledge, will, and power—man's knowledge, will, and power are finite,* but ever tending towards the infinite. Man has reason, and by it he knows the Absolute. He has a freewill influenced now by reason, and again by the senses; and, finally, he has an activity equally free which may be directed towards absolute good,—that is, according to the dictates of reason and not of the

senses. Accordingly, man, viewed in reference to the participation in the Absolute, has only *knowledge* that is not free but *necessary;* that is to say, he cannot prevent absolute truth from being truth for him and for other men. But in *will* and in *power* he is free. The moral obligation will come in when the *will* and the *power* of man are freely determined to participate in the absolute good, which necessarily manifests itself to his *cognition.*

Passing on to the application of his theories, he says that man is able, without having recourse to the knowledge furnished by his senses, to elevate himself to the idea of the Supreme Being, that his conscience does make him aware of the existence of good and evil, and does make him feel it his duty to aspire after participation in the absolute good. But so long as he is not brought into relation to other men, the idea of the relations of sensible good would not arise, so that he would be in the field of moral order rather than of law.

He next proceeds to point out eight distinctions between morality and law, which we shall here transcribe literally :— "(1.) As to their *object.* The absolute good or Divine Personality is the object of morality; relative finite good, or human personality, is that of law. (2.) As to their *end.* Morality in the responsible being requires that duty should be an end in itself; that man should do good because it is good; and apart from this absolute end, morality is not satisfied even if man should render useful acts to his fellow-creatures. Law does not demand this, but only that good should be practised, even from a sensible motive, as from fear, from interest, or from force. (3.) As to their *condition.* The co-existence of a number of men, and consequently of society, however limited it may be, is a necessary condition of the existence of law. Morality would exist even where but a single human being existed. (4.) As to their *extension.* Mere internal liberty and external actions being neither useful nor hurtful to society—*i.e.*, to other men—can only enter into the domain of morality.

External liberty alone, in so much as it produces benefit or harm to mankind, comes under the influence of law. (5.) As to their *criterion*. Reason alone is the criterion of morality; reason and the senses must be that of law. (6.) As to the *nature of their obligation*. The conception of ethical obligation, that is, of morality, is a simple and invariable one; whilst that of juridical obligation (*officium juris*) is a compound and variable one. (7.) As to their *sanction*. Morality does not admit of physical compulsion from man to man; law legitimises the use of force. (8.) As to their *effects*. Morality has only in view the keeping up of ideal order or of moral good, without taking account of the effects of any apparent benefit or harm which may result from actions. *Fiat justitia et pereat mundus*. Morals might be called the science of antecedent good in the mind of the responsible being. Law, without interfering with moral order, looks, on the other hand, just at the sensible effects of actions in so far as they manifest the moral element,—that is to say, it looks at the good that may result from them. What then have morality and law in common? Nothing but the basis of such good, and the subject of both kinds of obligation—viz., man. The *raison d'être* of both is very different, not merely in their accidental characteristics but in their substance and principles. That of the absolute good or pure justice, is morality. But the *raison d'être* of law is only to be found in the union of the two principles of *morality* and of *utility*, of which human or social justice is composed."

The right to punish, says Mancini, is not derived from the mere principle attached to absolute moral justice, that good is to be repaid by good and evil by evil; but also from that of social utility. Therefore punishment has not only in view an expiatory effect, but of necessity it also aims at the prevention of crime. Society has the right to punish only those offences against morality which include at the same time relative and sensible harm to mankind. In this consists the principal limitation of law as such. In saying this, Mancini thought to avoid a double stumbling-block: dissenting from

Rossi on the one hand, who made everything spring from the moral principle or from absolute justice, while admitting only a limit in the political element; and from Carmignani on the other hand, who takes the political principle as the basis of the right to punish, while assigning a limit to it in morality. He thus explains the expiatory, corrective, and preventive character of punishment.

The doctrine of Mancini was taken up by the eminent Neapolitan criminal lawyer Enrico Pessina, who made a distinction between retribution purely moral, necessitated by moral guilt and consummated in remorse of conscience, and retribution purely juridical, necessitated by legal guilt, and which has the object of making the principle of right prevail inviolate in society, by means of a re-assertion of it under the form of constraint when the free will of the individual is exhibited in the criminal action.(*a*)

The distinguished Professor of the University of Pisa, Francesco Correra, propagated the same views throughout Italy, writing in his *Exposition of Crimes considered in specie*, that the violation of a concrete right assumes the negation of the predominance of right in the abstract. In view of this violation a further fact is necessary, thus recognising the principle of the sovereignty of right in a form which is denied by the abuse of individual force. It appears to the author of this article to remove all discussion on this point if we define legal right as that part of morality which is indispensable to full human development and is accordingly sanctioned by public authority, the other part being left to the free will of the individual. Mancini himself regarded Kant's principle of the co-existence of the liberty of each person with the liberty of all as insufficient, when viewed as the ultimate end of right. In fact, the liberty of all supposes an end to be attained, and it could not be the sole sensible good if accepted as the specific content of right. It behoves us, therefore, to look higher—to the

(*a*) See the Introduction to Criminal Law of Pellegrino Rossi. Naples, 1853.

ethical whole as Trendelenburg expresses it—in order to find in morality the motive forces of right, and to place human nature and universal order in co-relation to one another.

The time of Italy was ripening. Congresses of Italian Scientists, in which Mancini took an important part, were succeeded by movements for reform. Then came the revolution in Sicily of the 12th January 1848. King Ferdinand conceded the statute of the 29th January; and on that very day Mancini set about publishing the political journal "*Il Riscatto*" in which there appeared a frank exposition of constitutional liberty, and of the principle of Italian Nationality.

Milan was up in arms; King Carlo Alberto was passing the Ticino; and Neapolitans were eager to fly to the succour of the oppressed brethren. Thereupon Mancini wrote in the form of a petition to the king, an apology for the Italian movement, imploring King Ferdinand to hasten to the fields of Lombardy. This petition was not without effect; the king held a long interview with Mancini, and consented to the departure of a corps d'armee for the northern provinces of Italy. Then came the fatal 15th of May. Barricades were erected, and the representatives of the nation who had assembled to deliberate in a preliminary sitting in the council chamber of Monteoliveto, received warning from a band of soldiers to quit the place. It was intrusted to the youthful deputy Mancini to draw up a protest against this wanton act, declaring that far from abandoning the fulfilment of their solemn duties, the Chamber of Deputies was only dissolved temporarily, and would meet anew in order to enter upon these deliberations which were demanded by the rights of the people, by the gravity of the situation, and by the principles of outraged humanity and national dignity. This protest was signed by sixty-nine deputies.

Meantime reason was triumphing in Europe. King Ferdinand after persisting in maintaining in power a ministry obnoxious to the Chamber of Deputies, endeavoured to raise a conflict upon the proposed new law of finance, but

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this both peers and deputies with equal tact succeeded in settling. Then he was obliged to throw off the mask,—he refused to sanction the law, and the Chamber was finally and for ever dissolved.

The era of persecution now commenced. Mancini had donned his gown again to defend many an unfortunate client. The authorities could find no other means of getting rid of him than by implicating him in a political trial, that of the 15th May, in which he was condemned to twenty-five years' of penal servitude in default. Warned in time of their machinations, he had taken refuge in the house of the French Ambassador, Count Rayneval, who furnished him with a passport, and, together with Conforti and Pisanelli, he escaped to Piedmont on board a French vessel.

Mancini found a home at Turin, and there it was that in the professor's chair he was to win some of his brightest laurels. By an Act of the 14th November 1850, a Chair of Public International Law was founded at the University of Turin, and Mancini received the first appointment. On the 28th January 1851, the course was inaugurated with a lecture on the principle of nationality, or the national basis of public law.

Nationality is liberty itself, the fundamental attribute of personality, extended to the common development of the organic whole of the individuals of which nations are formed. Nationality is the collective form of liberty; and therefore it is a sacred and a Divine thing, as much as individual liberty itself. The juridical relations which are spontaneously and necessarily generated from the existence of nationality, have essentially a double form of manifestation: the free internal constitution of the nation, and its autonomy with regard to foreign nations. The union of both of these constitutes the naturally perfect state of a nation,—its own *ἐθνικαρχία*.

This advanced theory became a mark for the objections of certain writers, and for diplomatic remonstrances on the part of Austria and of the kingdom of the two Sicilies, to which the Minister d'Azeglio replied in a dignified manner.

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After the triumph of his cause, in an address which he delivered in the University of Rome on the 23rd January 1872, the great thinker confining his ideas within the limits of reality, remarks :—"On the other hand, a State composed of heterogeneous nationalities must always act in its international relations, by placing its centre of gravity in that part of its territories and population which may be the nerve-centre of its own force and power. Thus it is able to live and act as a nation and at the source from which it draws the chief sustenance of its being. But it is also necessary to admit that there are in the world two kinds and qualities of States : those that are the work of external force, or of the confederation of provinces and territories belonging to different nationalities; and those that are the result of natural conditions or national States. Both are included in the juridical consortship of humanity, but with certain obvious diversities as regards their prerogatives and corporate unity. The former by virtue of the principle that the institutions and obligations of men are dissolved by the same means by which they are founded and established, can be undone, can undergo changes, and perish under the influence of the very causes by which they had their being—that is, by force or by united action (*eodum modo dissoluti quo alligati*). Quite otherwise is it with national States; the principle of their existence, and, therefore, of their duration, is independent of all the accidental and contingent action of treaties and of wars. Neither the events of war, nor treaties, nor princely heritages and successions can juridically decide about their cessation or incorporation into other States. A national State may truly be said to be immutable and eternal, in such sense, at least, as eternity is known in the history of mankind.

In the inaugural address of the Session of 1874, which may be considered the "swan's song" of Mancini as a professor, he considered how nations or States could evolve from the so-called state of nature, or imperfect social existence, keeping equally distant in his remarks from imperialism on the one

hand, and from utopianism on the other. He specially exhorted our writers to continue studying how to organise an international system of justice, and to elaborate a code of regulations for removing the difficulties in the way of choosing arbiters and determining the forms to be observed in the exercise of their functions, and to propose the means for having recognised the nullity of arbitral decisions issued outside of or beyond the scope of the question under arbitration.

Having thus far considered Mancini as an advocate, as a philosopher, and as a professor, it is time to look at him as a legislator and as a statesman. In 1855 Mancini was elected deputy by the electoral college of Dagliani, defeating Cassinis, his first opponent at the Turin bar, but, apparently owing to professional reasons he declined this honourable office. In 1859, when the principle of a national Italy found a fuller embodiment in the kingdom of Northern Italy, he was chosen simultaneously by the electors of Vigerano and Sossani, and declared in favour of the latter. He spoke and voted against the cession of Nice to France, which fact testified more than ever to his love for those abstract principles which we have already described him as inculcating.

Events were now rapidly bringing on the desired unity. Tuscany and Emilia, which had risen during the war of independence, would not accept the treaty of Zurich, and by solemn plebiscites they proclaimed their annexation to the kingdom of Northern Italy. Mancini was requested by Count Cavour to study the means best adapted for obtaining unity of legislation, and as the representative of the commissions of Florence and Bologna, he addressed to the Central Ministry at Turin four learned reports upon the course which ought to be taken.

Garibaldi disembarked at Marsala, proclaimed himself dictator at Palermo, crossed the strait, and entered into Naples triumphantly on 7th September 1860. After the plebiscite, Lieutenant-General,' His Highness the Prince of Carignano came to Naples, and called Mancini to the judicial

Presidency of Grace and Justice and Ecclesiastical Affairs. A commission was appointed to draw up proposals for legislative alterations and improvements of the law, so as not to leave the provinces for any length of time deprived of the institutions necessary for their safety and liberty. By the terms of the appointment of the commission, it was declared that those parts of the Civil Code which referred to private law should remain in force, until a definitive code for the whole of Italy should be adopted to regulate family and property relations; but that the parts which referred to Public Law, such as the Penal Code, the Code of Criminal Procedure, and the law as to Judicial Regulation should be published as quickly as possible. The personal work of Mancini in this office was the abolition of the concordat of 1818 (an enactment favourable to the royal ecclesiastical rights), and the immediate suppression of the monasteries and pious foundations by the decrees of the 17th February 1861, on the eve of the opening of the parliament.

After five years in his judicial post, Mancini took his seat in the Italian Parliament, where he voted with the majority until 1862, when he was intrusted by Rattazzi with the Portfolio of Public Instruction. This office he only held for about two months, too short a time for making any particular mark in it. Upon the Left being called to power, on the 18th of March 1876, Mancini was for a short time Minister, first of Public Instruction, then of Grace and Justice, and from May 1881 to July 1885, he held the office of Minister of Foreign Affairs. We can only state here the more important laws with which Mancini associated his name as deputy and as minister. He proposed and successfully carried the law abolishing personal arrest in civil matters, the law tending to repress legislation in local administrative affairs, and the law as to arrest of persons accused of crime and their liberation pending trial. He obtained in 1877 the approval of the Chamber to his Bill

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respecting the 1st Book of the Criminal Code, which is now about to be published. He took a very large share in promoting the measure decided upon in connection with the Commercial Code. The laws concerning contracts between persons at a distance, contracts by telegraphic correspondence, contracts of transfer, and procedure in bankruptcy, are also his work.

But the distractions of political life did not lessen his interest in general jurisprudence, or make him cease from taking active part in the movements of the European scientific world. He attended the first meeting and was elected first President of the International Institute, established at Ghent on the 10th September 1873. The International Juridical Congress, which met at Milan on the 14th September 1883 directed its President, Travers Twiss, formally to communicate to Mancini, who was then in office, the resolutions it had passed regarding the execution of judicial decisions pronounced in foreign countries. By a circular of 19th March 1884, Mancini advocated the meeting of a conference at Rome, for drawing up a code of uniform regulations in matters relating to Private International Law. Invitations to this Conference were issued and were accepted by the Argentine Republic, Austria-Hungary, Belgium, Columbia, the Republic of Costa-Rica, Denmark, France, Great Britain, Greece, Guatemala, Honduras, the Netherlands, Peru, Portugal, Roumania, Russia, San Salvador, Servia, Spain, Switzerland, and Norway and Sweden. Some governments could not definitely give their adhesion, on account of the hindrances which their federal system imposed upon them; but they expressed their sympathy with the proposal, and promised to take the results into consideration. The proposed conference fell through only by its giving place to the one already convoked for the drawing up of a Sanitary International Code. Regarding this proposal, Laurent's remarks are worthy of being quoted:—"Si la tentative de Mancini a été prématurée, ce n'est pas a dire qu'elle ait été

inutile: la voie qu'il a ouverte peut seule conduire à la solution des difficultés qui vont tous les jours en augmentant, à mesure que les relations internationales deviennent plus frequentes." (*a*)

To largeness of mind Mancini joined goodness of heart. He was respectful to his parents, tender to his wife, Laura Beatrice Oliva (a poetess of genius, whom he married in Naples in 1840, and who died at Florence in 1866), affectionate to his children, sincerely attached to his friends, and courteous to all. His countenance was indeed a faithful mirror of his soul, and one had only to catch but a glance of his noble features and expression to be convinced of all this. His memory will remain for ever enshrined in the history of Italy and in the scientific world, and will be always dear to those who enjoyed the privilege of his private friendship. Posterity will honour him as one of the leaders of that valiant generation which spent its best life in toiling with heart and hand to make Italy once more united and free.

DIODATO LIOY.

(*a*) Le droit civil international, tome premier, p. 21.

THE OREGONIAN RAILWAY DECISION.

HAVING been engaged, along with Senator Edmunds and the Attorney-General (Garland) of the United States, as counsel for the plaintiff in this case, I have been invited to contribute a brief note on the decision to the pages of this Review. As the history of the litigation is, from some points of view, almost as important as its result, I shall state shortly how the case arose, and how it fared in the American Courts, and then deal with the legal issues involved.

1. The plaintiff, the Oregonian Railway Company, was, in the autumn of 1881, engaged in constructing a system of railways in the valley of the Williamette in the State of Oregon, the main terminus of which was to be the city of Portland. The plan was to build from points in the valley inwards into Portland, and two lines converging to a point on the river about thirty miles from Portland had already been made when the defendant company made its offer to take a lease of the line. The offer was accepted, the further construction abandoned by the plaintiff, and the road as constructed handed over to the lessee.

The plaintiff is a Scottish corporation organised under the Companies Acts for a variety of purposes, among which were expressly included not only the building, operating, &c., but the leasing or selling of the railroad defined in the Memorandum of Association. The defendant is an Oregon corporation organised under a law which, in its main features, is the counterpart of the Companies Acts. It also was organised for a variety of purposes, one of which is expressed to be the

leasing (*i.e.*, taking a lease) of any railroad or railroads in the State of Oregon. It need hardly be said that the best legal opinion in both countries was consulted before the lease was concluded. The late Mr. Benjamin, Q.C., of the English Bar, certified its validity, as did also the principal solicitor on the other side, who was one of the gentlemen who afterwards succeeded in defeating it in the Supreme Court. The lessee entered into possession, and for about three years paid the rent. In May 1884, it suddenly repudiated the lease as invalid, and offered to hand over the railroad, large sections of which by that time had become wholly dilapidated, to its owners. An action for rent was immediately begun, and the case was first heard before Judge Sawyer (Circuit Judge) and Judge Deady (District Judge), sitting together in the Circuit Court of the United States for the District of Oregon. The opinion of the Court was that the defence was frivolous, and judgment would there and then have been rendered for the plaintiff, but for certain difficulties (which need not be mentioned here) in the form of the pleadings. Although the opinion of the Court on the main point had been obtained, the defendant continued to raise new defences of all kinds so that final judgment for the plaintiff was not obtained until the 18th March 1885. The defendant then appealed to the Supreme Court of the United States sitting at Washington. The hearing of the appeal took place in May 1888—about three years after the decision of the Circuit Court. The decision of the Supreme Court was pronounced on the 5th March last—nearly a year after the hearing, four years after the original decision, and five years after the repudiation. The plaintiff during this long interval—which is the measure of the chronic state of arrears in the Supreme Court—had to place the broken road in the hands of a receiver, and find money to pay its bond-holders in order to stave off dissolution. These facts were represented to the Court as reasons why hearing and decision should, if possible, be accelerated, but the Court allowed the case to take its normal course, except that judgment was delayed beyond the usual period.

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The result was that the Supreme Court pronounced the lease void—Mr. Justice Field dissenting. Mr. Justice Field is the member of the Supreme Court specially assigned to the judicial district of which Oregon is a part. All the United States judges—the district judge, the circuit judge, and the assigned justice—who are directly engaged in administering the laws of Oregon, have held the lease to be valid. And the district judge (Mr. Deady) was himself the framer of the Statute, the meaning of which was in question in the case.

2. The main—indeed the only—question was whether the lease was within the powers of the contracting corporations. Except on one point—to be noticed presently—the argument in favour of the lease was the same as to both companies. Take the case of the defendant company as being the simpler of the two. The Constitution of Oregon prohibits the formation of corporations by any special Act. The general law of Oregon contains provisions by which a corporation may be formed for any lawful purpose, to be named in its articles of association. The defendant company—the Oregon Railway and Navigation Company—was duly organised under this law for the purpose (named in its articles) of acquiring by lease and operating any railroad in the State of Oregon. It was not disputed that the railroad in question was within the description of roads which the defendant company had inserted in its articles of incorporation. The Supreme Court has now held that the Oregon Railway and Navigation Company had no power to take a lease of the Oregonian Company's road, or of any road.

The only ground on which such a decision would appear to be sustainable would be that to lease a railroad is not a "lawful purpose" in the State of Oregon. But the Supreme Court has not said so, and in the face of the Oregon Statutes it is difficult to see how it could say anything of the kind. The law as it existed at the date of the lease had no special provision for railroad companies, except in the matter of acquiring land compulsorily. But there was, at one time, one remarkable statutory provision which prohibited companies

of a special kind — viz., companies formed for navigating a stream—from taking leases of railroads. The natural inference would be that other companies were not prohibited. This prohibition was repealed before the making of the Oregonian lease—and the natural inference would be that even navigation companies might thereafter take leases of railroads if they had organised themselves for that purpose. The Supreme Court rejects both inferences on the ground that the prohibitive words of the section of the Statute referred to must be limited to the portage roads mentioned in the first sentence; although the enacting words expressly declare that they apply to "any incorporation which may be formed under this chapter," and "any road in this chapter mentioned." The chapter is the chapter on Corporations —containing nearly the whole law on the subject.(*a*)

The general corporation laws of Oregon, with this exception, do not allude to the leasing of railroads, nor to any other kind of contract relating to railroads. But there is a long line of so-called granting Statutes—conveying State lands, &c., to railroad companies and their assigns. And the plaintiff company had obtained an Act whereby State lands and certain rights in the city of Portland were given to it and its assigns, with the proviso that they were not to be separately assigned by it except as part and parcel of the whole railroad. The majority of the judges in the Supreme Court attached no importance to the argument founded on these enactments. It is not the form in which, as they said, they would expect to see the power of leasing railroads recognised. The word "assigns" they declare to be a loose and indefinite word. And the bearing of all these enactments on the question whether the leasing of railroads is a "lawful purpose" the Court did not discuss, because, as already stated, their judgment gives no answer to this, which,

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[(*a*) What the learned writer here refers to is the Chapter of the Collected Statutes dealing with Corporations. There is no Civil Code in the State of Oregon, although there are Codes of Civil and Criminal Procedure.—Ed.]

throughout the argument, was treated as the fundamental question of the whole case.

How, then, does the Supreme Court arrive at its conclusion? By a misapplication I venture to think of the perfectly sound doctrine that a corporation has no powers except such as are expressly or impliedly conferred on it by the State which calls it into being. A company chartered to construct a railway, and to do nothing else, has no right to let it, or to take a lease of another railway, or to engage in the industry of navigation or hotel-keeping, whatever be the form of its charter. The rule does not apply to leases more than to other contracts. In most States of the Union railroad companies are formed under special Acts. The question in such cases is whether a disputed contract is within the terms of the special Act. In Oregon they are formed under a general Act, which says, that any lawful enterprise mentioned in the articles of incorporation shall be within the powers of the corporation. Railroad leases in America have been the frequent subject of repudiation, but in no previous case has the lease been made under such a law as that of Oregon. The maxim that authority for the lease must be found expressly mentioned in a special Act has no application to a system of incorporation under a general law. The question then is not single but twofold. It is not whether the disputed purpose is mentioned in a special Act, but—(1) Whether it is mentioned in the articles of incorporation; and (2) Whether it is a lawful purpose.

Not only does the Supreme Court evade the last question, but it abstains from defining the class of contracts to which it by implication assigns railroad leases. It leaves, for instance, the status of the defendant company wholly unintelligible. That company was formed under the general law for a large variety of purposes, for not one of which has it express legislative sanction. It is not a railroad company in the sense of a company authorised only to build and operate a line of railroad. It is organised under articles which, *inter alia*, embrace—(1) building and operating certain lines of

railroad; (2) purchasing and leasing others; (3) running steamboats on river and sea. The Supreme Court, for the purposes of this decision has treated it as a railroad company pure and simple—as a railroad company authorised to build one set of roads, but not to acquire another set. Accepting this distinction for the moment, we might ask what becomes of the third purpose mentioned above? A "railway company" has no more right to run steamboats than it has to take or make leases. Has the Oregon Railway and Navigation Company any right, without *express* legislation, to engage in this and the other purposes which it still pursues —outside its proper railroad business? Or, again, supposing that the Oregon Railway and Navigation Company had been incorporated for no other purpose than to lease the railroad, would it have been a lawful corporation? Or, if not, how could a corporation for that purpose be formed, seeing that the constitution prevents its being formed by an act of the legislature? Is it to organise under the general law for some different purpose, and then to ask the legislature to give it powers of leasing? Or is it the law of Oregon that no such corporation is legally possible—either by charter or statute —although there is not a trace of such a prohibition either in the constitution or the laws, but, on the contrary, repeated recognitions by special Acts of the capacity to "assign"? This is one of the most amazing results of the decision of the Court, and although the Opinion attempts to explain away "the inferential argument" founded on it, the difficulty remains just the same.

The plaintiff is stated to be under a special disability not applying to the defendant. It came to Oregon under an Act which purported to give to foreign corporations the same rights and powers as domestic corporations of the same kind. By a highly-strained interpretation, the Court denies that this is its effect, and asserts that even if the defendant company had the power of leasing the plaintiff had not.

Two characteristics of the Opinion may be noted. One is a curious jealousy of corporations formed under general

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laws, which, it is said, "do not commend themselves to the judicial mind as requiring or justifying any very liberal construction" of their articles! Another is the refusal to construe a Statute according to the intent of its language, as in the case of the Oregon Railway Act and other Acts above referred to. "Whatever may have been the intent in the minds of the legislators in using these words, it is not precisely the form in which we should expect to find a grant of the power to sell, to lease, &c." The "judicial mind," one might have supposed, would be just as liberal to one class of corporations as to another, and would regard the intent of the legislators, as not merely relevant but conclusive on the construction of a statute.

The effect of the decision on the credit of American corporations in this country need not be discussed here. But it unquestionably leaves the powers of corporations in a state of confusion, wherever they are not defined in express terms by a special Statute. It revolutionises the corporation law of the State of Oregon where assignments of railways have been numerous, have been repeatedly before the Courts, and have never been challenged before. It exhibits the State of Oregon as inviting its own citizens and foreigners to invest their capital in corporate enterprises for lawful purposes, which all the time are incapable of being protected by the law. Let us hope that it will not shake the confidence of foreign investors in the Supreme Court of the United States as the special guardian and protector of the faith of contracts.

EDMUND ROBERTSON.

HOW LAW IS TAUGHT IN ITALY.

AS Scotland is now at length resolved to reform her Universities, she will do well to bestow some careful study upon the academic systems of other countries before undertaking her important task. She may learn valuable lessons in various departments from England, America, Germany, and other countries, but, in the department of law, probably none more valuable than from Italy. Mindful of the world-wide supremacy of her ancient law, and of the glorious traditions of her mediæval schools, modern Italy has prescribed to her students a course of legal study of unsurpassed breadth and completeness. To the mere casual observer the great German schools of law naturally appear more comprehensive, their teaching-staff being as a rule more numerous, and representing a wider range of subjects; but, as attendance on lectures is not generally compulsory, as a few selected subjects only need be taken up for graduation, and as, moreover, degrees in law appear to be falling somewhat into disrepute (see Prof. Goldschmidt's *Rechtsstudium*, reviewed *ante*, p. 93), the number of teachers in the German universities is frequently out of all proportion to that of the genuine learners. In Italy, on the other hand, the great majority of students proceed to graduation, and that goal can only be reached after due attendance with *diligenza* at lectures on a great variety of subjects.

A brief visit to the quaint and delightful old city of Bologna,—*Bononia docens*,—with her venerable and far-famed university, will best enable us to understand how lawyers and statesmen like the late illustrious Signor Mancini

are trained in Italy. It would be out of place to allude here to the deeply interesting history of this mother of all universities—*alma mater studiorum*—or to the memorable festivities with which she celebrated her 800th birthday in June last, except so far as to recall the facts that she owed both her foundation and the zenith of her fame to students and teachers of law, and that she still boasts of one of the most renowned faculties of law in Italy. The following twelve subjects are there represented by twelve chairs:—Philosophy of Law (that rock of offence to "practical men"), Roman Law, Institutions of Roman Law, Law of Italy, History of Italian Law, Criminal Law, Commercial Law, Constitutional Law, Political Economy, Administrative Law, Civil Procedure, and Statistics. Besides these subjects, Public and Private International Law are taught by the professor of Administrative Law; Encyclopædic Introduction to Law Studies by the professor of Constitutional Law; Canon Law and the History of Roman Law by the professor of the History of Italian Law; and lastly, Medical Jurisprudence, the History of Diplomacy, and State Finance by university lecturers. Attached to the faculty of law are also a School of Political Science, a School of Practice of Criminal Law, and a School of Notariate, most of the courses in which are merely optional. Besides this staff there are twenty-five *liberi insegnanti*, or extra-academical lecturers, who prelect on the above and other subjects, who are licensed by Government, and whose lectures qualify for graduation. Each course consists, as a rule, of three lectures weekly, or about eighty lectures during the academic year (1st October to 31st May, with Christmas and Easter vacations of a fortnight each, and a week's vacation at Carnival time); and several of the professors give two or more different courses throughout the year. Such, then, are the teaching-arrangements at Bologna, and they are similar at the larger universities of Naples and Turin, and at the smaller universities of Rome, Padua, Pavia, and others. Admirable as these arrangements are,

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those of the larger German universities, as above stated, are still more comprehensive; but, in other respects, the comparison is all in favour of the Italian universities. The cardinal difference between the systems of the two countries is that in Italy, where attendance on lectures is more or less strictly compulsory, the teachers do actually teach numerous students, while in Germany, with its *Lernfreiheit*, the teaching-power is apt to be a mere potentiality, and the teachers are occasionally almost as numerous as the taught. It is of course right and necessary that a university should possess ample teaching-power, but it is infinitely more important to the community at large that such power should be fully utilised. The following law curriculum of Bologna, which is substantially the same in all the other Italian universities, may indeed be objected to on account of its rigidity (and the rigours of compulsion ought, no doubt, to be mitigated by certain options); but the system possesses the great advantage of ensuring the efficient training of nearly a thousand new doctors of law per annum throughout the kingdom of Italy. In the first place each candidate for the *laurea*, before entering the University, must be provided with the *licenza liceale*, or school-leaving certificate (similar to the German *Abiturientenexamen*, and nearly equivalent to a "pass" B.A. in England or M.A. in Scotland). He must then attend twenty-two of the courses above enumerated, amounting to some 1600 or 1700 lectures in all, which are distributed as follows:—First Year: (1) Introduction to Legal Science and Institutions of Law; (2) Institutions of Roman Law; (3) History of Roman Law; (4) History of Italian Law; (5) Statistics.—Second Year: (1) History of Italian Law; (2) Roman Law; (3) Italian Law; (4) Criminal Law; (5) Constitutional Law; (6) Political Economy.—Third Year: (1) Roman Law; (2) Italian Law; (3) Commercial Law; (4) Civil Procedure; (5) Criminal Law; (6) Administrative Law.—Fourth Year: (1) Administrative Law; (2) State Finance; (3) International Law; (4) Philosophy of Law; (5) Medical Jurisprud-

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ence. At the close of each year the candidate is examined on the curriculum for that year. At the end of the four years he undergoes his examination for the *laurea*, or diploma of Doctor of Law, which consists in a disputation upon a thesis on a legal subject written by the candidate and upon several other legal subjects selected by himself. The whole of this elaborate curriculum, including the crowning diploma, costs £34, or on an average, £8, 10s. per annum. These fees are paid into a University fund controlled by Government. The professors' emoluments consist of exceedingly modest salaries, from £400 a year downwards, while the *liberi insegnanti* are paid by Government in proportion to the lectures they give and the students who attend them. The total sum expended by Government on the University of Bologna alone (which is the third of the twenty-one Italian Universities in point of attendance, having about 1400 students) amounts to nearly a million francs per annum. Last year the number of law-students at Bologna was about 320, the great majority of whom were passing through the whole of the prescribed curriculum with a view to graduation. The average number of Doctors of Law created by the *alma mater studiorum* is now 125 annually, about one-half of whom have migrated from other Universities with a view to complete their studies within her hallowed precincts.

That this system is perfect, or that other countries should attempt to imitate it exactly, no one would presume to affirm; but it is at least admirably thorough and deserves most respectful attention. Foreigners are often surprised at our happy-go-lucky way of making one man a judge because he has been a prominent politician, another a Cabinet minister because he has been a successful shopkeeper, and a third a legislator because he is the eldest son of his father. Nor is this plan of ours wholly bad in its results; but if we educated our lawyers, legislators, and statesmen as thoroughly as the Italians do, our system would certainly be improved, and its results could not fail to be better.

JOHN KIRKPATRICK.

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COUNTY COUNCILS IN SCOTLAND. (*a*)

THERE are three administrative questions on which a strong and definite opinion exists in Scotland. The people are quite resolved to have local inquiry into Private Bills. They see the necessity for a reform of sanitary authorities. They think that the imperial expenditure on national objects is not in proportion to the contributions made by Scotland to the Imperial Exchequer. The first and third of these questions will, no doubt, be partly solved by the administrative and financial independence of the larger local authorities. The urgency of the second question shows that any business-like scheme for the reform of local government in Scotland should begin with the parishes. Not only is change more necessary in the parish than in the county, but the whole matter has been practically discussed from that point of view, and it is obviously desirable to begin at the foundation, if you can. County and parish reform should, at any rate, go hand in hand.

The principles to be followed in the reconstruction of the parish government are clear and simple. The area of the parish district will be best settled by the County Council of the future. But, in order to make a start, there should be elected in each existing parish, by household suffrage, a Board or Council or Committee, of adequate, not excessive, number, primarily responsible for the affairs of that parish. It may be assumed that, according to the almost unanimous opinion of practical people in Scotland, there is no advantage at all,

(*a*) The present article was in type before the Government Bills for the reform of Local Government in Scotland were introduced into Parliament.

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but some unnecessary expense and confusion, in having separate parochial authorities, such as a Parochial Board, and a School Board. There should be one election of one authority, which may afterwards act by its committees. It may also be assumed that any authority not frankly democratic — any authority, for example, based on the peculiar incidence of county rates or other local assessment —will not be accepted as a business-like arrangement. If the incidence of local assessment is unjust, it should be set right, but public affairs must be controlled by the voice of the majority. Whether the parish or district Council thus created should retain the entire control over poor-law, sanitary, and educational affairs is extremely doubtful. In all three departments there is a demand for a wider area in the interest of efficiency as well as of economy. But it by no means follows that any one of these subjects is to be wholly transferred to a county authority. There is no hard and fast line between district and county business. The county may well take a superintending power over the proper business of the parish. The parish must undertake the local business of the county, and county business will in the future be much more localised upon the analogy of the specially rated districts formed under the County Police Act, 1857, or the Roads Act, 1878. It is a superstition that one local authority can transact only one kind of public business, and it is also a superstition that each kind of public business is exclusively appropriate to one area or authority. The great danger to avoid in the reform of local government is making things too rigid and inelastic. Different purposes require different combinations, and what is the right combination to-day may be quite undesirable to-morrow. The aim should be towards free combination, subject to a controlling power.

The relations between the county and the parishes being so many and so intimate, the balance of advantage is in favour of the County Council consisting of the Parish Councils, or of delegates therefrom. A second

election seems unnecessary, because the districts have already selected their best men. The central executive, thus constituted, will act through departmental committees, which will delegate certain matters of county business to the Parish Councils, and will also exercise a general superintending power over the action of the Parish Councils.

Such is the outline of a scheme which would, I think, satisfy the people in Scotland who are really interested in this question. The Government Bill is another matter, but it may be useful to consider what the general features would be of a Bill applying to Scotland the principles of Mr. Ritchie's Act, for that is the irreducible minimum of reform.

In the first place, the question is one of much smaller dimensions in Scotland than in England. I do not say that its constitutional importance is smaller, or that the difficulty of settlement is not as great. But there is a striking contrast in the bulk of interests affected. Take the figures of the local taxation returns for the year 1886-87. The total income, exclusive of loans, with which the English county authorities were debited in that year was £3,127,316. From the different distribution of business in the two countries it is impossible to give a precisely equivalent figure for Scotland. Indeed, to make a comparison at all, it is necessary to add to the figures just given for England the greater part of the sum of £814,050, paid from the English poor rate to the Highway Boards. The amount of English county business for the year mentioned may therefore be expressed as £3,941,866. In Scotland the amount may be stated approximately as £629,827—that is, between one-sixth and one-seventh. The police assessment in England was £645,106; in Scotland, £84,855 — viz., between one-seventh and one-eighth. The English outstanding loans, excluding road and asylum debt, amounted to £765,684; the Scottish loans of a similar character were apparently £88,753—viz., between one-eighth and one-ninth. If, however, the income from assessment be taken by itself, exclud-

ing Treasury subventions and miscellaneous sources of income, the proportion which Scottish county business bears to English county business rises to between one-fifth and one-sixth. The rateable value for county purposes was in England, £129,126,559; in Scotland, £14,112,580, less than one-ninth. It would, however, be misleading in the present state of the statistical returns to draw any immediate inferences from these figures with regard to the comparative rate of local taxation. The different incidence of these assessments must also be noticed. In England, practically the whole amount, or £2,912,009, is levied upon occupiers. In Scotland the total county assessments are £546,055, of which owners pay £368,218, or about two-thirds, and occupiers only £177,832, or about one-third. Although it may quite accurately be said, as matter of theory, that the landowner pays all this taxation in the long run, yet in the practical adjustment of business, and especially during leases of some duration, the occupier pays a good deal of it. On the other hand, if the parochial assessments for poor law, public health, and education are brought into the account, it will be found that out of £1,838,471, there is paid by owners £1,033,072, and by occupiers £835,399. Another aspect in which this contrast of magnitude may be stated is to take the number of towns which in each country should, on the same principle, be held entitled to the status of a county. In the third schedule to the Local Government (England and Wales) Act 1888, there is a list of 61 boroughs which, because they have a population of 50,000, or are already counties, are declared to be counties for the purposes of the Act. In Scotland, upon the other hand, according to the report of the Registrar-General of 19th March 1888, there are only seven towns having a population of 50,000—viz., Glasgow, 524,039; Edinburgh, 258,629; Dundee, 157,983; Aberdeen, 117,257; Greenock, 75,892; Leith, 72,297; and Paisley, 60,815. The proportion here is again between one-eighth and one-ninth. Intimation has already been made that a much larger number

of Scottish towns will claim to be excluded from the counties. In England the existence of a separate Court of Quarter Sessions and a Recorder entitles to exclusion. But it may be hoped that the proper formation of financially strong counties will not be prejudiced by an excessive deference to the privileges of royal and ancient burghs.

In the second place, the business which has in England been assigned to the new County Councils is at present in the hands of Local Authorities in Scotland, whose position is different from anything that existed in the sister country. In England the principle has been, speaking in general terms, to transfer administrative functions from Quarter Sessions to the County Council. To a large extent these functions of Quarter Sessions were the same as those which still belong to the Commissioners of Supply in Scotland. The general business of the county, the appointment of county officers, the maintenance of county buildings, the care of the county police, the execution of the Adulteration Acts, the work of registration—all these were common to the two authorities, and no doubt, in any democratic measure of county government for Scotland, all these would be transferred from the Commissioners of Supply to the new council in Scotland. It may be noted that the administration of the Weights and Measures Act belonged to Quarter Sessions in both countries, and has been transferred to the new English Council. But the authority of Quarter Sessions in England included many things which do not belong to the Commissioners of Supply, except indirectly and through their representation on some other board. The most important of such things are—(1) the administration of asylums for pauper lunatics, (2) the powers with reference to roads and bridges given by the English Highways Act of 1878, (3) the execution of the Cattle Plague Acts. In Scotland these matters are entrusted to separate and somewhat strangely organised authorities—the District Lunacy Board, the County Road Trustees, and the Local Authority for the Contagious Diseases Animals Acts, upon

all of which the Commissioners of Supply are strongly represented. It was necessary on two of these boards to represent the towns as well as the counties, and on two also to represent the tenants as well as the landlords. Thus, the Lunacy Board consists of certain Commissioners of Supply and certain magistrates of burghs; the Cattle Plague Authority consists of certain Commissioners and certain elected representatives of tenants and small owners; the Road Trustees consist of certain Commissioners, certain representatives of Corporations and Police Commissions, and certain members elected by ratepayers. The existence of these separate boards in Scotland certainly affords no reason why the principle of the English Act should not be followed. Asylums, main roads, cattle plague are all matters proper in themselves for county administration; and if efficient administration can be secured by a popularly elected council, it will be a decided advantage that one authority should take the place of four. In fact, as regards Lunacy administration, the difference is more apparent than real, as the English Acts provide for the appointment of Joint-Committees of Visitors. In connection with roads, it should, perhaps, be explained that the County Council in England receives, not only the powers formerly vested in Quarter Sessions, but also many of the powers of Highway Boards. In Scotland the consolidation of road management in 1878 proceeded a step further than in England, and the County Road Trustees have the entire general responsibility for the maintenance of the roads. It would be interesting, if space permitted, to trace the degree of connection which already exists between town and county in all these matters. The creation of a democratic county authority will tend to make that connection closer. In the case of Cattle Plague administration it is admitted that the present division of authority is arbitrary, indefensible, and even ridiculous. What special interest has a "Parliamentary Burgh," as distinguished from a "Police Burgh," in compensation for the slaughter of cattle? The chief *desideratum* is to produce a system sufficiently expansible, so that com-

munities, which are for the most part separate, may, when the occasion arises, act together.

Again, apart altogether from the question of the particular authority exercising jurisdiction, some things have been more distinctly recognised in England than in Scotland as proper subjects for county government. Perhaps the most important of these is the establishment and maintenance of reformatory and industrial schools. These were formerly dealt with by the Prisons Acts in both countries, but in Scotland the Commissioners of Supply have only a very meagre power of contribution to these child-saving establishments. The power to contribute may properly be extended when the local authority becomes directly representative and financially strong. It would be deplorable if reformatories were to sink into the position of State prisons and could not rely on the philanthropic spirit of each considerable neighbourhood. Another example of this sort of thing is the power formerly exercised by English Justices, and now transferred, of appointing conservators of salmon and fresh-water fisheries. The Fishery Boards in Scotland have never commanded much respect, and have certainly done little to preserve or develop fisheries. So far as reasons of administrative convenience are concerned, this would seem to be a county matter, with powers, of course, for different counties to agree, and for each county to discriminate the liability for its expenditure into districts. Upon the other hand, the Commissioners of Supply have certain duties which in England have not, even under the recent statute, been adopted as part of the system of county administration. Prominent among these is valuation of property, which at present is managed with partial success by a committee of the Commission. In England, partly from the existence there of such a powerful authority as the Board of Guardians, and partly from the fundamental importance of the poor rate in all local assessment, the business of valuation has not yet, except to the extent after mentioned, been transferred to the new English Council. But this does

not suggest any reason why valuation should not, like the other functions of the Commissioners of Supply, be transferred in Scotland. In fact, the English Justices were formerly, and the new Council is now, charged with "the preparation and revision of the basis or standard for the county rate" (although the limited jurisdiction in appeals by parishes against the rate has not been transferred), and it would be impossible to separate county valuation, in some form, from the organic assessing power in the county, even if the system of valuation required modification for particular purposes in particular localities. There seems to be no particular reason why a popular Secretary like Lord Lothian should not take this opportunity of introducing some much needed reform in the practice of valuation. The subject has been three times examined by Committees since 1854. The main principles of the law are sound enough, but there should be some security for uniformity in its operation.

So far as existing powers and obligations are concerned, the only matter remaining to be mentioned is the County Police. This gave rise to a great deal of controversy in England for which there does not seem to be the same ground or occasion in Scotland. No doubt the administrative code of police law set up by the English Police (Counties and Boroughs) Act 1856 closely resembles that adopted in the following year for Scotland in the County Police Act 1857. But the difficulty that was felt in making a complete transfer of police authority in Mr. Ritchie's bill, and that resulted in the compromise of a joint-committee of the old and new authorities, arose from the circumstance that the Justices were not only administrators of police but also Commissioners of the Peace, and therefore under any circumstances some control of the police would have had to be left to them. It may be that this necessity might have been adequately provided for by some such provisions and reservations as are contained in sect. 8, sub-sect. 2, of the Local Government (England and Wales) Act, 1888, without breaking the administrative integrity of the new Council. In any view this

difficulty does not present itself in the same form in Scotland. The Commission of Supply is at present solely responsible for police administration in the county, subject to certain checks from higher authority. The transfer to a county council of powers now belonging to the Commission of Supply cannot therefore have any effect upon the position of Justices in Scotland with reference to the police. In this, as in other matters, affairs in Scotland will certainly lend themselves to a simpler and easier adjustment than farther south. It is not proposed to weaken the authority of the Imperial Executive over the constabulary. Before leaving the subject of the police it is convenient to refer to the cognate subject of the investigation of crime. Here a radical difference in the institutions of the two countries is discovered. In England the new Council will elect a county coroner. This was previously done by the freeholders of the county. In Scotland there is no coroner, the preliminary investigation of crime being undertaken by a Procurator-Fiscal attached to the Sheriff-Court and appointed by the Sheriff, subject to confirmation by the Crown. The democratic spirit may, of course, ultimately demand that not merely Fiscals, but Sheriffs, and even superior judges, shall be selected by a popular vote. But although the popular election of a coroner will probably be cited hereafter as a precedent for such a demand, it is obvious that in Scotland at least the reform of local administration does not suggest any change in the system of public prosecution which, notwithstanding the periodical remonstrances of Lord Minto, has worked well according to the universal testimony of Scottish authorities. It in fact combines immediate local action with central supervision and responsibility. With several minor matters, such as the provision of compensation where crops affected by destructive insects are destroyed by public authority, and the regulation of close time for wild birds, I need not burden this paper. I merely note that the second of these subjects is of much wider economic importance than is generally supposed.

XUM

The new powers or functions of county administration in England are partly specified in Mr. Ritchie's Act, but, as regards by far the most important part of them, they are only indicated generally. I do not desire to under-rate the importance of those specified, which are mainly the administration of the Rivers Pollution Prevention Act, the appointment of a medical officer of health for the county, and the power to oppose bills in Parliament. (1.) Hitherto, the prevention of river pollution has been assigned to the Board of Guardians as the rural sanitary authority. But the nature of the subject obviously points to a more extended continuous jurisdiction. There are few rivers worth cleaning that do not pass through the whole of a county. If this be the right view in England, the case for a similar transfer would seem to be stronger in Scotland, where the existing authority—viz., the Parochial Board, has a much smaller area than the Board of Guardians, and is therefore proportionately insufficient. In point of fact very little has been done in Scotland by the Local Authorities under this statute. The recent report by Mr. Fletcher was conclusive on that point. The case of the Water of Leith is in some respects exceptional, but the Bill now being promoted in Parliament was partly rendered necessary by the fact that administrative responsibility is so much divided. (2.) The recognition by the county of sanitary obligations, which is involved in the appointment of an officer of health, is of immense significance. No doubt Mr. Ritchie in the recent bill did not attempt the impossible task of transferring the whole powers of sanitary administration from the Board of Guardians to the County Council. It is probable enough that after consideration it may be found that the Union is a good district for this and some other important purposes, and it is indicated that a District Council will succeed to the Board of Guardians and also the Highway Board. But the new Officer of Health by his reports acquaints the Council with the facts of public health within the county, and lays upon them a general responsibility in the matter. In Scotland, where sanitary administration is

carried on by a non-representative Local Authority in each parish, it seems desirable that a greater and more decisive change should be made. The vigilance and knowledge of local committees is an important factor in a successful administration, but, especially as regards sanitation, the opinion of experts has long demanded a much wider area than the parish for initial authority, for skilled advice, and for liability to assessment. No objection whatever can be stated on principle or expediency to a general transfer of authority in such matters to a County Council which, after considering the distribution of various interests within the area, should delegate responsibility to larger or smaller committees according to the necessities of each particular district. An arrangement of this kind might result in the simple combination of parishes, or in the delimitation of new areas altogether.(*a*) In most cases the existing parish would probably form an electoral district. The consent of the Scottish Department or of the Board of Supervision would form a guarantee against local injustice. In any view, it is desirable to escape from the result which is threatened in England of adding one more separately elected body to those already in existence.

It is a much larger and more difficult question whether in Scotland any general responsibility in connection with poor law administration might, with advantage, be transferred from the parochial boards to a County Council. *Prima facie*, here also a larger district is required, the English Union having been constructed expressly for this purpose. English poor law administration, however, has proved more expensive than that in Scotland. There is a considerable mass of opinion in favour of extending the area of chargeability. But in the meantime the more prudent course would probably be to leave this matter in the hands of a reconstituted parochial board, while the County Council will receive powers

(*a*) Last century the shire of Mid-Lothian was divided into wards, with a serjeant responsible for each. The idea of wards was developed in the early County Government Bills introduced by Sir Eardley Wilmot and others about fifty years ago.

XUM

in connection with combination poorhouses and other matters so as to give the most rapid facilities for joint action by several poor law parishes. In the same way, with regard to education, notwithstanding the urgency of the teaching profession, the primary responsibility must in the meantime remain with the reconstituted school board or parochial board; but the County Council may certainly assist the school boards in the adjustment of several matters, and it may be hoped that ultimately the Council will be invested with a direct responsibility for the provision of secondary and advanced technical instruction within its area.

(3.) The last new power specified in the Act of 1888 is the power to oppose Bills in Parliament, and of prosecuting and defending legal proceedings "necessary for the promotion or protection of the interests of the inhabitants of the county." Looking to the case of *Wakefield* v. *Commissioners of Supply of Renfrew*, 6 Ret. 259, and the somewhat narrow grounds on which it was decided by the First Division of the Court of Session, distinguishing between the conduct of the affairs of a county and the protection of county interests which were alleged to be imperilled, it will no doubt be necessary to introduce a similar clause into the Local Government Bill for Scotland. It is true that in the case of the *Waterworks Commissioners of Perth* v. *M'Donald*, 6 Ret. 1050, the opinion was expressed by the Second Division of the Court that the Municipal Corporation Act of 1872, 35 & 36 Vict. c. 91, extends to Scotland. But, assuming that to be clear, it is by no means clear that the present Commissioners of Supply are, or that the new County Council would be, "a governing body" in the sense of that statute. If the proposals now made for local inquiries in private bills, and for an extension of the system of Provisional Orders are carried out, the apprehensions with regard to cost, which probably influenced the decision in *Wakefield's* case, will be to a large extent displaced.

The real new departure in the Act of 1888 is, however, that contained in section 10, which generally indicates

the fresh powers to be given to County Councils. These are the powers, duties, and liabilities of the Privy Council, the Secretary of State, the Board of Trade, the Local Government Board, the Education Department, and any other Government department, which relate to the county and are conferred by statute; and also the powers and duties of any public body, corporate or incorporate, within the county, other than municipal boroughs, school boards, boards of guardians, &c. It is quite true that such transfers require the consent of the particular department or public body, and also the sanction of Parliament; but it is equally clear that this section opens up the prospect of a very large and valuable decentralisation of administrative authority —something much larger than has as yet been suggested in the case of municipal corporations. This seems a safer and more practical experiment for the relief of the central authority than the erection of local legislative bodies. Its success or failure will, at any rate, afford valuable experience in judging of the necessity of proceeding with any such schemes. But the general idea of giving administrative autonomy to counties, and minimising the reference to London for authority, is likely to recommend itself to the business instincts of ratepayers even more strongly in Scotland than in England. The regulation of factories and mines, the approval of tramway and gas schemes, the granting of Provisional Orders for taking land, and for a variety of other public purposes, the direct enforcement of sanitary laws by subordinate authorities, the authorising of loans, and the audit of accounts—all such things will, no doubt, in course of time be transferred to the new County Councils. It is doubtful whether, except in the matter of police and the administration of justice, the Central Executive will require to retain any direct control over the proceedings of well-constituted Councils on this scale. Everything in the nature of legislation will remain subject to the authority of Parliament. On certain points, too, the necessity for uniformity may involve an intervention from head-quarters; and, where money is got from

the State, the conditions prescribed by the public creditor must be followed. But anything illegal in local administration can always be challenged in a Court of Justice; anything scandalous can be made the subject of complaint in Parliament; and on every ground it is desirable to give free play to the common sense, the self-interest, and the business aptitude of these large communities.

WILL. C. SMITH.

THE "NEGLIGENCE CLAUSE" IN CHARTER PARTIES.

ON the 20th of March, 1888, the Second Division of the Court held the owners of a steamship named the *Ethelwolf* liable for the value of a cargo of copper ore lost by her shipwreck in the Bay of Biscay. On the 21st of December, 1888, the First Division of the Court absolved the owners of the *Ethelwolf* from a claim for the value of a cargo of oranges lost by the same disaster. As both cargoes were carried under contracts of affreightment expressed in identical terms, these two decisions, which will be found reported in 15 R. 616 and 16 R. 295, merit some notice.

The charter parties under which each cargo was carried contained the usual exception of "dangers and accidents of the seas," and, in addition, a clause, now commonly known as the "negligence clause," which was expressed thus—"errors or negligence of navigation of whatsoever nature and kind during the said voyage excepted." The owners claimed exemption from liability, in answer to the demands of the freighters for loss of the cargoes, on the ground that the shipwreck was due to causes excepted in the contract of affreightment. There were, they maintained, only three possible causes of shipwreck—(1) perils of the sea, (2) fault of the crew, and (3) initial unseaworthiness of the ship. But under the contract in question only the last-mentioned cause would involve them in liability. For disaster due to perils of the sea or fault of the crew the contract expressly relieved them from all responsibility. This seaworthiness or unseaworthiness of the ship was the sole issue that could be raised

under such a contract. All this seems tolerably clear; but unfortunately the Sheriff-Court pleadings in the action at the instance of the owners of copper ore exhibit a strange confusion of ideas as to the mutual rights and liabilities of owner and freighter. Because the latter averred that the loss of the ship was caused by the negligence of the engineer in allowing the water in the boiler to run so low that the boiler was damaged, and it became necessary to draw the fires. And to this averment, oddly enough, the shipowner gave an explicit denial. It is worthy of observation that, after lengthened investigations in both the cases, this averment of the owner of cargo was ascertained to have hit the true cause of the loss, and finally put the freighter of oranges out of Court.

To exhibit clearly the important and, in some aspects, novel questions of shipping law raised by these cases, it will be convenient to narrate briefly the facts, and notice, as they arise, the questions of law deduced from them.

The ship, with her copper ore and oranges on board, left Seville for Antwerp and Swansea on the 5th of December 1886. Seville is situate on the banks of the River Guadalquiver, a very muddy stream, about sixty miles from the sea. Some thirty-six hours before sailing, the chief engineer filled the ship's boilers with water from the river. And the freighter's case ultimately came to be this, that a steamer leaving Seville with her boilers full of Guadalquiver water taken in thirty-six hours before sailing, was an unseaworthy ship. Here, then, at the very outset an interesting question is raised. Given a steamship stout, staunch, and strong in every particular, well manned and equipped, does she become unseaworthy if, in preparation for the voyage, some element of danger—mud in the boiler, coals insufficient, or even stores insufficient—be taken on board? In short, can a ship, sound in her structure and in all that relates to her permanent condition, be called *unseaworthy* in respect of some fault or insufficiency connected with her temporary and changing conditions? In the Second Division the Lord Justice-Clerk

answered this question in the affirmative, and his opinion was concurred in by Lord Craighill and Lord Rutherfurd-Clark. But, then, the Lord Justice-Clerk added this: "No doubt the injury to the boiler was the unthinking or ignorant act of the engineer, and did not arise from organic or radical defect. It was accidental and not structural." This is curious reasoning: for it makes quite plain that, in the opinion of the majority of the Second Division judges, "unseaworthiness" of the ship might be brought about by the negligence of one of the crew. It was on this point that Lord Young specially expressed doubts as to the soundness of the judgment. "The ship was," he said, "seaworthy when she arrived at Seville, she was seaworthy down to the moment when those in charge of her filled the boiler with muddy water, and that the presence of that muddy water in her boiler constituted unseaworthiness is a proposition by no means clear to my mind. If it is a case of unseaworthiness as distinguished from an error in navigation, then the law is quite clear that the shipowner is liable for any loss or damage occasioned to the cargo by such unseaworthiness. I have no doubt about that, and none was suggested to us. My only doubt is as to whether, by taking in muddy water from the river, this steamer became an unseaworthy vessel." It would have been well to have had an authoritative judgment upon this point. Because the extent of the exemption given to shipowners by the "negligence clause" is materially affected by the answer to the question whether an act of neglect committed by the crew before leaving port is covered by that clause? If the question had been raised by the shipowners with their own underwriters, a clause in their policy, expressed in similar terms to the "negligence clause" in this charter party, would, it seems clear, have entitled the owners to recover. This has been expressly decided in the English Courts (*Carmichael*, L.R. 19, Q.B.D. 242; *Good*, L.R. 6 C.P. 593; The *Warkworth*, L.R. 9 Prob. Div. 145). And it can hardly now be disputed, after the series of House of Lords' judgments pronounced in the summer of 1887

(12 App. Ca. pp. 484-518), that the same expression, although occurring in different instruments, must have the same interpretation put upon it. Unfortunately for the law of the case, the First Division found it unnecessary to pronounce any opinion upon the question. For in the case before that Division the freighters of the oranges made an explicit averment that the ship, when she sailed, was unseaworthy in respect of the muddy water in her boiler. And the owners met the averment, successfully in point of fact, by showing that the mud, if a source of danger, could with ease have been expelled from the boiler immediately the ship got to sea. In that state of the fact, the fault, if fault there was, lay in the failure of the engineer to discharge the mud—*i.e.*, in an "error of navigation." Holding it proved that if mud were in the boiler to a dangerous extent an easy and familiar operation would have expelled it, the First Division was not directly called upon to say whether a steamship leaving port with muddy water in her boiler is or is not an unseaworthy ship. So that the large and general question on the scope of the "negligence clause" remains still undetermined so far as express decision goes. That the question, however, when it does emerge purely will be solved in favour of the shipowner there seems little reason to doubt. The English decisions, in the insurance cases above referred to, go the whole length necessary. In them, the negligent failure to close a bilge cock before the ship started, the negligent closing of a port-hole in the ship's side by which cargo was taken in, the omission to supply a proper pin for the ship's steam-steering gear, were all held to be faults in navigation. And there can be no doubt that the sole object of introducing the "negligence clause" into contracts of affreightment is to protect the shipowners from any claim by the freighter, not based on structural defect of the vessel or insufficiency in her manning and equipment. If the loss of cargo is due to error or neglect of the crew, whether committed during the voyage or prior to its commencement, the object of the "negligence clause" is undoubtedly to free the owner from responsibility

for the loss. Nor, if the conditions under which the shipowner conducts his business be kept in view, is this at all unfair. Statutory control is constantly over him. In the selection of his master, his engineers, his crew, he is not free to act as he chooses. In the fitting and furnishing of his ship he is bound to comply with the provisions of the Merchant Shipping Acts. If in all these things he walks up to statutory requirements, why should he be called upon, in addition, to bear a vicarious responsibility for the blunders of a crew, in the selection of which he is not a free agent? These are the kind of considerations which have led for some years back to the adoption of a "negligence clause" of some sort in charter parties and bills of lading. That it is not viewed as unfair by the shipping interest generally may be inferred from the circumstance that its use is becoming every year more general, and that its absolving power has seldom been combated in the Courts.

But to revert to the *Ethelwolf*. Her start from Seville with the muddy water in her boiler is the point at which she was left. The rest of the story may be briefly told. On her way down the river she grounded on a bank, remained aground for about an hour, all the while trying to get off, and taking in more muddy water. If this mud caused the ultimate disaster, all parties were agreed it was a *peril of the sea*. Whether it did cause it or not was disputed in fact, and caused a division of opinion upon the Bench. At last the ship got to sea. For two days there was moderate weather, and all went well. On the third a westerly gale and a heavy sea rose. The ship began to roll; the mud in the boiler got stirred up; it choked the gauge-glass; the chief engineer jumped to the conclusion that his boiler was too full; he shut off the feed by which the boiler is kept full; his conclusion was wrong; in four hours the water fell in the boiler till the tops of the furnaces were bared, and the fire that still played upon them inside caused them to collapse. To prevent the boiler bursting the fires were drawn; but the ship was now on a lee shore; in a couple of hours the

breakers were dangerously near, and to get up steam the boiler was filled from the sea and the fires put on; the deluge of cold water thus introduced caused the not yet completely cooled plates and tubes to contract; extensive leakage followed, and, although a certain pressure of steam was at length obtained, it was not enough to save the ship; and she was ultimately abandoned and became a total wreck on the morning of the 10th December. These are the facts as they were found to be proved by the First Division. Assuming them to be true, the inference that the ship was lost by "errors or negligence of navigation" is irresistible. The engineer's blunder in assuming that the boiler was too full, and consequently shutting off the main feed, was, as has been indicated, ultimately proved to be the cause of the disaster. But the facts were keenly disputed. It was maintained on behalf of the freighter that it was not shortness of water, but a mud cake, composed of the sediment of the water taken in at Seville mixed with grease in the boiler, which had formed on the furnace tops, prevented the radiation of heat, and thus ultimately caused them to collapse. And in this conflict upon the facts the question of *onus* was anxiously discussed. The freighter adopted the traditional and easily understood attitude of the man who has handed over his cargo in good order and condition to the carrier, and demands its return in the like good order and condition. But, in order to state his case, he was compelled to aver that the ship was wrecked in the Bay of Biscay. *Prima facie*, the owner answered, shipwreck is due to perils of the sea or blunders of the navigator. It is not *prima facie* due to initial unseaworthiness of the ship. In a contract of affreightment, as in a contract of marine insurance, seaworthiness is presumed. He who avers unseaworthiness must prove it. And under this contract, seaworthiness or unseaworthiness is the sole issue; for loss by dangers of the sea or errors of the crew this contract absolves the shipowner from blame. On this, the second important general question in the case, again there was no decision by the First Division, although

some valuable expressions of views upon the matter fell from Lord Shand. In the Outer House it was otherwise. Lord Kinnear, without hesitation, directed the shipowner to lead in the proof; and he did lead, rather than accept the confident challenge from the freighter to renounce probation on both sides, and take the judgment of the Court upon the record as it stood. To the mind neither of the Lord Ordinary nor of counsel for the freighter was there sufficiently present the great distinction between the old and the new form of contract—the contract without and the contract with the "negligence clause." Had this distinction been observed, they would have seen that seaworthiness or unseaworthiness is now the sole issue. And upon that issue the only precedent in shipping law that, so far as we know, can be cited, lays the burden of proving unseaworthiness on the man who alleges it. It is not difficult to gather from the opinions of the First Division judges that they were prepared to follow Lord Ellenborough, who, when asked to give judgment in favour of a freighter on the simple statement that the ship had gone to sea and was never heard of more, said: "That this was not sufficient to induce a presumption of negligence, it rather tended to prove a loss by *perils of the seas*" (*Boyson* v. *Wilson*, 1 Starkie, p. 236). But meanwhile it cannot be said that the scope of the ordinary "negligence clause" or the *onus* of proof in contracts of affreightment containing exceptions of "perils of the sea" and "errors of navigation," are yet removed from the list of unsettled questions. The two cases upon which the foregoing comments have been made will do no more than furnish useful material for the discussion yet to come. It is sometimes suggested that in the settlement of the controversy the freighter has no material interest; that the sole interest lies with his underwriter. But this is an obvious misapprehension. The premiums of insurance will be, and indeed as matter of fact are, sensibly affected by the existence and scope of the "negligence clause." If the under-

writer on cargo is to take the risk of the seamen's blunders, and that whether committed before or after the ship sails, he will require to be paid for that risk; and if, when he goes into Court, standing in the freighter's shoes, he must look forward to being forced to establish affirmatively his case of fault against the owner, the underwriter will expect to be paid for that too. The freighter has thus brought home to him, in the way of increased premiums, a very direct pecuniary interest in the questions raised by the wreck of the *Ethelwolf*.

ALEX. URE.

LOCAL GOVERNMENT IN FRANCE.

THE present system of Local Government in France dates from the very beginning of this century (Law of 28th Pluviose, Year VIII.), so that it has lasted nearly ninety years—a veritable eternity for French institutions. Of course, there have been a great many statutes concerning the principal organs of local government since that time. But the fundamental principles laid down by the law above referred to still remain in vigour. That law was founded upon the following idea, which has become almost an axiom in France—*i.e.*, "agir est le fait d'un seul, délibérer est le fait de plusieurs." In accordance with the first principle contained in this maxim, the head of the state, whoever he may be—Emperor, King, or President—directs the general administration of the country; the various ministers preside over the chief great Government offices; the prefects are at the head of the "departments" or counties; the sub-prefects administer the "arrondissements" or districts; and finally the mayors have the direction of the municipal government of the "communes" or boroughs. In accordance with the second principle, a council is established beside each of these personages to guide and assist them in their administration. Beside the head of the state there is the Conseil d'Etat and the Cour des Comptes. In each Ministry there are subordinate councils relating to every section of that particular branch of the public service. Beside the prefects in their departments there is the Conseil Général, the Commission Départementale, and the Conseil de Préfecture. Beside the sub-prefects there is the Conseil

d'Arrondissement, and, finally, beside the mayors, the Conseil Municipal.

I shall confine myself in this sketch to county government proper, leaving on one side the central and the municipal administration, a study of which would make this article too long.

Before coming, however, to the present system, it may be as well to say a few words about those systems of county government which have preceded it. Before 1789, France was divided for financial and administrative purposes into "Généralités" or "Intendances," at the head of each of which there was an intendant, having under him one or more sub-delegates, who, like the sub-prefects of the present day, had very little power of their own, and could merely refer difficulties and disputes to their hierarchical superior. Since the Revolution there have been three different systems.

The first is that of the Constituent Assembly of 1789. The law of 22nd December in that year divided France into departments, arrondissements, and communes or boroughs. The administration was divided into three separate heads—the executive, the legislature, and the judiciary. The power of the executive was vested in a "Directoire de Département" consisting of eight persons chosen by the Conseil Général from among its own members. The power of the legislature was conferred upon the Conseil Général, consisting of thirty-six members chosen by the electors of the county, and that of the judiciary was attributed to a Procureur-général-syndic elected in the same manner. There was a similar organisation for the district and for the borough.

Next comes the system of the Year III. The district is suppressed and replaced by a "Municipalité de Canton." The principal change consists in the fusion of the executive and legislative authorities in the hands of a single body called the "Administration Centrale" for the department, and the "Administration Municipale" for the "Municipalité de Canton."

This system was not found to work, and was abolished by the law of the 28th Pluviose, Year VIII., which established the groundwork of the system still in vigour, and which was founded upon the principle, already referred to, of the unity of action and the plurality of deliberation. In explaining the dispositions of this law, I am therefore relating the system of local government at present in force.

The law of the Year VIII. established in each department a Prefect with the power of action, and in order to control and aid him in his administration a Conseil Général and a Conseil de Préfecture, whose especial function it is, not to act, but to deliberate.

Let us take the Prefect first. He is nominated by the Head of the State, on the recommendation of the Minister of the Interior, and it will be readily understood that the Minister only nominates now-a-days men of staunch Republican opinions, who are prepared to support the Government through thick and thin. The Prefect must be a French citizen, but no other condition is required by the law. He cannot be at the same time a senator or deputy, except in the case of the Prefect of the Seine. His salary ranges, according to the importance of his department, from 35,000f. (£1400) to 18,000f. (£720), the departments being divided into three classes by this criterion. His appointment can be cancelled at any moment by the Head of the State, and he has therefore very little independence, and is practically forced to be subservient to the Ministry in power for the moment.

The powers and duties of the Prefect, which were settled in outline by the law of the Year VIII., were greatly increased by two decrees of 25th March 1852 and 13th April 1861. They are known as the decrees of decentralisation, and were the putting in practice of another maxim—viz., that if government, in the broad sense of the word, can be carried on from a distance, a good administration can only be effected on the spot (si l'on peut gouverner de loin, on n'administre bien que de près). The Prefect is not only the represent-

ative of his department, he is also the agent of the central authority. In the latter capacity he sees to the execution throughout his department of all laws, decrees, and ministerial instructions, directs the police of the department, brings actions in the name of the state, and defends those brought against it. As the representative of his department he figures, in its name, in all actions at law, contracts, &c.; but if an action were brought by the state against his department, he would act for the state, a member of the "Commission Départementale" representing the department; for it is the quality of agent of the central authority which predominates in the Prefect, and hence his dependence thereon.

From what I have said about actions brought by and against the department, it will be seen that the latter constitutes a corporation in France. This point was fiercely contested for a long time. The Civil Code of 1804 did not confer on the department the civil personality it attributed to the state and to the borough. Two decrees of 1811 and 1813 were held by many to have implicitly supplied this omission, but the point was not finally set at rest till 1838 by a statutory enactment.

The Prefect exercises his administrative powers by means of what are called "arrêtés préfectoraux," which are practically miniature laws for the department. Frequently the intervention of the Conseil de Préfecture is necessary. These "arrêtés" may then be compared to our Orders in Council, but with a purely local importance. Anyone who considers his interests prejudiced in any way by an arrêté préfectoral may appeal to the Minister in whose province the question lies, and from the Minister to the Council of State, but only if he alleges that the Prefect has exceeded his powers—as if, for instance, he had omitted to take the opinion of the Conseil de Préfecture in the cases where the law requires that he should do so.

Before passing from the Prefect to the general council it is necessary to say a few words of his powers as a judge. These powers are anomalous, and have been conferred on the

Prefect since the law of the Year VIII.—of the fundamental principles of which they are a flagrant violation, inasmuch as that law carefully separated the executive, legislative, and judicial authorities. The Prefect sits as a judge of appeal for certain cases relative to the cutting of timber, and to the indemnities due to inhabitants of the department for the board and lodging of soldiers, these cases being settled in first instance respectively by the Sub-Prefect and the Mayor. The Prefect moreover decides in first instance disputes touching the construction of dangerous or unhealthy establishments, such as manufactories of gunpowder, sulphuric acid, or chemical matches, sugar refineries, &c., &c.; also disputes relative to payment by the buyer of state property, and other similar matters which ought by rights to go to the Conseil de Préfecture. An appeal from his decision always lies to the Minister, and sometimes to the Council of State.

I have already said that the action of the Prefect is controlled, and to a certain extent directed by the Conseil Général for each department. By the law of the Year VIII. which established this council, its members were to be always nominated directly by the Head of the State, and such continued to be the system under the Consulate and the First Empire. But in 1833 a law was passed by which the Conseil Général became an elective assembly, and since 1848 the election is by universal suffrage. The law of 1871, which at present regulates the general councils, settled that there should be one counsellor for each "canton" of the department; the department being divided into so many arrondissements, each arrondissement into so many cantons, and each canton into so many communes or boroughs. The canton is therefore a subdivision of the arrondissement. The election is by universal suffrage, and the electoral lists are the same as those used for municipal elections. To be successful at the first ballot a candidate must poll an absolute majority of the votes recorded, and a number equal to a fourth of the electors enrolled. At the second ballot a relative majority of the votes recorded is sufficient. To be

eligible as a general counsellor a candidate must be at least twenty-five years of age, a French citizen, be enrolled as an elector before the day of the election, and be domiciled in the department, or at any rate be inscribed on the list of one of the four direct taxes (to wit, real property, personal property, windows and doors, commercial licenses), on the first day of January preceding the election, or have inherited landed property in the department since that date. The counsellors are elected for six years, but a certain proportion go out of office at the expiration of three years. To this end during the first session the Council divides the "cantons" into two series (the cantons of every arrondissement being so divided) in an equal proportion, and the series are then drawn by lot to decide the order in which the renewal shall take place.

The General Council holds two ordinary sessions in the year. The first, in which the Budget and the accounts of the department are gone into, always commences on the first Monday after 15th August, and must not last more than a month. The second begins on the second Monday after Easter day, and must not last more than a fortnight. There are occasionally extraordinary sessions of eight days. The Council is on such occasions convoked by the Prefect on the demand of the chairman, and the latter is obliged to make this demand if two-thirds of the counsellors have requested him in writing to do so. This chairman is elected every year at the beginning of the August session. There is also a vice-chairman, whose functions are likewise annual.

The Prefect always has his entrée to the sittings of the Conseil Général, and can speak after obtaining permission from the chairman. The sittings are public, but the doors can always be closed if the majority of the Council on the motion of at least five members vote the "huis clos." Half the Council, plus one member, constitute a quorum. As a rule, the voting is by secret ballot, but if a sixth of the members present demand it, a public ballot must be substi-

tuted. In case of equality of votes, the vote of the chairman is decisive. A minute of each sitting is drawn up in the course of forty-eight hours after its conclusion, and held at the disposal of all the journals of the department, while a more detailed account is written by one of the secretaries of the Council, and can be seen by any elector or tax-payer of the department on demand.

The powers and duties of the general councils are regulated at present by the law of 11th August 1870. The matters concerning which it is their duty to deliberate may be divided into two categories, those as to which their decision is final without any ratification of the central authority, and those as to which this ratification is necessary. The first category is by far the most extensive and the most important since the law of 18th July 1866. Before that law was passed almost every decision of the Conseil Général was necessarily approved by the central authority, but since the law of 1870, it is only exceptionally that the Executive or the Chambers have the right to interfere. The most important matters of the first category are the voting of "centimes additionnels,"—the levying of which is permitted by the Budget law to the various departments in a greater or less degree according to their respective necessities—the raising of certain departmental loans, the revision of the electoral divisions, the construction and maintenance of certain roads and highways, the nomination and revocation of certain county pensioners, and notably the division of the direct taxes in the department. The direct taxes on landed property, personal property, windows and doors, and commercial licenses, form a fixed sum annually voted by the Chambers, incorporated in the Budget law, and divided by the same law among the various departments. It is the duty of the Conseil Général to subdivide its own contingent among the various arrondissements composing the department, while the conseil d'arrondissement again subdivides the sum allotted to the arrondissements among the different "communes" or boroughs, and finally a commission in each

borough distributes the sum it has to furnish among the taxpaying inhabitants.

Among the matters composing the second category—viz., those for which the approval of a higher authority is necessary before the decision of the Conseil Général can be carried into execution, I may mention the levying of certain extraordinary taxes which have not been authorised by the Budget law, the raising of exceptionally heavy departmental loans, the acceptation of gifts and legacies made to the department in cases where the family of the donor or testator has filed a legal "opposition" or *caveat*, and finally the consideration of the budget of the department which is by far the most important duty of the Conseil Général, but too long and complicated a matter to discuss in so cursory a sketch as the present.

Before passing from the powers and duties of the Conseil Général, I must not omit to make mention of the political functions conferred upon it by a curious enactment of the law of 1870. It provides that in case the Chambers should be illegally dissolved or prevented from sitting, the Conseil Général in each department shall immediately assemble without waiting to be convoked, and take measures for the general safety and public order of the department; and that an assembly composed of two delegates from each general council shall sit in secret committee in the place to which have repaired the ministers and deputies "qui ont pu se soustraire à la violence," and there legislate for the whole of France. There is a grim humour about this enactment of the law, and one cannot help smiling at the idea of the deputies and general counsellors flying from the violence of a revolutionary mob, and travelling secretly (and perhaps disguised with blue spectacles like a certain general not long since) to the scene of their deliberations, but the idea in question has unfortunately been so frequently and so recently realised in France, that the enactment has a very serious practical utility, of the efficacy of which we may be able to judge at any moment in these troubled times.

I now come to the "commission départementale," which

is an institution created by the law of 10th August 1871, and borrowed by this law from Belgium. It is a commission elected every year by the Conseil Général from among its own members, and destined to carry on its work during the interval between the sessions. It is composed of at least four members, and of not more than seven. It assembles at least once a-month, and sits at the Prefecture, the Prefect himself being generally present. The oldest member is *de jure* in the chair. Its duties are to decide certain matters which would have been referred to the Conseil Général had it been sitting, but which are either too urgent or too unimportant to await its reassembling. It controls the Prefect in his administration of the finances of the department, gives its opinion when consulted by him upon any question, and calls his attention to all matters involving local interests. Moreover, its opinion, though not its approval—the Prefect being theoretically a free agent—is necessary to him before defending any action brought against the department, or making any contract in the name of the department. On the opening of each ordinary session of the Conseil Général, the commission makes a report of its labours, and submits to the Council any proposition which has been suggested to it thereby, or which it considers useful.

In speaking of the systems of local government which have preceded the one at present in force, I mentioned that by the law of the 22nd December 1789, the administration of the country was divided into three heads, the executive, legislative, and judicial authorities, and this principle has been preserved throughout all subsequent changes. Thus I have shown how at the present day the power of the executive in each department is vested in the Prefect, and that of the legislature in the Conseil Général. I now come to the judicial power which is conferred upon the Conseil de Préfecture. It has been one of the fundamental principles of French public law since the First Revolution, that the judicial and the administrative authorities must be kept wholly distinct and independent. The principle was laid down for

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the first time by the constituent assembly of 1790, and reproduced in the constitution of 3rd September 1791. Lastly, we find it proclaimed by the convention in the decree of 16th Fructidor, Year III., in the following terms:—"Défenses itératives sont faites aux Tribunaux de connaître des actes d'administration de quelque espèce qu'ils soient, sauf aux réclamants à se pourvoir, s'il y a lieu, en exécution des lois." In conformity with this principle there are in France administrative tribunals of various degrees (Conseil d'Etat, Cour des Comptes, Conseil de Préfecture) besides the ordinary Courts of Justice, and there is a Tribunal of Conflicts presided over by the minister of justice, and composed of three judges from the Court of Cassation (the Supreme Court of law), and three counsellors from the Conseil d'Etat (the Supreme Administrative Tribunal), which settles in disputed cases whether such and such a suit is or is not of an administrative character. Whenever the Prefect of a department thinks that a case pending before a Tribunal d'Arrondissement—which corresponds roughly speaking to our County Courts—is of an administrative character, he notifies his opinion to the President of the Tribunal, and if the latter, nevertheless, proceeds with the case, the Prefect refers the matter to the Tribunal of Conflicts, pending the decision of which the suit must not be tried. (*a*) In this manner the independence of the two jurisdictions is preserved.

Now, to English jurists and politicians, this division of administrative tribunals from the ordinary Courts of justice will probably seem curious. It is one of the fundamental principles of the English constitution that the Common law is applicable in precisely the same manner to every subject of the realm. From the Prime Minister down to a tax collector or a post-

(*a*) It is asserted in Professor Dicey's book on the Constitution, that the Tribunal des Conflits is not a judicial body. With all due deference to such an authority, I submit that Mr. Dicey is in error upon this point. The Tribunal des Conflits is most emphatically a judicial body, composed as it is of judges of the two co-ordinate Supreme Tribunals, legal and administrative, and sitting to decide the question of law of whether the source of a given dispute is or is not an "acte administratif."

man every official is answerable for his acts to the ordinary tribunals of the country. The principle, indeed, is carried so far that even soldiers, when summoned before a Court of law, cannot allege in defence of their conduct that they were acting under orders, although it is well known that if a soldier refuses to obey orders, he is liable to be shot by order of a Court-martial—a juridical paradox which might produce a curious dilemma.(*a*) But the contrary principle, as it is established in France and Germany, and generally, I believe, all over the Continent, is productive of still more absurd consequences, which have far greater practical importance. Thus, whenever, as I have endeavoured to show, the ground of a dispute arises in what is called an administrative act, the administrative Tribunals claim jurisdiction. Now, what is an administrative act? It is defined by French writers on administrative law as every act performed by a government functionary in the execution of his official functions. A case occurred not long since in which a child visiting the Jardin des Plantes in Paris was bitten by a monkey which had got loose. This was an administrative act; and on an action for damages, brought by the child's parents before the ordinary Tribunals against the keeper for negligence in allowing the monkey to escape, it was decided that the case must be referred to the administrative Tribunals, for the keeper, who was responsible for the monkey, was himself responsible to the Gardien Général of the different out-door resorts of amusement in Paris, who in his turn was responsible to the Minister of the Interior! Examples might be multiplied *in infinitum*, but I think the above is sufficient to show how far-reaching is the principle.

The Conseil de Préfecture in each department is composed of three or four members according to its size and population. In the Conseil de Préfecture of the department of the Seine, there are nine members. To be a Conseiller de Préfecture, it is necessary to be twenty-five years of age, a

(*a*) *Cf.* Stephen's "History of the Criminal Law," vol. i. p. 205.

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French citizen, and a licencié en droit, a degree which corresponds to our call to the bar, and entitles the graduate, if a Frenchman, to be enrolled as an "avocat." The Prefect is always President of the Conseil de Préfecture except in the department of the Seine. The sittings are public, the procedure is oral, and the Public Prosecutor is always present.

The attributes of the Conseil de Préfecture are not exclusively of a judicial character. It has some administrative powers besides; for instance, it is the Conseil de Préfecture which accords or refuses to a borough authority to bring or defend an action. Without such authority the borough cannot figure in a law-suit. Moreover, the Prefect is bound to take its opinion on a vast number of matters which he is called upon to decide. The opinion of the council does not legally fetter the Prefect in any way, though, as a matter of fact, he generally conforms to it; but if he omitted this consultation, his decree would be illegal. The principal matters as to which disputes are decided by the Conseil de Préfecture have been enumerated by the important law of the Year VIII., to which I have so constantly had to refer. They relate to direct taxes, public works, roads and highways, and the national domains. Subsequent laws have attributed competence to this council in a large number of other cases, among which I may mention those concerning public health, indirect taxes, mines, tobacco-growing, fisheries, and municipal and district elections.

For a long time it was held by Courts of law that the Conseil de Préfecture was in general competent in any litigation relating to local administration where the law had not expressly referred it to another Tribunal. But this opinion is now abandoned. It is generally admitted that the Ministers are the ordinary judges of administrative disputes, and that, as head of each great branch of the public service, they constitute the ordinary Tribunal for disputes relating to their administration. An appeal from their decision, as well as from that of the Conseil de Préfecture, lies to the Conseil d'Etat.

So much for the department, the administration of which forms by far the most important part of local government. I have only a few words to say about the arrondissement. The latter, unlike the department, does not constitute a corporation. In the arrondissement the Sub-prefect represents the active administration, and the Conseil d'Arrondissement represents the deliberative assembly. The Sub-prefects are nominated by the Head of the State just like the Prefects. There is one for each arrondissement in the department, except that in which the chief town is situated, and which is administered by the Prefect himself. The Sub-prefect though nominally the representative of the executive power in his district, is in reality little more than an intermediary between the Mayors and the Prefect, for, in point of fact, there is hardly any real administration to be done in the arrondissement, it being practically absorbed by that of the department. Certain powers, however, have been expressly conferred upon the Sub-prefect by law, such as the delivery of passports and gun-licenses, or permis de chasse, the authorisation of lotteries, &c. Moreover, the Sub-prefect decides, in first instance, disputes relating to the opening of certain unhealthy establishments, and the levying of divers municipal dues, an appeal from his decision being always possible to the Prefect, and sometimes to the Conseil d'Etat.

In every arrondissement there is a Conseil d'Arrondissement to control and enlighten the Sub-prefect, just as in every department there is a Conseil Général for the Prefect. The council is composed of as many members as there are "cantons" in the arrondissement.

To be eligible as Conseiller d'Arrondissement the candidate must be twenty-five years of age, a French citizen, and domiciled in the district, or on the list of one of the direct taxes. The election is by universal suffrage, as for the Conseil Général. The counsellors are elected for six years, and partially renewed at the end of three. There is only one ordinary session, each year, but it is divided into two parts, the one preceding and the other following the August session of the general council.

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The sittings of the Conseil d'Arrondissement are not public like those of the Conseil Général, but any inhabitant or tax-payer of the department can have a copy of the protocols of the sittings.

The principal and most important duty of the Conseil d'Arrondissement consists in the division of the direct taxes among the various "communes," in the manner I have already explained when speaking of the general councils. This is the only matter in which the Conseil d'Arrondissement may be said to have any direct authority of its own. Its other attributes merely consist in the expression of an opinion on a great many questions which are referred to it, and may be said, therefore, to be of a purely consultative nature. Sometimes this opinion is indispensable to the Government —as, for instance, when it is proposed to make a change in the territorial limits of the arrondissement; more frequently the Government is not bound to consult the council, but generally does so when it considers that the interests of the arrondissement are seriously involved. Lastly, the council *may* give its opinion spontaneously on a certain number of matters enumerated by law—as, for instance, any acquisition or alienation of the public edifices of the arrondissement.

Such is the general outline, necessarily cursory and incomplete, of the French system of local government. The new county and district councils are in their general conception very similar to the Conseil Général and the Conseil d'Arrondissement, manifold as are the differences in detail. But there is not in the English Act that trenchant division between the executive and the legislative power, which is the fundamental principle of the French system. And herein there is absolute consistency between the new county and the old state government. To a much greater extent than is the case, I believe, with any similar institution, the English House of Commons is at once an executive as well as a legislative assembly. There is not that essential separation between the two which has sometimes been supposed. Montesquieu, for instance, has told us that one of the

chief characteristics of the British Constitution is precisely this division of the executive and legislative functions. And when, among what Frenchmen love to call the immortal principles of 1789, they loudly proclaimed "la séparation des pouvoirs," the idea was probably mainly derived from what Montesquieu had represented to them as the English Constitution.(*a*)

It may perhaps be considered a waste of time to write about the French Constitution at a period when there is such an uproarious clamour in that country for what is called revision. But I hardly think the system of local government is likely to be swept away, even by what looks like the rising wave of another revolution. It has already withstood so many shocks in the course of the last century, and has been found on the whole to work so well, that it would probably not be materially modified were an emperor to ascend the throne to-morrow. Some branches of local government, which I have not been able to touch on here, are really admirable. The French system of roads, for instance, though a somewhat complicated piece of mechanism, is perhaps the most complete and the most successful in Europe, and to students of the subject well repays investigation.

MALCOLM M'ILWRAITH.

(*a*) [See Bryce's "American Commonwealth," Vol. i. p. 36.—ED.]

LORD FRASER.

BY the sudden death of this eminent judge the legal profession in Scotland has lost a member of whom it was justly proud. Alike as a student of juridical science, as a legal writer, as an advocate, and as a judge, he has been universally recognised as one of our best representatives.

Patrick Fraser, who was in his seventieth year when he died, was called to the Bar in 1843. Devoted heart and soul to the profession which he had adopted, he threw himself with ardour into the work before him, and with settled purpose sought to obtain for himself success in his career by the honourable path of industry and labour. He first made his mark in the profession by the publication, in 1846, of his great treatise on "The Law of Domestic and Personal Relations." By this work, which was dedicated to the first Lord Moncreiff, he at once proved himself to be a writer and thinker of no mean order, and it soon obtained a high reputation. In it the municipal law of Scotland relative to husband and wife, parent and child, guardian and ward, and master and servant, was expounded with great learning and ability. But it was something more than a text-book stating the rules of law and practice applicable to these legal relations. This it did fully, but it also displayed elaborate research, both historical and archæological, into the sources of this department of jurisprudence. The foundations of the Scottish law in the civil law, the canon law prior to the Council of Trent, and the old customs of Scotland and practice of its Courts, were carefully explored and expounded. The work was produced at the right time. The transference

of the jurisdiction of the Commissary Courts to the Court of Session in 1831, made an exposition of the law relating to marriage and divorce of particular value to the profession. The records of these Commissary Courts had never been printed; the papers in them were contained in a large number of manuscript volumes, which were neither indexed nor arranged on any methodical plan; and only the comparatively few decisions that had come on appeal to the Court of Session were reported, and these, as a rule, very meagrely. It was Mr. Fraser's great merit that he explored and made available for the elucidation of the law these records of the old Consistorial Courts. The work must have cost him years of labour; few probably can understand what laborious industry must have been required for arranging, digesting, and stating what was valuable in such a mass of manuscript reports.

When the first edition of this book became exhausted, it was resolved to republish it in separate parts—a project which, from the arrangement of the subject-matter, was a very feasible one. A new edition, accordingly, of the part relating to Parent and Child and Guardian and Ward was first brought out (edited in part by Sheriff Cowan), in 1866. This book is now out of print, and a new edition is, we understand, in course of preparation. The part relating to the law of Master and Servant was next re-edited in 1872, and a third edition of this part was published in 1882, under the editorship of the author's son-in-law, Mr. William Campbell. Both of these works have been received with much favour by the public, and are constantly referred to and cited in the practice of the Courts. But much more important was the new edition of the part relating to the matrimonial relations, which was re-edited by the author himself, and published in 1876 under the title of "Treatise on Husband and Wife." This was in many respects a new work rather than a new edition. In his preface the author says:—"I have found it necessary not so much to re-edit the first edition as to write a new treatise. There have been many

changes and additions to the law since the first edition was published, which have rendered it necessary to recast the whole work. In doing this, I have not confined the exposition merely to Scottish authorities, but have freely used illustrations drawn from other systems of law where these seemed apposite and instructive." These remarks are indeed most just, and the work displays the most thorough research in all directions in which information upon the law of matrimonial relations could be looked for—containing, as it does, great wealth of illustration, drawn not only from the civil and canon law, but also from the law of England and the legal systems of foreign countries.

It is not intended to enter into a criticism of these treatises at present; that may perhaps be done hereafter. That they are free from defects cannot be affirmed. Generalisations are occasionally founded upon insufficient premises, and the balance of authority is not always correctly estimated. As an instance of this we would refer to his views upon the constitution of marriage by *de presenti* acknowledgment, and promise *cum subsequenti copula*, and his criticism of the judgments in the *Dalrymple* and first *Macadam* cases. It is thought that his statements of the canon law as to *Sponsalia*, with reference to these cases, cannot now be supported, and his view of the early Scottish case of *Pennycook* v. *Grinton* is erroneous. But despite these defects it is beyond all question whatever, that these treatises are monuments of Scottish legal literature, and are, and will long remain the standard works in our law on the subjects with which they deal.

With the above-mentioned treatises Lord Fraser's literary activity did not end. For a great number of years he was a steady contributor to current literature, both legal and general. In particular, as his mind had a considerable bent towards the subject of history, he wrote several instructive articles of an historical character for the *North British Review*, while under the editorship of Mr. E. F. Maitland, afterwards Lord Barcaple. He also, in connection with his

favourite subject of the Matrimonial Relations, published in 1860, a valuable pamphlet dealing with the conflict of laws in cases of divorce. Along with Lord M'Laren and Sheriff Guthrie Smith he took part in the founding of the *Journal of Jurisprudence*, and he frequently contributed to its pages articles on almost every topic of legal interest. His pen was indeed ever ready at the call of his profession, and in legal controversy, he could use it with trenchant force, whether in attack or defence. As a legal draughtsman he also did some valuable work, having been the author of the two well-known statutes relating to our marriage law—to wit, the Act of 1856, which practically put an end to the Gretna Green marriages, and the Act of 1861, which is known as the Conjugal Rights Amendment Act, and which, *inter alia*, gave married women a certain amount of protection for their property against their husband's creditors.

In 1878 Mr. Fraser was elected Dean of the Faculty of Advocates, and in 1881 he was appointed a judge of the Court of Session, with the title of Lord Fraser. Prior to his election to the Deanship, he had held the offices, in succession, of counsel for the Inland Revenue and Sheriff of Renfrewshire, both for a number of years. His work in these offices was done conscientiously and well, and was received with deserved favour. In his capacity as sheriff, he became a member of the Board of Supervision, and as such he did valuable work in connection with the administration of the Poor Law and Public Health Statutes, and, in particular, as we have been informed, he was very active and rendered much service in obtaining the introduction of new water supply into the smaller burghs.

A word must be said regarding the singular success which Lord Fraser achieved in his capacity of Dean of the Faculty of Advocates. After being twice defeated in his candidature for that high office, he was ultimately elected by unanimous voice. During the three years which he held the office he worthily sustained its traditions, and it will be generally admitted that the present generation

at least has seen no more popular Dean. His great familiarity with the affairs of the Faculty, acquired by years of assiduous attention to its business, both at the general meetings and on committees; his almost unrivalled knowledge of the library with its vast stores of books; but, above all, the counsel and assistance which he gave, and was ever ready ungrudgingly to give, to his younger brethren combined to obtain for him this popularity. As an instance of this latter characteristic it may perhaps be permitted to the writer of this article, to say that it was entirely due to Lord Fraser's advice and encouragement that his own treatise upon the Law of Bankruptcy was undertaken. The interests of the Faculty received, indeed, at all times his watchful, not to say zealous, care, and any attempt to encroach upon its rights and privileges was met by him with determined opposition. Not only as a member of the Bar, but as a patriotic Scotsman, he saw that it was necessary to resist such encroachments. He had the prescience to foresee that if the Faculty were once to surrender pusillanimously any of its important privileges, its decay and ultimate dissolution could hardly be averted. Accordingly when it was proposed by the Copyright Commissioners in 1878, to repeal the statutes requiring that a copy of every new book should be deposited in the Public Libraries (including that of the Advocates), and again when, at the passing of the English Judicature Act, the attempt was made to transfer appeals in Scotch cases to a different tribunal from the House of Lords, no one was more active in opposition to the proposals than Lord Fraser.

As an advocate, Lord Fraser was chiefly distinguished for the sound common sense and shrewdness with which he conducted the cases entrusted to him. He made no pretensions to forensic oratory, in the sense, at least, in which that implies fluent and ornate rhetoric. But he was a most persuasive speaker, and was particularly successful with juries. He had at all times a very considerable practice, and was

engaged in a great many *causes célèbres* during his career—such as the Udny, Breadalbane, and Yelverton marriage cases, the Cardross case, the criminal trial of the City of Glasgow Bank Directors—and in all of them his legal learning and abilities were of the greatest service to his clients.

As a judge, Lord Fraser proved his great legal qualities, and gave much satisfaction. But he failed perhaps to reach the highest point. Equitable considerations were wont at times to prevail over strict interpretation of the law, and his mind did not seem to readily adapt itself to close and subtle reasoning. His period of judicial work, moreover, was not long enough, and he had not the opportunity of sitting as an appellate judge in the Inner House, to enable him to show himself at his best in this field. Some of his decisions, however (notably that pronounced in the Orr-Ewing case), will survive among our best specimens of judicial opinion. In manner he was a model judge. And this is no small praise, for injustice is perhaps as frequently done by hastiness and defect of temper on the part of judges as by lack of legal acumen. He was ever courteous and considerate to the Bar—never rude, never over-bearing—and made it a point to listen with perfect patience to whatever counsel had to say, even in the most hopeless case. This is the way, and the only way, as he well knew, to acquire the confidence of the Bar.

By those who have known Lord Fraser and have been associated with him in his work, his human personality, his kindly nature, in which the pungency of satire was wont to blend so attractively with humour, and his warm sympathy with all that concerned the best interests of the profession, will assuredly never be forgotten.

HENRY GOUDY.

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THE JUDICIAL SYSTEM OF GERMANY.

Part II.

AT the seat of every Oberlandesgericht (higher Court of Appeal) an *Anwaltskammer*, or Chamber of Advocates, is established—a body of which all the members of the bar within the jurisdiction are members. The imperial Anwaltskammer at Leipzig, however, is composed solely of the counsel before the Reichsgericht. The Chamber of Advocates assembles periodically for the election of an executive, the members of which hold office for four years, and which exercises a general supervision over the members of the bar, and undertakes the settlement of disputes between them or between any counsel and his client. It is bound to furnish reports to Government, and to the other Courts of the country when called upon, and it is authorised and encouraged to approach the Legislature in regard to any matters affecting the administration of justice within the State. The President is further bound to furnish the Government and the Oberlandesgericht with a yearly report of the matters which have engaged the attention of the Executive. The President, Vice-President, and three members of the Executive, form the *Ehrengericht* or Court of Honour, which possesses a disciplinary authority, and has, as its chief object, the punishment of any of the members of the bar who have been guilty of violation or neglect of professional duty. Its judgments vary with the nature and gravity of the offence—admonition, censure, fine up to £150, and expulsion forming the gradation. Fine may be combined

with any of the other punishments. Appeal may be taken against the final decisions of any provincial Court of Honour to the *Ehrengerichtshof* at Leipzig—a Court composed of the President and three members of the Reichsgericht and three members of the Imperial Chamber of Advocates—and its judgment is final.

In Germany, as in Scotland, the prosecution of crime is, with but few exceptions, in the hands of a public prosecutor. To every Court there is accordingly attached at least one counsel whose principal duty it is to conduct criminal investigations and prosecute offenders. This official is popularly known as the *Staatsanwalt* or Public Advocate, though his official name varies with the Court to which he belongs. While his chief functions are those of a criminal officer, and in the inferior Courts correspond very closely to those of our Procurator-Fiscal, he has also important civil duties to perform. He is the representative of the public interest in the Courts to which he is attached, and is entitled, in that capacity, to interfere in any matter in which he believes the public interest to be concerned. His position as a civil officer is thus analogous to that of the Lord Advocate on the rare occasions when that official appears for the public interest in the Court of Session.(*a*) In every Court of Germany there is at least one Public Advocate, and in the higher Courts there are several — the head of the whole body being the *Oberreichsanwalt* in Leipzig. The interference of the Public Advocate in his civil capacity is in practice confined to matrimonial causes, and cases relating to guardianship, but he is never bound to appear, and there can consequently be no appeal against a judgment, or action of reduction to have it set aside, on the mere ground of his non-appearance. He may, when necessary in the cases in which he is entitled to appear, take the place of any absent person, whether as pursuer

(*a*) [His position is also analogous to that of the Queen's Proctor in England. —Ed.]

or defender, if he believes there is a good ground of action or of defence, and he frequently intervenes merely for the purpose of ensuring that there shall be proper investigation and discussion. In matrimonial causes he generally appears as a supporter of the marriage, and it is only in rare instances that he himself institutes a suit for nullity or divorce.

The duties of the clerks and other officers of Court are similar to those performed by the corresponding officials in this country. Neither Clerks of Court nor *Gerichtsvollzieher* (Messenger-at-arms or Sheriff-officers) can perform any official act in a cause in which they are nearly related to the parties, or are interested themselves. It is deemed to be as important to secure integrity in their case as in that of the judges, and the same grounds which justify the declinature of a judge disqualify the Clerks and Sheriff-officers. Any proceedings in which they have taken part when subject to disability may be set aside. The subordinate officers of the Reichsgericht are appointed by the Chancellor: those of the inferior Courts by the various Ministers of Justice.

Such then are, in brief outline, the general characteristics of the Courts of Law in Germany. I shall now proceed to examine in some detail the special features of the individual tribunals.

I. *Civil Courts.*—These are, as mentioned in the former part of this paper, four in number—the *Amtsgericht*, the *Landgericht*, the *Oberlandesgericht*, and the *Reichsgericht*. The lowest of these is the *Amtsgericht*, and it consists of a single judge. Before him may be brought all actions the subject of which is a money or property claim, and in which the value of the action does not exceed £15. The Amtsgericht is further the proper Court for the trial of such questions as are considered suitable for summary treatment, or can be best disposed of by a judge possessing a certain amount of local knowledge, and that without respect to the sum in dispute or the value of the action. The Law of Judicial Organisation

specifies minutely the matters which fall to be dealt with in the Amtsgericht, as falling under this category, and the list includes various classes of action between landlords and tenants, masters and servants, employers and workmen, innkeepers and travellers, and so on. It is also the Bankruptcy Court, and the Court for the cognition of the insane, and the imposition of curatory upon them and upon spendthrifts. The judge of the Amtsgericht—or the *Amstrichter* as he is called—is frequently required by the Superior Courts to make preliminary investigations in matters which are subsequently to come before them for discussion—*e.g.*, to conduct local inquiries in connection with claims for damages, and to take evidence to lie *in retentis*—and the decrees of Superior Courts, so far as requiring further judicial interposition in order to render them effectual, are dealt with by him.

The other Court of first instance in Germany is the *Landgericht.* It is a Collegiate Court, and may consist of any number of judges, but it sits in chambers of three judges each. In it are brought all actions not specially appropriated to the Amtsgericht, whatever may be their character, and whatever the value of the subject in dispute. It is further the proper Court for the trial of cases in which the public interest is involved as well as a matter of private right, and that even although the value of the action be under £15—*e.g.*, actions under the revenue laws and claims against state officials for neglect of duty. Besides being a Court of first instance, the Landgericht is the Court of Appeal against the judgments of the Amtsgericht. In such appeals new facts may be stated, new pleas urged, and additional proof taken, but the judgment of the Landgericht is final. Appeal stays execution, except when the sum in the decree is under £15 and in summary cases.(*a*)

(*a*) The following information relative to the salaries paid to the judges and other officials in these Courts may be of interest:—The President of the Landgericht in Berlin receives £525 per annum; in the provinces of Prussia the salary of President in a Landgericht runs from £325 to £495. The ordinary judges in the Landgerichte and the Amtsgerichte are paid at the same rate, and

The Federal authorities are empowered by the Law of Judicial Organisation to ordain, if they see fit, that sections of the Landgericht shall sit periodically as *Handelsgerichte*, or Commercial Courts. These Courts may be held either at the seat of the Landgericht or of any Amtsgericht within the territory. The Handelsgerichte, however, do not (like the *Tribunaux de Commerce* of France and Belgium) form distinct and independent organisations with a jurisdiction and procedure special to themselves and available only to them, but are mere divisions of the Landgericht. When no Handelsgericht has been established in any locality, commercial cases are brought before the ordinary civil chambers of the Landgericht. When, however, commercial chambers have been formed at the seat of a Landgericht, all properly mercantile causes, provided they would otherwise have been competent in the Landgericht, must be tried by them. Disputes between merchants arising out of mercantile transactions, and raising, for example, questions of exchange, partnership, agency, affreightment, patents, and trade-marks, and such like, are tried before a Commercial Court; and should any properly mercantile case be brought before one of the ordinary chambers of the Landgericht, it may, upon the motion of the defender, be transferred to the appropriate Commercial Court, should such exist. The Court is composed of a judge of the Landgericht (whose place may, however, be taken by an Amtsrichter when the sittings of the Court are in his district) and two lay assessors known as *Handelsrichter* or commercial judges. Every German of the age of thirty, who is entered upon the mercantile register as a merchant or director of a joint-stock company, and who is not otherwise disqualified, is eligible for the office of Handelsrichter. The office is honorary, and judges are appointed by the State from the nominees of chambers of

receive in Prussia from £120 to £300; the Public Advocates from £135 to £375; and the Clerks of Court from £105 to £180 per annum. In view of the long preliminary training and the importance of the duties performed, the scale of remuneration upon which these officials are paid is anything but extravagant.

commerce and similar mercantile bodies. They hold office for three years, but may be removed during their tenure by the Oberlandesgericht in the event of their coming under any of the statutory disqualifications.

Next in order of importance to the Landgericht comes the *Oberlandesgericht*. It is the Court of Appeal against the judgments, both interlocutory and final, of the Landgericht and the Handelsgericht (where such exists separately) in so far as appeal is not excluded by statute. It consists of civil and criminal senates, the number of which varies in the different provinces. Each senate is composed of five judges, including the president, and as in the other Courts, the presence of a full bench is necessary to give validity to the proceedings. The place of an absent judge may be supplied by any Amtsrichter or Landrichter, but not by a *Referendar* or *Assessor*. (*a*)

From the decision of the Oberlandesgericht appeal is in general competent only to the Reichsgericht. In view, however, of the diversity of the local systems of law prevailing throughout Germany, and of the advantage of having the law of each province administered in the Court of last resort by men who have made it their special study, the code authorises any of the Federal States to establish within its own borders an *Oberst Landesgericht* to deal with those appeals from the Oberlandesgericht, which would otherwise have come before the Reichsgericht. The only State which has as yet taken advantage of this provision of the code is Bavaria, and the *Oberst Landesgericht* at Munich forms the Supreme Court of appeal for that kingdom, in all cases in which the Reichsgericht is not declared by statute to have privative jurisdiction.

The Supreme Court of appeal for the Empire is the

(*a*) The salaries paid in Prussia to the officials in this Court are as follows :— President of the whole Court, £700 and official residence or its equivalent in money ; Divisional Presidents, £375 to £495 ; Ordinary Judges, £240 to £330 ; Public Advocates, £120 to £240 ; and Clerks of Court from £105 to £210 per annum.

Reichsgericht. It has its seat in Leipzig—a choice which was made, partly because that town was the seat of the *Oberhandelsgericht*, or Higher Commercial Court, to the functions of which the Reichsgericht succeeded, and partly because of an unwillingness on the part of the federating States to see Germany converted into a sort of magnified Prussia, or to allow Berlin to obtain for itself in Germany the predominant place which Paris has—unfortunately for that country—long held in France.

The business of the Reichsgericht is at present conducted in a temporary building upon the Brühl in Leipzig, but a new *Palais de Justice* is in course of erection, the foundation stone of which was laid some months ago by the Emperor, and which will form, when completed, a more worthy habitation for the Teutonic Themis than her present somewhat shabby quarters. The Reichsgericht is the Court of appeal against all decisions of Imperial consuls and the consular Courts, and against the decisions of the various Oberlandesgerichte, when the value of the action exceeds £75, and the decree is alleged to involve the violation of an imperial or provincial statute which is in force not only within the territory of the Oberlandesgericht appealed from but beyond it. As having superseded the Imperial Commercial Court, the Reichsgericht has jurisdiction in the numerous commercial cases formerly proper to that tribunal, and there are certain miscellaneous cases in which jurisdiction is conferred upon it by special statutes. The Emperor, with consent of the Federal Council, may also authorise appeals to be taken to it in cases where they would not be otherwise competent, and he may also prohibit appeal in cases which would otherwise warrant it. The members of the Court and also the public advocates there (who are known as *Reichsanwälte*) are appointed by the Emperor upon an address by the Federal Council. The statutory qualifications for the bench are the same as those required in the case of the inferior judges, with the addition that no one can be appointed who has not reached his thirty-fifth year.

The Reichsgericht consists of seventy judges, and is divided into ten senates of seven members each. Of these senates six are civil and four criminal. Each civil senate sits only two days a-week, the consideration of the cases which have been heard, and preparation for those to follow, being understood to occupy the remainder of the judges' time. Most of the judges have climbed the judicial ladder from its lowest step, but a few of them have been taken from the Bar and from among the public advocates—the latter office at one of the higher provincial Courts forming a favourable position from which to secure a seat in the Reichsgericht. The judges wear robes of crimson silk with square caps (*barettas*) of similar material; the counsel have no gowns, but wear evening coats. In the inferior Courts both judges and counsel wear black robes and barettas, the cap being removed by the counsel when pleading, though the judges frequently retain theirs all day. Wigs or bands are unknown, and the white necktie is seen only by way of variation upon the parti-coloured arrangement which is the usual choice.(*a*)

Although the Reichsgericht is the highest Court in Germany, its judgments when given do not form an absolutely binding precedent, and it is open to any senate which is disposed to differ from the previous judgment of any other senate, or even from a judgment of the whole Court, to call for a fresh argument before the combined senates for a reconsideration of the matter. Precedent is not treated in Germany with anything approaching the veneration with which we are accustomed to regard it here. The philosophic jurists for long despised it, refusing to admit its authority, and scoffed at appeals to it as quite unscientific; and though practical lawyers have not taken up such lofty ground, it is only within very recent times that an attempt

(*a*) The salary of the president of the whole Court—the highest judicial officer in Germany—is £1250 per annum, with an official residence. The presidents of the senates and the imperial advocate receive £700, and the ordinary judges and public advocates £600 a-year. The clerks of Court have an average salary of £210, and the assistant clerks of £120 per annum.

has been made to take systematic reports of the judgments of the Courts with a view to their being used as authorities. The reports now issued, however, though slender, are models of brevity, clearness, and precision. They are, nevertheless, but rarely quoted, and to one who has been accustomed to observe the practice in our Courts, where counsel rarely argue a case of any importance without the support of an imposing arsenal of authority, it is a little curious to witness a German Rechtsanwalt conduct a long argument with no further external assistance than is derived from a little pocket edition of the codes, which he flourishes about in one hand. The fact that so much of the law is codified, contributes greatly of course to render this possible. Another noticeable peculiarity of the pleading is its boldness and its apparent freedom from the trammels of technicality. In virtue of what is known as the principle of "*Mündlichkeit*" the Courts are entitled to consider anything that is brought forward in argument, although not contained in the written pleadings, and on the other hand are not bound to regard what is contained in the pleadings, or even in the report of an examining judge, if not adopted and founded on in the course of the argument. Cases are accordingly seldom thrown out upon relevancy; the accuracy of averment and counter averment which we require is not insisted upon, and what may be called the *minutiæ* of pleading are in great measure disregarded. The papers which constitute the process, though similar in their general characteristics to our own, are shorter, and are almost invariably written, even in the cases which come before the Supreme Court. The judges hand the documents to one another, and printing is little used.

A sketch of the Criminal Courts must be reserved for another number.

J. J. Cook.

Current Topics.

Professor von Holtzendorff.—Within the last few weeks several great jurists have gone to their rest, but none more distinguished, none of wider culture, none more genial and philanthropic than the late Professor von Holtzendorff. Scion of a noble Prussian family, Baron Joachim Wilhelm Franz Philipp von Holtzendorff was born in 1829, and after studying at Berlin, Heidelberg, and Bonn, he graduated as Doctor of Law in 1852. In 1857 he became a "Docent" at Berlin, and in 1861 was appointed a Professor in that University, where he taught encyclopædia of law, criminal law and procedure, public, international, and ecclesiastical law, and political science. In 1873 he was translated to Munich as professor of public, international, and criminal law, and occupied that chair down to his death on 6th February 1889. Time and space preclude a full enumeration of his works and the honours bestowed upon him by European and American academies and learned bodies: suffice it to say that he was at once a profound jurist, a high authority in political and social science, a linguist, and a prolific and gifted author. One of the noblest objects of his life was the promotion of prison and penal reform, the study of which led him to travel extensively in Europe, and to publish works on the prison systems of the Romans, of Ireland, and of Germany. For many years he was the able editor of the *Allgemeine Deutsche Strafrechtszeitung*, and of the *Jahrbuch* of German legislation and administration of justice; and among many other works he has written standard treatises on criminal law and procedure. He was the founder and editor of the admirable *Encyclopädie der Rechtswissenschaft*, the originator of the important German "Juristentag," a staunch and leading member of the "Protestantentag" (in which the mantle of Bluntschli may be said to have descended upon him), an original member of the Institute of International Law, and one of the most distinguished *savants* who attended the Social Science Congress in Edinburgh in 1880. Among the most prominent events in his career was his masterly defence of Count Harry von Arnim, who was tried for the alleged treason of having abstracted State documents from the public archives. Holtzendorff showed great courage and public

spirit in this defence, inasmuch as the prosecution was being strongly pressed by Prince Bismarck. His *Vertheidigungsrede* in this case has been published in a separate form. Nor must we omit to notice that he was an earnest advocate of the amelioration of the social position of women, and that he was honoured with the friendship of the late Emperor Frederick. In June last the writer had the privilege of several meetings with Professor von Holtzendorff at Bologna, whose far-famed university had invited him to receive her "octocentenary" doctorate in law, and he there learned that in the midst of the great jurist's busy career he had delighted in the cultivation of the poetic muse. In a poem written by him in honour of the Bologna Festival he draws a beautiful comparison between "*Nord und Süd*," describing their modern union, their common aspirations, and that common goal which he himself (too early, alas) has now reached—

"Das gleiche Recht, das gleiche Ziel:
Die heil'ge FREIHEIT und den FRIEDEN."

J. K.

Professor Leopold Neumann. — Owing to an oversight there was unfortunately excluded from our previous number a notice of the death of this eminent professor of law in the University of Vienna. His death took place on 7th December last. Baron Leopold de Neumann occupied the Chair of International Law and of Statistics in Vienna University, from 1849 till within a few years of his death. Among his numerous works may be named his "Handbuch des Consulatwesens," his elementary treatise on international law, and an important collection of Austrian treaties from the year 1763 downwards. He was a life member of the Austrian Reichsrath, and belonged to many learned societies, including the Institute of International Law. In 1868 he was elected Rector of the University of Vienna, and it is worthy of mention that the Emperor entrusted him at different periods with the legal training of four young archdukes of the imperial house. With remarkable industry and accurate learning he combined the Austrian characteristics of great kindness and cordiality of manner, and his loss will be sincerely mourned by all who knew him or who benefited by his extensive labours in the province of jurisprudence.

University Legal Education.—In an admirable address delivered to the students of Bombay University, on the occasion of its annual Convocation, on 15th January last, Lord Reay made some important observations on the subject of legal education. In particular, he took occasion to indicate what provision a properly equipped University must make for the

teaching of law. Referring to the fact that the Law Faculty in Bombay was undermanned, he observed :—

"For admission to the public service, attendance at lectures on public law, of which administrative law forms part, should, I think, be made compulsory. Administrators in local bodies will also avoid many errors if they have sought such knowledge before they seek the votes of electors. All those who aspire to take part in public affairs should make use of the opportunity given them. The University cannot allow the stigma which the absence of such teaching entails to rest on it even temporarily. The best illustration of the malignant results of the absence of such teaching is to be found in the misunderstandings which must arise when principles have not been mastered. No controversy should have arisen about local self-government if a clear understanding of its meaning had been the results of a previous University teaching."

Lord Reay then goes on to point out the desirability of a Faculty of Law having two distinct departments—viz., a Faculty of Law proper, and a Faculty of Politics, the former being specially adapted for the training of barristers and other legal practitioners, the latter for the training of students for the service of the State in its imperial and local institutions.

"The great object of a Faculty of Law," he observes, "is to teach those who aspire to take part in public life jurisprudence, not as the art of jurisdiction, but in its connection with moral and social sciences—in its philosophical and historical aspect. In this relation, besides a Chair of Public Law, Chairs of Philosophy of Law, of Political Economy, of Commercial and International Law are necessary. They presuppose, of course, that the student has in the Faculty of Arts been well trained in the method of historical inquiry from a sociological point of view, and has had a sound general education. As a school for barristers or solicitors, the Faculty of Law will have to provide a Chair of Roman Law, of Civil Law, of Criminal Law, of Civil and Criminal Procedure, of Medical Jurisprudence, of Hindu and of Mohammedan Law, leaving it to their discretion to attend the lectures in the other division of the Faculty of Law, which would naturally be attended by the sons of chiefs, and by those aspiring to serve the State in a bureaucratic character, as well as by those who might consider it their special vocation to take a share in public affairs. In both divisions of the Faculty of Law the chief object should be to train the mind in the method of juridical argument, so that future legal studies should be guided and facilitated by this previous training. The omission in the University curriculum in England of a Faculty of Politics is indefensible, and, as institutions become more democratic, the necessity of political training becomes greater. . . . My friends Mr. Bryce and Mr. Oscar Browning have taken up the subject at their respective Universities, and Professor Lorimer has not ceased to insist on its consideration in Scotch University Reform."

These observations of the distinguished Governor of the Bombay Presidency suggest some reflections upon the teaching of Law in the Universities of Scotland. If a School of Law be an essential branch in a University's constitution, it may be fairly said that there is only one University in Scotland. Edinburgh alone possesses a Law Faculty in any proper sense of the

term, and even in it a number of the Chairs regarded as necessary by Lord Reay are conspicuous by their absence. No Chairs or Lectureships, for instance, exist for the teaching of administrative law, criminal law, commercial law, or private international and comparative law. But it would be a stretch of language to speak of a Faculty of Law as existing in any of the other three Universities. Want of funds and of a sufficient number of students may perhaps explain the absence of such teaching in Aberdeen and St. Andrews, though there is an astonishing amount of provision made for the teaching of the sister science of Theology. But what is to be said of the great city of Glasgow? Leaving out of view the Chair of Conveyancing, in which, as hitherto arranged, a procurator in busy practice has been wont to teach legal drafting, the Faculty of Jurisprudence in Glasgow University is represented by a single chair of Civil Law, the professor of which is expected, *mirabile dictu!* to teach also the Municipal Law of Scotland. There are, indeed, also two unendowed lectureships, one on Public and the other on Constitutional Law; but these, instead of being nurtured and fostered, receive apparently a good deal of the cold shoulder from the University authorities. Hitherto at least these lectureships seem to have been held by professional men engaged in practice in Edinburgh, and who could devote only a portion of their spare time to them. To a stranger it would scarcely appear credible that, in a great mercantile community like Glasgow, there is practically no provision made for the teaching of Commercial Law. It is difficult to say at whose door the blame for this lamentable, not to say scandalous, disregard of the true interests of University teaching is to be laid. Probably the indifference of the legal profession is most to be blamed. In an instructive pamphlet on "The Faculty of Law in the University of Glasgow," Mr. Galbraith Miller, the lecturer on Public Law, points out certain causes that have hindered that University from accomplishing its mission for the teaching of jurisprudence, and makes some valuable suggestions for reform. It is useless to hope for anything in the way of improvement from the existing governing authorities. Every movement in the direction of reform made by intelligent members of the University, seems to have been either chilled with apathy or crushed through interested opposition. While the Arts classes have been crowded with a mob of boys who, to the detriment of the secondary schools, are taught Elementary Latin and Greek, and whom it is the merest *façon de parler* to describe as *students* at all, the great subjects of jurisprudence and political science have been left untaught and uncared for. The *auri sacra fames* seems, indeed, to have been sometimes a more potent influence than the pure love of science with those having control of University affairs.

The Railway and Canal Commission Rules.— The Rules which the New Railway and Canal Commission were empowered to make for the conduct of business before them have recently been published. The schedules contain specimens of the forms in which the matters at issue are to be submitted to the Court, which appear to be as simple as possible. Drawn chiefly upon the model of English pleadings they provide one or two variations based upon Scottish practice applicable to Scottish cases. The initial writ is termed an "application." It must contain a clear and concise statement of the facts, the grounds of application, and the relief or remedy sought. Distinct instructions are given as to the form in which the remedy or relief is to be concluded for in the various cases with which the Commission can deal, and in certain excepted cases, involving the doing of something by the defendant company in the distinguishing or publication of rates, the application may be by summons, accompanied by an affidavit stating that, and showing how, the applicant is interested. Where damages are claimed, the amount and the ground of claim must be stated in the application, and the defender may pay into Court (or, in Scottish cases, into one of the incorporated or chartered banks in Scotland), a sum of money, which is taken as an admission of the claim, or he may pay in the money with an answer denying liability; and special provision entitles the defendant in any matter before the Commission, who desires to have all claims for damages in respect of such matters dealt with by the Commissioners to make such claim in his answer, or, with leave, at any subsequent stage. The application is filed with the Registrar, and a copy endorsed and served. Within fifteen days of service, except in exceptional cases, the defendant must file his "answer." Within six days from receipt of this the applicant may file a "reply," and no subsequent pleading other than a joinder of issue can be put in without leave. The Commissioners have power to order and settle issues, to order a preliminary hearing on a point of the law before three of their number, and to hold it as the hearing of the case. Interim interdict may in Scottish cases be granted by the *ex officio* Commissioner, and either party in Scotland may at any time before proof present to the *ex officio* Commissioner a statement of facts and move for an order on his opponent to answer it. The proceedings are to be dealt with by the Scottish judge whenever the defender has his domicile or principal place of business or head-office in Scotland; where defendants belong to different parts of the United Kingdom, or there is a difference as to which "Superior Court" is meant, the Commissioners decide. The rules have been framed with care and clearness and their detailed provisions illustrate the curious combination of judicial and administrative duties impressed upon the new Railway Tribunal.

J. F.

XUM

Admission of Women to the Legal Profession.—In the apparent progressive march of the modern world towards the establishment of Women's Rights, many claims have been made on behalf of the sex for admission to the learned professions. Much argument and not a little denunciation have been directed against the system of close corporation and monopoly which restricts these professions to the male portion of humanity. On the other hand, strong resistance has been made by powerful adversaries, and in all quarters of the civilised world the conflict goes on with more or less intensity. The attacking forces seem, however, to gain upon their opponents step by step.

In this condition of things it is necessary to keep a watch upon our own profession. Fortunately for us the portals of the legal profession in this country have hitherto been left almost undisturbed. Whether it be that the study of our "codeless myriad of precedents" is too arduous and unattractive for the feminine mind or that the faith of the British public in woman's logic and eloquence is not easy to establish, it is the fact that there have been as yet few or no demands on the part of the ladies of these islands for admission to the Bar or the incorporated law societies. Our legal Faculties and Inns of Court have been as yet spared those tremors of excitement which their brethren in the Medical Schools have had such frequent occasion to exhibit. So far, indeed, as we have been able to discover there have been only two ladies in this country who have ventured to engage in the direct practice of law—viz., a Miss Orme and a Miss Richardson, who are or were in practice together as conveyancers and attorneys in London.

But it is not quite the same in other countries, and particularly with our cousins in the United States. The admission of women to the practice of the law in America seems to have become an everyday occurrence. Our attention was recently directed to the first number of the *Chicago Law Times* (November 1886) in which there is an interesting article by a Miss Ellen A. Martin, giving a historical account of the efforts by which women gradually obtained admission to the Bar in the several States of the Union, accompanied with short biographical notices of prominent lady pleaders. We make the following extracts:—

"In April 1873, Nettie Cronise (now Lutes) was admitted in Ohio, and immediately began practice in Tiffin. In September of that year, her sister Florence was also admitted, and the two were in partnership in practice three or four years, and until Miss Nettie's marriage with N. B. Lutes, a lawyer of Tiffin, with whom she has since been associated under the name of Lutes & Lutes. Florence Cronise continues in practice by herself. Mrs. Lutes, not long after her admission, was appointed by the Court to examine applicants for admission, and Florence Cronise has since acted in the same capacity. The Cronises and Miss Hulett were about the first, probably the first women to open law offices and begin an active, energetic practice of the profession."

In the State of Wisconsin some difficulty seems to have been experienced at first in obtaining admission to the Courts. We are told that—

"In June 1874, Lavina Goodell was admitted to the Circuit Court of Rock County, Wis., and began practice at Janesville. Having business in the Supreme Court the year following, she applied for admission there, and was refused, although it was the rule of that Court to admit attorneys from the Circuit Courts, as a matter of course. Judge Ryan asserted that the common law had excluded women ever since Courts administered the common law, and said that if a change was to come he would have no voluntary part in bringing it about. He even intimated that the Court would not be bound to admit, even if an Act were passed requiring it; but the Act was promptly passed, and Miss Goodell admitted. Miss Goodell continued in practice until her death from sciatic rheumatism, 31st March 1880. She had a judicial mind and extensive legal learning, and her arguments evinced a thorough appreciation of the genius and spirit of law."

But the State of Illinois seems to have been most fortunate of any in the possession of Miss Frederika Perry, a lady who died young, and of whom the following glowing eulogy is given:—

"Miss Perry was a successful lawyer, and her success was substantial. She combined in an eminent degree the qualities which distinguish able barristers and jurists; her mind was broad and catholic, clear, quick, logical, and profound; her information both on legal and general matters was extensive. She had a clear, strong, and pleasant voice, and was an excellent advocate, both in presenting the law to the Court and the merits of a case to the jury. She was a skilful examiner of witnesses, and understood as few attorneys do, save practitioners who have grown old in experience, the nice discriminations of Common Law Pleadings and the Rules of Evidence, the practical methods by which rights are secured in Courts. All her work was done with the greatest care."

Making allowance for a little pardonable exaggeration, the above extracts are sufficient to show with what ardour and success the study of the law has been entered upon by the women of America, and with what resolution the opposition to their admission to the practice of the Courts has been gradually overcome.

More recently the question has caused a stir in legal circles in Belgium. At the opening of last winter's session of the Royal Courts of Justice in Brussels, a Mademoiselle Popelius applied to be sworn in as a barrister. The Court allowed a special debate on the subject, and it was argued by her, or on her behalf, that as there was no express provision of the law to the contrary, a lady was entitled to be admitted to practise at the Bar. The claim was stoutly opposed by the Procureur Général, who contended that the functions of an advocate were such as to make it an essentially manly office. The Court ultimately gave its decision rejecting Mdlle. Popelius' claim.

Prevention of Cruelty to Children.—This Bill, which is backed by many distinguished names of all political parties, is another gratifying illustration of the earnestness with which the new democracy is beginning to look social evils in the face. The remedy proposed may be crude enough, but the right spirit is there. The Bill has been partly suggested by the fact that under the English Poor Law Amendment Act 1868, it is impossible to deal with cases of criminal neglect to provide young children with necessaries, unless the Board of Guardians prosecute, and unless you have got hold of the parent, and not merely a baby-farmer, tramp, showman, or other such person. So also, under the English Vagrancy Acts, the child must be charged as a criminal before it is sent to an Industrial School. This Bill, therefore, considerably extends the definition of legal cruelty inflicted on "dependent and helpless children who are in their parents' custody." Any treatment or neglect which is likely to cause unnecessary suffering, or to be injurious to health, is declared to be a misdemeanour in the case of boys under fourteen and girls under sixteen. The maximum punishment on summary conviction is £100, or imprisonment with or without hard labour for six months. Where there is a money interest in the death of the child, these penalties may be doubled. There are also stringent clauses dealing with begging, singing, selling, performing in streets or public-houses. A power of search, by justice's warrant on affidavit, is said to be necessary in the "chamber crimes" or domestic cruelties. Pending the trial of the case, the child may be detained in a place of safety; and after conviction, the child may be committed to any person, named by the Court, who shall have parental control, and shall be entitled to receive the contributions of the parent for the maintenance of the child. The evidence of the children may be taken in Court if they seem intelligent enough, and understand the duty of speaking the truth. The wife or husband of the person charged may be compelled to testify. There are no doubt many serious offences against young children which are neither assaults on the one hand nor abandonment on the other. Many of them, such as the two illustrations given in the memorandum prefixed to this Bill—viz., shutting a child up alone in a room for a long time without the means of cleanliness, and shutting a child out at night in severe weather, have been distinctly recognised by the common law of Scotland (see the cases noted in Macdonald, 2nd ed., p. 171). The London Society for the Protection of Young Children, which was sometime ago inaugurated by an eloquent sermon from Cardinal Manning, has certainly pointed out the existence of a considerable mass of preventible suffering among young children. It is desirable, however, to deal with only the grosser cases. It cannot be expedient to convert into a misdemeanour every case where a parent treats a child so as probably to cause unnecessary suffering or even injury to health; still less in all such cases to hand the child over to the secretary of a vigilance society. Except where specific acts are charged, involving danger to the life or health of the child, the criminal law should confine

itself to cases of persistent cruel conduct. More allowance should be made for the inconstancy of evil impulses and the strength of parental instincts even among the degraded and depraved.

Treatment of Habitual Drunkards.—There can be little doubt that this country will receive in the immediate future a great deal of what is called social legislation. And, whatever difference of opinion may exist as to the means employed, it is a pleasing and wholesome sign that so many politicians should be concentrating their attention on what is after all the most important object for society—the increase of domestic comfort and happiness among the great mass of the people. This is "the true pathos and sublime of human life." This is the apology for the fanaticism of the Liquor Prohibition party. When they have persuaded the majority to be earnest on their subject, they will carry out their policy of locking up strong drink. In the meantime a somewhat different proposal is made—to lock up weak drinkers. The Restorative Homes (Scotland) Bill, which has been prepared by Mr. Charles Morton, W.S., formerly Crown Agent for Scotland, and which was discussed at a recent meeting of the Medico-Chirurgical Society of Edinburgh, is a most interesting contribution to the settlement of a painful question. It proceeds on the general assumption that the Dalrymple Act of 1879 has proved wholly inadequate to meet the evils of habitual drinking, which were reported on in graphic terms by the Commons Select Committee of 1872. Under that Act the habitual drunkard has voluntarily to go before two Justices of the Peace, confess his condition, and submit to detention for a short period in a licensed retreat. It is admitted that at the only proper Home established under that Act, at Rickmansworth in Herts, the success of the treatment has been encouraging. But it is said that no self-respecting drunkard will make the confession before the Magistrate, and that there is no power to detain for a sufficient time to admit of permanent benefit. The Bill therefore proposes that a member of the drunkard's family, or any near relative, or a near friend taking interest in him, may, without intimation to the drunkard, apply to the Sheriff for his committal for a period not less than a year to a District Home, which the Lunacy Board shall have power to require the erection of, partly at the public expense, in various parts of Scotland. Medical evidence is required to support this application, and the drunkard after being committed may appeal to the Sheriff, the Court of Session, and the Secretary for Scotland for his discharge. As regards the reasons assigned for the introduction of this Bill, it is painfully obvious that the excessive (often secret) drinking, against which it is directed, destroys gradually both the mental power and the moral character of the individual, and inflicts much misery and degradation on the family. Mr. Morton's proposal, however, is open to the charge of vagueness. What clearly appears is that the

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persons to be affected by the Bill are not lunatics, but sane persons, in a legal sense. It is accordingly a fundamental provision in the Bill that they shall not be sent to an asylum. It is in substance left to the discretion of the Sheriff to say whether the man is drinking hard enough to be shut up against his will, and indeed without his knowledge. This proposal seems, therefore, unworkable. Habitual drinking when it passes into mental disease should be treated in principle, though not in detail, like other forms of insanity. It will generally be found hopelessly incurable. Before that stage is reached it is a tremendous thing to interfere with individual and family responsibility. Apart altogether from the opportunities of abuse which such procedure would afford, it could not be adopted until the duty of wife and children, friend, physician, and clergyman had been exhausted. In how many families can this be truly said?

International Association of Criminal Law.—From Amsterdam comes the announcement that an International Association for the Amendment of the Laws relating to Crimes and Penalties—(*De Internationale Vereeniging Voor Strafrecht*)—has been founded. The initiative seems to have been largely taken by the Professor of Criminal Law at Amsterdam, Dr. G. A. Van Hamel, by Professor Prins of Brussels, and by Professor Fr. Von Liszt of Marburg, and already the adhesion of a considerable number of eminent Continental jurists has been obtained. The articles of constitution (*Statuten*) have been issued, and the standpoint or general principle upon which the Society is based is indicated in Article I. We give the French translation of this Article:—"L'Union Internationale de Droit Pénal estime, que la criminalité et la répression doivent être envisagées aussi bien au point de vue social qu'au point de vue juridique. Elle poursuit la consécration de ce principe et de ses conséquences dans la science du droit criminel comme dans les législations pénales."

The first meeting of the Association is intended to take place at Brussels in August next, though this has not yet been definitely fixed. The administration of the affairs of the Association is to be in the hands of a committee (*bureau*), to be elected at the annual general meeting of the members. This Committee is to have power also to elect new members who have been duly nominated. The annual contribution of members is in the meantime to be five francs, though this sum may be afterwards increased.

We have been kindly informed by Professor Muirhead that the Instituto di Diritto Romano at Rome has in view the publication of the text of the so-called *Tipucitus*, which contains an epitome of the "Basilica," and was made use of by the editors of that compilation. It is contained in a MS.

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in the Vatican, and as an edition of it will, from its size, entail considerable expense, the members of the Institute are desirous of knowing, before they proceed with the publication, to what extent it would be taken up by the public. Those interested in the study of Roman law who are willing to subscribe for a copy are requested to send their names to Professor Vittorio Scialoja, University of Rome.

Limited Ownership of Land in Scotland.—In the Parliamentary session of 1887, a Bill dealing with this important subject was brought in by Mr. Haldane, an English barrister and M.P. for Haddingtonshire, and was remitted by the House of Commons to a Select Committee, who revised its numerous clauses with great care. Last year the Bill, so revised, was again brought in; but Mr. Haldane withdrew it on receiving a pledge from the Lord Advocate that the Government would take up the matter and deal with it in a Bill of their own in the ensuing session. The main objects of Mr. Haldane's Bill were to prohibit entails in future, and to enlarge the powers of liferenters of land, and heirs of entail in possession under existing entails; and those objects met with the approval not only of the general public in Scotland, but also in great measure of the legal profession and the landowners. But the Bill was drafted on wrong lines. It was practically an attempt to introduce into Scotland the English system of settled estates, as amended by the Settled Land Acts of 1882, 1884, and 1887, with but scant regard to the existing system of land rights in Scotland. It seemed to aim at sweeping away all the remedial legislation of the last 120 years in this branch of the law in order to have a *tabula rasa* upon which to inscribe the law of England. On this ground the Bill was objected to by the chief legal societies in Scotland, whose members were well qualified to foresee the confusion that must result from such an attempt to graft an alien system on the land rights of Scotland. What those societies recommended was the passing of an Act of the nature of a code to consolidate the numerous entail Statutes, and to reform the Scottish law of land rights with reference not only to heirs of entail, but also to all liferenters and trustees holding land. The passing of such an Act would undoubtedly be of great advantage to Scotland. Even if the measure were limited to the consolidation of the existing Statutes, already more than twenty in number, the advantage to lawyers and their clients would be considerable; but the benefit to the community will be vastly enhanced if the opportunity be taken to prohibit entails of every kind in future, and to enlarge the powers of all classes of limited owners of land in Scotland.

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Reviews of Books.

The American Commonwealth. By James Bryce, Author of "The Holy Roman Empire," M.P. for Aberdeen. In Three Volumes. London and New York: Macmillan & Co., 1888.

One of the things on which an American reviewer of this already-famous work feels impelled first of all to comment is the character of its reception. It is decidedly worthy of note that the book seems to have given rise to equal pleasure and admiration on both sides of the Atlantic. This is not only a high tribute to its qualities, but a significant evidence of an important change of sentiment which has been going on in America during the last twenty or twenty-five years. Before the Civil War, a European book upon America could not easily secure the favour of the American public save by almost unrelieved laudation; national sensitiveness to European criticism was exceedingly acute. But from that tremendous conflict the American nation emerged adult and mature, able to look upon itself and the world around it with more sobriety and discrimination, and to examine its characteristics and modes of life with an externality of view unknown to the preceding generation. Mr. Bryce makes full and free statements of the defective and evil elements in American politics and government. An American who loves his country can hardly fail to rise with deep pain from the reading of some of those chapters in which Mr. Bryce has described systematically the faults and evils which are individually familiar to the reader, but which, thus described, come upon him with cumulative effect. But he is likely, in these days more than ever before, to recognise the justice of what is said thus in friendly criticism, and to prefer the book which gives instruction to that which feeds national vanity. Perhaps, too, it may be assumed that the warm reception with which the book has been received in Great Britain is due not alone to its remarkable excellences, but in part also to an increasing interest in American affairs which begets and is begotten of a kindlier feeling toward the younger English nation than was once entertained or, perhaps, deserved.

But to turn to the book itself. Seldom indeed has any nation received, at the hand of a foreign observer, the gift of a description of its political

anatomy and physiology so thoroughly complete and just. America is greatly indebted to Tocqueville's remarkable exposition, written fifty years ago. But Tocqueville's account, acute and thoughtful as it is, is far inferior to Mr. Bryce's in fulness and precision of detail, in the attainment of reality. He often seems a political theorist, drawing illustrations of his theories from American democracy, rather than a student whose thoughts take their origin from things actually observed. In a word, his politics breathe the philosophical spirit, where those of Mr. Bryce breathe the scientific spirit of our time. Rarely, however, has the scientific spirit in politics been so completely followed. Again and again does the American reader—and the more often the better acquainted he is with the institutions of the United States—find himself called upon to marvel, first, at the minute accuracy of the information respecting those institutions displayed by a European writer; again, at the extraordinary completeness of his presentation; and thirdly, at the vigilant discretion with which all non-scientific material has been excluded. This last deserves a moment's special comment. As England grows more democratic, Englishmen grow more and more into the habit of resorting to American experience for examples of political arrangements or results. It must have been obvious to Mr. Bryce that a book like his would be frequently used as an arsenal of political weapons. The temptation to be constantly making applications and pointing morals was therefore strong, and we ought therefore to bestow high praise upon the self-control with which he has avoided this temptation, or perhaps one ought rather to say upon the qualities of mind which made the temptation less strong to him than it would be to thinkers less thoroughly disciplined.

European and American writers have been hampered by two different prepossessions in their treatment of American institutions, and have thereby usually failed to draw a true and well-proportioned picture of the whole system. European writers have brought with them in their minds the general framework or scheme of governmental institutions common to European states, have unconsciously referred American institutions to this scheme, have described as significant those parts which correspond to significant elements in the European scheme, and have taken less interest in other parts and described them but meagrely. In reality, the whole scheme of things is in many ways different in America, and a distorted view is given, unless one recognises this and discards at the outset any prepossession that stands in its way. It is one of the signal merits of Mr. Bryce's book that he has done this. He has given their true place to the governments of the States and the system of party organisation, the two elements in American political arrangements most foreign to European experience. These are elements which occupy a vast space in the actual configuration of affairs, of the latter of which he rightly says that these organisations "form a second body of political machinery, existing side by side with that of the legally constituted government, and scarcely less complicated;" and to

them, with the inclusion of local government, he is not wrong in assigning the whole of his second volume. The same rectitude of vision appears also in minor matters.

American writers have not only been led into these errors of inapt classification and disproportionate emphasis, but have been subject to another source of error of their own. This is of the sort which Lord Bacon called *idola fori*. The application of the phrase, "the Constitution of the United States," to the particular document in which the brief outline of the federal system is written down, an application which in the minds of most Americans is nearly the exclusive one, has brought it about that American works professedly treating of the American Constitution have, for the most part, been confined to comment on that document. In reality, not only do great portions of the American systems of government lie quite outside the field of that document, as, for instance, the portions spoken of in the preceding paragraph, but even considerable portions of the federal government itself are not mentioned in it, but have grown up either from it or outside of it. Mr. Bryce is among those who have not only perceived this, but perceived it in its full force and extent. In other words, while the distinction he so forcibly points out between rigid and flexible, or written and unwritten constitutions, is a vital one, it is not to be forgotten that, over and above its written constitution, the United States has, if one may so say, a large amount of unwritten constitution; and Mr. Bryce has had a sufficient eye for reality to see and adequately to use this fact.

There are, however, a few matters which one would be glad to see treated with more fulness, especially because of the important place they hold in American political life. One such is the matter of contested elections to legislative bodies. To an Englishman this seems an unimportant matter; and so it would be in the United States if the method of dealing with it were what it should be. It is only the gradual introduction of better methods,—by Mr. Grenville's Act in 1770, by Sir Robert Peel's Act, and by the Act of 1868 referring election petitions to the judges—that has reduced it to unimportance in England. It was not unimportant in the age when Sir Robert Walpole's Ministry fell by reason of defeat on the Chippenham election petition. Now the American House of Representatives and the legislatures of the States are, in this matter, in almost as bad a state as the House of Commons was before the passage of the Grenville Act, when all such cases came before the whole House, and were decided by the House on party motives, so that, as Mr. Lecky says, "A considerable portion of the members of the House of Commons owed their seats, not to the electors, but to the House itself." Something like this is true to-day of American legislative bodies. It is true that a Committee of Elections prepares the case, and often virtually decides it, but that Committee is always as much a partisan body as the whole House before which the case comes for final decision. It is obvious how demoralising an influence in the governmental system must be exercised

by even a few cases such as these in Federal and State Legislatures; and cases of contested election occur in greater or less number nearly every year. Mr. Bryce says, speaking of the Federal House of Representatives, "As a member is elected for two years only, and the investigation would probably drag on during the whole of the first session, it is scarcely worth while to dispute the return for the sake of turning him out for the second session" (i. 169, 170). What makes it worth while is the $5000 of salary *per annum*, and the excessively large allowance for "mileage," which sometimes amounts to $1000 more. Instances have therefore been known in which contestants have been seated in the last days of the second and final session, and have then drawn their pay for the two years' service to which it is decided that they were entitled.

Something similar may be said of the practice of "gerrymandering." This abuse, dismissed with a sentence, might well have received a greater emphasis; for it has become almost universal, and ingrained into the political habits of the American people at least as firmly as the "spoils" system itself, so that it is a difficult matter to induce the average American voter to see any harm in partisan arrangements of the boundaries of electoral districts, provided it is not pushed to an absurd extreme. It may be worth while to add that Mr. Bryce is slightly in error in his statement of the connection of the gerrymander with Ellridge Gerry, of whom he says that he, "when Massachusetts was being re-districted, contrived a scheme which gave one of the districts a shape," &c. (i. 165). Gerry was governor at the time. The scheme originated in the legislature, and Austin, in his "Life of Gerry," says that the governor advised his party associates in that body against it. The main odium does not belong to him, therefore, though it is true that when the bill came up before him he failed to veto it. It is perhaps of interest to know that the first instance of gerrymandering for Congress seems to have been that involved in a redistricting scheme put in operation in Virginia by Patrick Henry, in the autumn or winter of 1788, in order to secure the defeat of James Madison.

A third suggestion may be ventured, ungracious as it seems to find fault with a work for which Americans owe so great a debt of gratitude. It may be observed parenthetically that the reviewer, who desires to find fault with the book, will find himself almost wholly confined to suggesting the inclusion of this or the heightening of that statement (in regard to which the author may very well be supposed to have his own views of fitness or proportion to maintain *per contra*); for as to incorrect statement of important facts, there is hardly an instance of it to be found in the whole three volumes,—a most astonishing thing when one thinks of it. But, after urging that two evils, upon which Mr. Bryce touches, are so pervasive in their effects that the black spots which they represent in the picture might have been made larger, it is pleasant to call attention to a place in which a fuller treatment would have brought better elements of American public affairs into prominence. Of the three departments of government, between which

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the federal constitutional system attempts so completely to discriminate, Mr. Bryce gives least space to the executive department. This is wholly reasonable, and his treatment of the office of president leaves nothing to be desired. But one would be glad to see him devote a few more pages to the organisation and conduct of the executive departments, beyond the few in which he treats of the members of the cabinet. For, in spite of all the enormous and wide-spread evils with which the spoils system has afflicted the country, and in spite of all the injury it does to the public business, the organisation and management of the executive departments of government is a strong point in the American system, and one which well displays certain of the nation's most noteworthy characteristics. The exclusion of executive officials and especially of cabinet ministers from the legislative bodies is frequently commented on by European observers as weakening the executive, and no one has better stated the evils of this want of close connection between the two than Mr. Bryce. But it has this compensation that it makes it possible to put at the head of a department a man who, though perhaps a poor speaker and little apt successfully to defend the interests of his department in a parliament, may have exceptional gifts for the special business of administration. Such men are more than ordinarily numerous in the United States, and numbers of them have from time to time occupied themselves with its public business. The result is that the organisation of the executive departments is in many respects excellent, and their methods of managing business presents many interesting points capable of generalisation. This is one of the reasons why the unreformed system of appointments to office does not produce as pernicious effects as a European observer would be led to expect. The spoils system is immensely harmful, but the business talents of the nation neutralise its evils to a surprising extent.

It is one of Mr. Bryce's many merits that he so clearly perceives and sets forth the extent to which the defects of American political machinery are in part corrected in practice by the operation of national qualities, without which they would prove disastrous. A description of that machinery, without reference to those compensations, would do America much injustice. It has to be said that the nation often contents itself with crude devices in matters of politics; but it often happens also, that devices which look badly on paper, are made to work fairly well in practice. An instance of this is the elective character of the judiciary in the States. Indeed, Mr. Bryce's treatment of the judiciary is a particularly excellent portion of his book. Especial praise belong to his luminous exposition of the real character of the judicial function of pronouncing upon questions of constitutionality. His thesis that this is a simple and necessary incident to the function of declaring the law, possessed alike by State and Federal judges, might, did space permit, be re-inforced by a further discussion of the cases in which State Courts pronounced laws unconstitutional before the erection of the federal judiciary. *Trevett* v. *Weeden*, if it was such a case,

which a Rhode Island critic has recently doubted, was not the first of them. Among the earlier instances was one, the famous case of *Rutgers* v. *Waddington*, 1784, in which an Act of the Legislature of New York was declared void, by reason of unconstitutionality, by no higher a Court than that of the mayor of New York city!

Mr. Bryce's description of the organisation of political parties in the United States, a description filling the second half of the second volume, is especially worthy of admiration because the American literature of the subject, is so far as systematic efforts at description are concerned, exceedingly meagre. He gives practically the first extended treatment of this complex and elaborate system, and gives it with extraordinary accuracy, comprehensiveness, and good judgment. His remarks on the history of the parties are excellent, too, though his introduction disclaims any intention of going fully into historical matters; and the few little errors which have crept in here and there in the course of the three volumes occur mostly in matters of history. In respect to the generalisations with which the author concludes this chapter, some will be inclined to doubt whether the two parties which may be said to run through our political history are rightly to be characterised as the parties of liberty and of order respectively (ii. 340, 341). In some respects the cleavage coincides with this division, but in some it does not. The identification is a true one when applied to the times when the party in opposition to the Democrats was the Federalist party, but less true in the days of the Whig and the Republican parties. Mr. Bryce is right, however, in thinking that there is a pervasive distinction between the two parties throughout their histories; indeed there is a distinction so vital that the ordinary division into loose-constructionist and strict-constructionist, according to attitude toward the Federal Constitution, is only incidental to it. The term, party of liberty, may very well stand for the Democratic party, which, during its continuous life of nearly a century, has had in the main the simple creed of American political principles—the principles of democracy in the general sense of that word. The average American has had in quiet times no other articles than these in his political creed, and has therefore adhered to the Democratic party. But over against this party of political principles has been set, from time to time, a party mainly characterised by devotion to the furtherance of political measures, a party of progress, a party seeking definite political changes. In other words, there have three times arisen from the mass of American democracy bodies of men united in the purpose to add to or alter our political fabric—the Federalist, Whig, and Republican—all of whom may, be grouped together as a party of political measures more securely than as a party of order. The relation of this party to the constitution is involved in its main purpose. It is loose-constructionist because it wishes to get certain definite things done, yet is working under an instrument. What confirms this last deduction is that all those minor parties in the United States which have been parties of political measures—parties,

that is, of definite, limited programme,—have had loose-constructionist platforms.

It is interesting to note the strong sentiment of admiration and interest which Mr. Bryce entertains for Alexander Hamilton, and his feeling that Hamilton's countrymen "seem to have never, either in his lifetime or afterwards, duly recognised his splendid gifts" (ii. 328). It is interesting to note it because one may suspect that there is a special reason why Hamilton should be better appreciated by a European statesman than by his own countrymen. Hamilton was in fact essentially a European statesman. He was of the same school as Bacon, Strafford, Richelieu, Cromwell, Bismarck, the school in whose ideals of government the office of the individual statesman has its highest place, the school of administrative statesmen who would have a nation ruled by the person of weightiest brain. Herein the course of the Federalist party is different from that of all other parties in the history of the United States, that it proposed to itself these European ideals of statesmanship and of political conduct. But in a new country the part played by natural conditions, economic, and other, is proportionally far larger, that played by individual statesmen proportionally far smaller than in Europe. America therefore turned away in large measure from the political ideals of Hamilton and the Federalists, and in the present age it may probably be true of the whole party, as of Hamilton, that a European is likely to appreciate them more highly than Americans do.

The admiration of the reader increases as he enters the third volume, which treats of the nature and action of public opinion, the general characteristics of American democracy, and the social institutions of the United States. These are subjects which call for political generalisations of the highest order, and bring out the best qualities of Mr. Bryce as a political observer. Every page shows comprehensive study, a catholic spirit, and, above all, discrimination and soundness of reflection. Many as are the generalisations which are made in this volume, there are few that will not command the general assent of thinking men, when the form in which they are cast is exactly noted. Mr. Bryce's style is grave rather than brilliant; but it has the precision of statement belonging to scientific writing, and is occasionally warmed with a touch of genuine enthusiasm for what is best in America. Americans will not be slow to recognise this trait, as well as the just faithfulness of portraiture which has made so many pages of the book sad reading to them. They will highly appreciate the friendly spirit which has presided over the making of a book destined long to be the classical description of their public life, and will gladly reward its author with grateful feeling as well as with enthusiastic admiration.

J. Franklin Jameson.

The Theory of Law and Civil Society. By AUGUSTUS PULSZKY (Dr. Juris.), Professor of Law at the Royal Hungarian University of Buda Pest, Corresponding Member of the Hungarian Academy of Sciences, Member of the Hungarian Parliament. London: T. FISHER UNWIN, 1888.

This important contribution to social, political, and legal science, secures special interest at the outset from its relations to the representatives of the contemporary English Schools of thought. In a short preface the learned author acknowledges his obligations to Herbert Spencer for his general scientific views, and to the late Sir Henry Sumner Maine for his guidance in the historical and scientific study of law. Among other modern English writers, Professors Holland, Pollock, and Clark, and Mr. Lightwood, are also mentioned as having furnished valuable suggestions and materials. It can therefore no longer be said, as was done a few years ago by Sir Henry Sumner Maine, that the English School of Jurisprudence is unknown or ignored on the Continent. In Professor Pulszky—thanks to the wide and fruitful influence of Sir Henry Sumner Maine himself—the School has found a disciple and exponent who is able to sustain its best spirit and to extend its latest work. His treatise, originally published in Hungarian, has been rendered into English by himself, with some assistance, in order to make his views more accessible to English readers. The book will be found well worthy of study even by those who are most familiar with the writings and doctrines of the English School. Although its style is somewhat involved, and an occasional indefiniteness in the technical phraseology sometimes dims the clearness of its thought, yet it everywhere displays massive knowledge of the subject, remarkable power of systematisation, and vigorous reflection. The eminent Hungarian Professor has certainly repaid his debt to his English masters with usury.

The work is divided into two Books, of which the first is entirely occupied with introductory methodological discussions. It may be thought that a good deal of this introductory matter might have been spared, but it is valuable as showing the author's standpoint and method, and as an evidence of his scientific conscientiousness and thoroughness. In the main, he follows Herbert Spencer in his review of "Science and its Classification" (chap. i.), and in his discussion of "Method" (chap. ii.). His standpoint is entirely empirical and historical, and in consequence, he follows the great founder of the Positivist School in rejecting the theological and metaphysical conceptions. A point of special importance, and even originality, is his 'Theory of Ideals.' This theory arises from the felt insufficiency of mere generalisation from empirical phenomena; and it is devised, in the absence of purely rational ideas, to explain the progress of the historical development and to make up for defects in the historical record. It is ingenious, and it would be interesting to pause upon it, and to consider its consistency and validity in connection with the scientific theory of the author as a whole,

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but our space will allow only the briefest objective summary of his positions. The subject-matter of *the Philosophy of Law and Civil Society* is a department of Social Science along with the other three sciences of Political Economy, Ethics, and Political Science (chap. iii.). The division of the Philosophy of Law and Civil Society into Public Law, Private Law, International Public Law, and International Private Law, shows what it is meant to include; and the relations of these constituent elements are explained in detail (chap. v.). It would be easy to criticise this division of the social sciences both as regards their order (Political Economy, Ethics, Philosophy of Law and Civil Society, and Political Science), as well as their distinction from each other. But this is subordinate, and we shall content ourselves with briefly following the author in his treatment of the material which he has marked out and defined for himself.

The second book contains the substantial discussion of the subject of the work. It is divided into three parts:—I. Society; II. The State; III. Law and Right. It is impossible to give here more than the merest summary of the rich, comprehensive, and valuable material presented under these heads.

Part I. contains the author's theory of the formation, development, and organisation of society; and he justly claims attention for it as the most important and original portion of his work. It presents a comparatively complete view of the evolution of the whole order of human society, as the author regards it. All social phenomena are founded upon and implied in the natural sociality of man; and the problem here before the author is to show how they have been all evolved out of this elementary basis, by a process of development, in which the natural interests, aims, and ideals of human life are gradually and progressively realised. He sketches the course of this evolution in clear and forcible outline (chap. vi.). The savage state was "originally universal," and out of it arose the first form of social organisation, under the conditions of kinship in "consanguineous society." This natural relationship has not yet been completely traced through its forms of promiscuity, polyandry, polygamy, exogamy and endogamy, but it gradually assumed definiteness in the family, and under favourable circumstances, in the patriarchal union, and in monogamy. This lowest stage of organic association widened into and became superseded by "the tribal society," under the settling influence and interest of local contiguity. Out of the tribal relationship there emerged "the communal society," with a wider range, higher interest, and more definite organisation. This, again, was succeeded by "the conquering society," occasioned by the interest of amassing wealth for consumption, and that of plundering by conquest, and taking shape in the superior force of a military people, on all the stages from kingship to Cæsarism. After this, again, comes "the ecclesiastical society," when the religious interest becoming predominant in the minds of men satiated with worldly aggrandisement, power, and enjoyment, obtains the supremacy, and organises institutions and means for real-

ising its supramundane aims and interests. The ecclesiastical society, after being for a time universal, is superseded by "the national societies," when the idea of nationality and patriotic sentiment have taken the place of the universal religious faith in the minds of the people. In chap. vii. the author elucidates in some detail "the mutual relations of the societies," and in chap. viii. he attempts to give a historical vindication and verification of his theory of the rise and succession of these forms of society by a survey of "the societies in history." This chapter shows great knowledge, force of thought, and constructive ingenuity, and is well worthy of the attention of students of the philosophy of history. The author's theory of social evolution assumes a relation of conflict between the different elements in society; and the advance from stage to stage is determined by the social wants, common necessities, interests, and ideals that arise in the course of this conflict in the consciousness of the community. The materials of the evolution are the general social phenomena of human life in their widest range, from the lowest animal manifestations of human nature in the savage state up to the highest point in the development. The evolution is organic, because it proceeds from the lowest undifferentiated phenomena by organic combination under the stimulus of a new vital interest; and the higher and more complex stages are founded upon and involve the simpler antecedent elements of the lower stages. The theory would thus account for the social development of human life in the past, and it at least tentatively adumbrates the higher developments of the future. The evolution of the social life of Europe has followed the essential lines of the theory generally in a normal way; and European society is now, under various stimulating influences, passing from the national form of association to an international common society occasioned and developed by industrial, economical, and commercial interests. And beyond this, looming dimly in the future, there is the appearance on the horizon of the coming of a cosmopolitan universal society which will embody and realise all the interests and aims and ideals that are most essential to humanity. "The federation of mankind based upon the external balance of national States, is the ideal of the future, as invariably pictured in the minds of the present generation."

Part II. exhibits the author's view of the State as regards its constituent elements (chap. ix.), its origin (chap. x.), and its aim, sphere of action, and ideal (chap. xi.). At every stage of the social development, the State is "the *dominant* society." It arises out of the collision and conflict of the various social elements or societies: and its function is to regulate and to control the social co-existence of the whole. It always includes more or less the co-existing vital interests of democracy, aristocracy, and monarchy. Indeed, "*every* society is of a democratic character at the time of its formation, aristocratic during the period of its struggle for development, and monarchical at the moment of its becoming dominant." The State is the society which creates law and maintains law. Its materials are individuals

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and social groups, and sovereignty is its principle attribute. The theocratical and metaphysical theories, as well as the theory of contract, advanced in explanation of its origin, are now to be regarded as superseded. An interesting account of the various theories of the aims of the State is given; and it is shown that the sphere of the functions of the State narrows with the growth of social consciousness, and widens with the increase of social aims.

Part III. passes on to discuss law and right as essentially arising out of the nature of the State. Law is defined as "the sum of the conditions of social co-existence, with regard to the activity of the community and of the individuals" composing it. Law is the will of the State as indicated or laid down by it. The notion of subjective right is distinguished from that of objective law, and their relations are analysed. The idea of right arises from a consciousness of power in the individual, and of his ability with reference to the assertion of his interest; it springs out of the struggle of man with the agencies of nature; it involves a circumscribed sphere of action, and obtains its legal form when it is sanctioned by the State, The conflicts between subjective right, as the subjective liberty to assert a claim, and objective law, as the command of the State, are harmonised objectively in justice, and subjectively in the disposition of virtue (chap. xii.). The "fundamental principle of law and right" is discussed in chap. xiii. In accordance with the standpoint of the author, he holds that this fundamental principle is not an absolute ideal, and that it is not immutable, but is only a relatively perfect standard and abstract of the highest social order. The various theories of the fundamental principle of law and right are classified and reviewed; and it is held that the development of right has run parallel with the law of the development of society; but this is not shown in detail. The concluding chapter (chap. xiv.), on "The Sources and Forms of Law," is a lucid and interesting statement, which should be of help to the student; but it does not contain much, if anything, that is special to the author. Through the usual categories and rubrics he is led up to the question of codification, which he touches in a moderate and reasonable spirit, avoiding the extreme view of Savigny and the German Historical School, without committing himself to the one-sidedness of Bentham and his immediate followers.

Such a work furnishes much material for reflection and criticism. It has the great merit of presenting a complete and lucid outline of the empirical theory of evolution in its application to society and the State. It comes opportunely at a time when the Darwinian theory of the struggle for existence, and the survival of the fittest, is under the keenest scrutiny in the domain of physical science, and is making way among us in the sphere of sociology. This ingenious and able application of the theory to the social phenomena with which it deals, cannot but stimulate and quicken the scientific interest of the students of social and political science who may give it a candid hearing. Those who still desiderate and believe in the possibility

of ultimate rational explanation will not be convinced that everything is contained here, but they must recognise the necessity of elucidating and enlarging the application of their own principle so as to embrace the phenomena thus presented. The contemporary historico-positive School has not only superseded the limited analytical method of Austin; but it has gone far to show that order and rationality are co-extensive in the process of evolution with all the manifestations of human nature. From every point of view, grateful recognition is due to Professor Pulszky for his able work, and the University of Buda Pest is to be congratulated on having so competent and accomplished a teacher.

W. Hastie.

The Law of Damages, a Treatise on the Reparation of Injuries, as administered in Scotland. By John Guthrie Smith, Sheriff of Aberdeen. Second Edition. Pp. 488. Edinburgh: T. & T. Clark, 1889.

The present treatise is rather a new work than a new edition of the familiar "Law of Reparation," published in 1864. English authority notwithstanding, we prefer the former title as more precise if less popular. Of the two great departments of law which respectively work out the principles "*alterum non lædere*" and "*suum cuique tribuere*," the former is the main subject of this book, contracts being considered only incidentally and in relation to the measure of damages. During the intervening years since 1864, complex forms of commercial and social activity have sprung up; new rights, duties, and interests have arisen, while old ones have been abolished or ascertained, or developed; numerous Acts have swelled the statute-book; and many judges have been adding daily to the Augean heap of precedents. This work, touching every province of human life or experience, could have been written only by one who had pronounced many decisions and turned over many law books. It bears the stamp of long industry and wide erudition in domestic and foreign jurisprudence.

As to how such a book should be constructed and arranged different men will have different opinions, from the arm-chair jurist, who desires a scientific exposition of principle holding on its even way unvexed by empirical vagaries, to the counsel militant, who pants after finding in the pause between two interruptions the one case needful to silence his adversary or distract the Bench. None will be quite satisfied or yet quite dissatisfied with the author's mode of treatment. Yet such distinct points of view as the Obligation, the Action, and the Judgment should be kept distinct. From the first point of view the subject may be approximately defined, and its primary divisions indicated in one proposition. Every unwarranted infringement of the legal rights of another in his person, property, or reputation, whether purposed or not, and every failure to discharge a legal duty towards another, in the manner reasonably practised

in the class of like cases, if loss is thereby caused to that other, obliges *ipso jure* the party so infringing right or failing in duty (either by himself or by those for whom he is responsible) to repair all injury which in ordinary course has resulted or may result to that other from his conduct. The action is simply, as a martial jurist has said, the obligation or right placed on a war footing. "Damages" is redress expressed in terms of "the universal solvent," but includes both reparation for injuries and compensation for breaches of contract. The Wrong, the Remedy, the Redress is the natural order of importance and exposition. English lawyers have been, till recently, so trammelled by forms of action that they have often tended to measure the wrong by the remedy, or test the existence of the right by their ability to discover a suitable writ in the lumber-room of common law. The author rather balances, from title to index, between these different notions, but his work may claim the merit, usually ascribed to the British Constitution, of being a judicious compromise leaning towards practical utility. As the Aberdonian delights to say of his dish of sheep's head, "It is fine confused feedin'."

The materials of the work have come out of many fields. References to the Civil Law are not wanting. The decisions of our own Courts are very fully cited, though one would have expected some mention under "Apology" of *Faulks* v. *Park*, 17 D. 247, and in connection with a master's responsibility under the Revenue Statutes of *Advocate-General* v. *Mathieson*, 1852, Douglas' Manual, 256. On points of principle not decided in our law, such as the responsibility of a lunatic's estate for his wrongful acts, or ripe for re-consideration—*e.g.*, the rights of a seceding minority of a dissenting church in the church property (the tenure by theological dogma favoured in the *Thurso* and *Kirkintilloch* cases having already become odious), Sheriff Guthrie-Smith makes judicious and suggestive reference to the leading American authorities. Many will think, however, that he uses English texts, cases, and phrases, somewhat too indiscriminately. English doctrines and decisions are of great weight on subjects such as Railway and Patent Law, less valuable on others such as slander, and on several points, where they proceed on principles different from those of our law, for instance claims for *solatium*, altogether misleading. As to the employment of English terms of law, "Tort," though abandoned in the land of its origin, we willingly entertain as a brief name for wrongs independent of contract; "confession and avoidance," one can make a shift to comprehend. But an alderman would stare and gasp if Addison or Ball discoursed to him of "assythment," and similarly magistrates of Scottish burghs may be perplexed beyond all help from their assessors by Guthrie-Smith's sayings on "bailments" and "the duty of bailees."

The first three chapters are introductory and discuss—(1) The Grounds of Responsibility, (2) Delict and Contract, and (3) The Limitations of Responsibility. They will repay a careful study. But the definition of Negligence is less than satisfactory. And one regrets that the author in

treating of the degrees of *culpa*, should have countenanced the hasty notion of some English judges that the distinction between *culpa lata* and *culpa levis* amounts to nothing but the adding or taking away of a vituperative epithet. The distinction rests on the substantial line dividing the expert or specialist, who is answerable for any want of such skill as is ordinarily possessed by experts of his class, from the non-specialist who is answerable only for any want of such intelligence and diligence as are shown by men of ordinary prudence in affairs. It is immaterial whether the employment of the expert in the particular case has been gratuitous or not. A distinction recognised by every code in Europe, and rooted in general jurisprudence is not to be overthrown by a breath even of the judicial mouth. It may be noted that in *Raes* v. *Meek*, 15 R. 1033, the Lord President thought gratuitous testamentary trustees bound only to such diligence and knowledge as they actually possess in the management of their own several affairs, while Lord Shand declined to recognise any such exception to the general rule, regarding it as novel or advanced solely by Stair. But the "*diligentia quam suis*," failure in which is sometimes called "*culpa lata in concreto*," is no new standard of duties arising out of relationships involving special confidence—partnership for instance. If A. appoints as trustees on his estate, consisting of foreign investments, his two brothers, one an experienced stockbroker and the other an ignorant ploughman, is it reasonable to suppose that he relies on either more or less than the aptitude or capacity he has observed each of them use in his own business, or is it just to mete out to both these trustees the same measure of legal responsibility?

The subsequent chapters deal successively with—(4) The Church and the Civil Law; (5) Trespass to Person and Property; (6) Road and Railway Accidents; (7) Collisions at Sea; (8) Fraud; (9) Injuries to Land; (10) Defamation; (11) Abuse of Legal Process; (12) Infringement of Copyright Patent Trade Marks; (13) Master and Servant; (14) The Measure of Damages, several of which have singly furnished matter for many volumes. Chapters 6, 10, 11, and 12 are specially well done. In general the leading doctrines in each branch are carefully expounded with notices of, or materials for tracing their development. On topics bristling with difficult points and overlaid with conflicting opinions, such as "Liquidate Damages or Penalty," "Contributory Negligence," and "Compensation under the Railway Acts for Lands injuriously affected," the author's guidance may be followed with reasonable confidence. But he sometimes states propositions more broadly than is warranted by the cases he cites in support, or by any general principles of law—*e.g.*, at p. 107, "A person complaining of the judgment of a Church Court as illegal, must exhaust the remedies which the Church itself provides before coming to the Civil Court for redress." This does not hold when the illegality complained of consists in the judgment being *ultra vires* of the Court pronouncing it. The author's anxiety for condensation has frequently spoiled his style and occasionally made the text almost unintelligible except by reading the cases cited, as at

p. 124, "If two persons are both *versantes in illicito—e.g.*, riding furiously along the road, the one is liable for all the harm done by the other, *M'Lachlan* v. *Monach*, 2 S. 506."

Finally, there are many valuable hints on incidental points of practice and evidence scattered through this volume. It has a good index and a fairly accurate table of cases, and contains a useful Appendix of Statutes and Forms of Pleading. May one hope that in the next edition, the chapters will be re-arranged, divided into sections, and prefaced each by a head-note of sectional titles for the greater comfort of the reader.

N. J. D. KENNEDY.

The Whewell Lectures — International Law. — A Series of Lectures delivered before the University of Cambridge, 1887. By Sir HENRY SUMNER MAINE, K.C.S.I., late Master of Trinity Hall, Cambridge, and Member of the Indian Council. London: JOHN MURRAY.

This is the last work of the late Sir Henry Maine. It is made up of twelve lectures delivered by their author in 1887 at Cambridge as Professor of International Law on Dr. Whewell's Foundation. They were not published during Sir Henry Maine's life; and his executors, Mr. Frederic Harrison and Sir Frederick Pollock, have printed them from his draft, without alterations, except to clear the sense, and also without the correction of a few obvious slips that would have been avoided had the author himself revised his work for the press.

The lectures cover only a small part of the ground usually occupied by treatises on international law. Two of them discuss the sources and sanctions of international law, and two are devoted to an exposition of State sovereignty and its fundamental rights. The rest of the course is confined to the law of war, and consists in the main of a commentary upon selected texts of such documents as the manuals of the rules and customs of war prepared for the use of officers on the field, the Geneva Convention, and the report of the Brussels Conference. Of private international law there is no word. The injunction of Dr. Whewell in founding the professorship was that the lecturer should make it his aim to lay down rules and suggest measures which might tend to mitigate and finally extinguish war; and Sir Henry Maine keeps the injunction always in view.

Sir Frederick Pollock has said that the subject of this work is not one which affords much room for historical discoveries or speculation, since the history and literature of international law are altogether modern. This is to a great extent true, but Sir Henry Maine's contribution to the study of international law has no conspicuous value except in so far as it brings the light of the historical method (which was Sir Henry's way of thinking out the problems of law) to bear upon this field of jurisprudence. When he expresses his favour to the total abolition of the capture of private property

by sea, for example, he merely adds the weight of his authority to a view already familiar to all students of the science. International law has made its way not by the authority of persons, however, but by the moral force of its doctrine. As Sir Henry Maine puts it, it created a law-abiding sentiment; and gained something of a legislative authority, because, like Roman law, it has a power of self-propagation. And if any part of the lectures should have a power of self-propagation it will not be the part in which rules and propositions are laid down, but the parts in which the author touches upon the history of a rule or a doctrine of international law, and explains its significance by reference to the state of the circumstances in which it arose or was developed. When he says that "peace is a modern invention;" when he establishes an analogy between international law and the Roman *sacramentum*, in which his historical sense sees "a judicial proceeding taking the place of a fight;" when he suggests that the famous war of Troy was a piratical expedition of ancient times, and explains the history of the law of war by sea as "a movement from *mare liberum* to *mare clausum;*" and when he sees in the name "Queen o' Scots" a memory of a time when sovereignty was conceived as sovereignty of a tribe, apart from all considerations of territory and territorial right—it is in these and similar passages that he makes a personal contribution to the study of international law, and stimulates by suggesting new methods of inquiry. The novelty of the point of view, coupled with the old accomplishment of style that graces all Sir Henry Maine's books, makes these lectures legal literature in a sense in which the words can be applied to only a few law books. But they give far from an exhaustive view of their subject, and touch their topics without expanding on them. Sir Henry Maine's doctrines are always so neatly expressed as to have a great air of clearness. But those students of jurisprudence who claim for the Law of Nature that it has an absolute existence as a law intrinsic and essential to rational creatures will find it difficult to arrive at a clear conception of the Law of Nature which Sir Henry apparently interprets, in one place, as the *jus gentium* seen in the light of the Stoic philosophy, and, in another place, as a system of rules derived by philosophers from an imaginary state of nature supposed to exist in prehistoric times.

G. P. M'Neill.

Railway Rights and Duties; a Summary of the Law relating to a Railway in Operation. By James Ferguson, Advocate. Edinburgh: William Green & Sons, 1889.

The Law of Railways has been formed during the last half century, by the ceaseless action of our Legislature and Courts of Law, in adapting to novel circumstances many of the old familiar principles of law and equity.

The process of adaptation has always been interesting, and sometimes amusing, as, for example, when the venerable doctrine of *culpa lata* is transformed into "the diligence prestable in connection with the re-delivery of empties." But the action of the Legislature has not been invariably directed by far-reaching views, and hence Railway Legislation has too often been of a tentative and piece-meal character. Thus, each special Act incorporating a Company and authorising its undertaking, originally contained the whole law applicable to the construction and management of the railway; and it was not till the year 1845 that the clauses common to all Railway Acts were codified by the three Consolidation Acts known as the Companies Clauses, the Lands Clauses, and the Railways Clauses Acts. Again, when railways were first constructed, they were regarded as analogous to turnpike roads, and it was contemplated that the persons using them would conduct their own traffic in their own trains, on payment of certain tolls to the owners of the lines; but experience soon showed such a system to be unworkable, and the result has been to give to the owners of the lines a practical monopoly of the traffic. This has necessitated legislation of a different type, for the protection of the railway companies' customers, culminating in the Railway and Canal Traffic Act of 1888, by which the law of merchandise traffic has been revised and put under the cognisance of a permanent Commission, invested for the first time with all the attributes of a Court. The fact that under this Act a Scottish judge has been made *ex officio* a member of the new Court in all Scottish cases, without being required to attend any sittings out of Scotland, opens up a new prospect to the Scottish Legal Profession.

Mr. Ferguson, who is not unknown in other departments of literature, has thus chosen an opportune time to publish the treatise now under review. It professes to be a supplement to the well-known book by the late Mr. Deas upon "The Law of Railways applicable to Scotland," published in the year 1873. But it is specially directed to "the relations of the railway in operation and use, as a going concern, conducting its business, and transacting with the public, with individuals, with its servants, and with other companies." There is no doubt that such a treatise has been much desiderated for several years, not only by Scottish lawyers, but also by traders and other railway customers who require a trustworthy guide to recent legislation and judge-made law in so far as applicable to Scotland.

In acting as guide, Mr. Ferguson has had a difficult task to perform, but we are of opinion that he has performed it well. His book consists of five parts dealing with—(1) Traffic, its rates and regulations, with the provisions of the Railway and Canal Traffic Acts; (2) The company as carriers of goods, of live stock, of passengers' luggage, and of passengers; (3) The company and the public, other than passengers and traders; (4) The company and their servants; and (5) The company and the Crown, including the conveyance of troops and mails, national defence, the telegraph system, and passenger duty. To these are added a short digest summarising

the cases decided in the Scottish Courts upon other branches of railway law since the publication of Mr. Deas's book, and an appendix of the Statutes, in so far as not repealed, relating to railway and canal traffic, and other railway Statutes passed since the year 1872. These are specially dry and technical subjects, but Mr. Ferguson has treated them with such literary skill as to make his book quite readable, and in some chapters—such as those on carriage of passengers—interesting, and even amusing. Thus, one cannot help sympathising with the barrister (p. 187) who, on a foggy night in Christmas week, owing to derangement of the railway traffic, was confronted with the alternative of spending the night at a small station where there was no accommodation, and no refreshment except non-alcoholic drinks, or of going on in a second-class carriage attached to a goods train. Our examination of the book further justifies us in commending it as accurate in its statements of law. In one or two instances, however, Mr. Ferguson has failed to perceive that English decisions to which he refers are inapplicable to Scotland. Thus, at p. 216, he states that a railway company "cannot be restrained by injunction from taking measures to prevent prescriptive rights being acquired, constituting an easement of light and air." It is trite law that in Scotland such an easement or servitude cannot be acquired by prescription. We may also point out that in dealing with the English decisions there have been some omissions which should not have occurred. Thus, although the important case of *The Bernina* was appealed to the House of Lords, and the decision of the Court below affirmed on 24th February 1888, Mr. Ferguson does not state this or give any reference to the House of Lords report, either at page 155 of his book, where the case is mentioned, or in his "note of cases reported since the sheets went to press." So also the decision of the House of Lords on February 24, 1888, in *Bunch* v. *Great Western Railway* (13 App. Cases, 31) —in which the reasoning in *Bergheim* v. *Great Eastern Railway Co.*, 3 C.P.D. 221, was disapproved—seems to have been overlooked, and the decision in *Cole* v. *Miles*, 1888, not quite correctly appreciated. These defects, however, are comparatively trifling, and but little detract from the genuine merits of the book.

J. H. B.

Law Examination Manual for Students. Compiled by WILLIAM WHYTE, Solicitor Supreme Courts. Edinburgh: T. & T. CLARK, 1889.

We cannot say that we are favourably impressed with this book. It is essentially a book of "*cram*," and as such objectionable. In his preface the author (who seems to be a lawyer of some ability) says, "Although written principally for those who may be studying for the Final Law Agents' Examination, it is also intended for the use of all who are reading

for class examinations or degrees in law, and it is hoped that it may supply a much felt want to those who desire to take advantage of the Act of Sederunt of 1886, and to present themselves for examination without having attended the law classes at a university." We hope not; and we venture to think that such factitious aids to study are injurious rather than beneficial. Only the most scrappy information can be given, and the student is apt to trust to his memory where he should rely upon his general comprehension of a subject. Nor are we satisfied with the author's treatment of his subject. Take, for instance, the law as to registration of long leases; half-a-dozen questions about it might be asked by an examiner, and yet the only reference to it we find is on p. 89, where the Act is mentioned, and it is said that it "allows leases for thirty-one years or more, and of land under fifty acres in extent, to be recorded in the Sasine Register." Or taking the subject of diligence (pp. 38-41), we find here a certain looseness of statement. It is not accurate to say that the old forms of diligence prior to the 1838 Act are *never used.* They are used in charges for payment of composition bonds, and against co-cautioners, and one or two other cases. See Mackay's Prac. i. 65. As regards arrestments and poindings, it is said that *arrestments* "within sixty days of sequestration are not effectual," which is accurate; but why is the same thing left unsaid regarding *poindings?* Then, as to imprisonment for debt, if it is "*limited*" in the case of alimentary debtors, are we to understand that it is unlimited as regards debtors for rates? Six weeks is the period for such debtors. A list of Latin maxims culled from the Institutional Writers, with translations, is given. The translations are in a number of cases defective. We would not translate "*assignatus utitur jure auctoris*" as "an assignee enjoys the same right as his author;" nor "*dies nec cedit nec venit*" as "In annuities which depend on lives, money is not due till day of payment;" nor "*unumquodque eodem modo solvitur quo colligatur*" as "a written deed is discharged in the same manner." We may remark, too, that "*del credere*" and "*liege poustie*" are not Latin maxims; the first being Italian, and the second Anglo-Norman. We do not think an examiner would do much credit to himself by framing such a question as the following in the Law Examination Questions:—"What assaults, partaking of the character of attempts to murder, are by statute capital offences, and are they now?"

Notes on Decided Cases.

Bankruptcy Oaths by Creditors.—At lovers' perjuries they say Jove laughs; but the Court seems disposed to view with greater sternness the unsworn eccentricities of creditors in a sequestration. The case of *Blair* v. *North British and Mercantile Insurance Company*, Jan. 8, 1889, 16 Ret. 325, merits attention on several grounds. It relates to what is matter of every-day importance in bankruptcy law—the solemnities required in a creditor's affidavit to the verity of his claim; it is distinguished by the Lord President's terse and vigorous denunciation as "utterly illegal and also immoral" of a practice which business men still insist on defending; and it involves, when contrasted with the case of *Wylie* v. *Kyd*, 1884, 11 Ret. 968, the, at first sight, anomalous result that an affidavit may be utterly bad as a ground for awarding sequestration, and yet perfectly good as a ground for sustaining the appointment of a trustee on a sequestrated estate. But the conflict between the two decisions is superficial merely; on closer scrutiny of the judgments it entirely disappears, and, while it is almost inevitable that candidates for trusteeships should attempt, by the aid of Blair's case, to reopen the decision in Wylie, it seems quite inevitable that that decision must be repeated for the reasons there laid down.

Touching the general question decided in Blair's case, the propriety—or rather the necessity—of the decision is very manifest. The Bankruptcy Act, 1856, provides that every creditor petitioning, or concurring in a petition, for or claiming in, a sequestration, must produce not only an account and vouchers of his claim, but also "an oath;" and "such oath shall be taken by him before a judge ordinary, magistrate, or justice of the peace, to the verity of the debt claimed by him." Blair's case simply decides that *an oath must be taken*, and that if a creditor produces not an oath, but a paper which falsely records the taking of an oath that was never taken, a sequestration based on such a paper is liable to be recalled. It is clear that the Court could not sustain a document asserting that the creditor had been "solemnly sworn and interrogated," once a proof disclosed that he was not sworn at all. But it is strange that in the argument against an allowance of proof no reference seems to have been made to the English authorities relating to affidavits. In England it would seem that the presumption,

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omnia rite esse acta, in the case of an affidavit is not, as in Scotland, *præsumptio juris* only, but also *de jure*. Thus in Taylor on Evidence, 8th edition, vol. ii. p. 1312, we read that, on a trial for perjury in respect of false statements contained in an affidavit, "the signatures of the defendant and of the person whose name is attached to the *jurat* must be proved; after which the Court will presume that the oath was duly administered." The authorities cited fully substantiate this statement. The language of Abbot, C. J., in *Rex* v. *Spence*, 1824, 1 C. and P. 260, and of Erle J. in *Regina* v. *Turner*, 1849, 2 C. and Kirw. 732 (both perjury trials), is specially distinct and emphatic; and the cases of *Miles* v. *Bough*, 1842, 3 A. & E., Q.B. 845, and *Cheney* v. *Curtois*, 1863, 13 C.B., N.S. 634, supply confirmatory doctrine. Exclusion of proof of irregularity in taking the oath is not absolutely affirmed in these cases, but such exclusion may be legitimately inferred from them. And there is much reason in the view that a man, who has deliberately subscribed to a falsehood in an affidavit *ex facie* regular, shall not escape the pains of perjury (or of taking a false oath, as the case may be—see *Barr*, 1839, 2 Swin. 282), by proving that he was not put on oath. Why should he not be barred from pleading such defect, just as one who wittingly neglects a solemnity in executing a deed is barred from taking advantage of his own irregularity? See *Baird's Trustees* v. *Murray*, 1883, 11 Ret. 153. In the only Scotch case nearly touching this question—a case where a witness sought to excuse admitted falsehoods in an affidavit on the ground that he had not been sworn—the Court severely censured the witness, and directed the proceedings to be laid before the Lord Advocate, *Hall* v. *Colquhoun*, 1870, 8 Macph. 891.

It is likely that, in future, sequestration affidavits will be frequently challenged on the ground successfully maintained in Blair's case; and it is therefore worth considering whether that ground of challenge cannot be wholly removed. Would not a simple alteration on the usual style of affidavit end the difficulty? That style, be it observed, has no statutory sanction; and if, instead of reciting that the deponent has been solemnly sworn, it ran, "I, A B, hereby swear, as I shall answer to God, that what is hereinafter written is the whole truth, and nothing but the truth," we would have a *written* oath, attested by the signature of the deponent, written in presence of the subscribing justice. This would surely have all the solemnity and binding force of an oath verbally administered. Further, the suggested style would be an exact parallel to the style now prescribed for written affirmations by the Oaths Act 1888. That Statute, 51 & 52 Vict. c. 46 (passed 24th December 1888), enacts by section 4 that "every affirmation in writing shall commence, 'I, , of , do solemnly and sincerely affirm.'" Presumably an affidavit so worded would be unchallengeable, and it seems reasonable to suppose that an affidavit containing the oath *in gremio* would be unchallengeable likewise.

J. F. M'L.

Jurisdiction — Inferior Criminal Courts — Summary Procedure. — The law, which is proverbially censured for its delay, is not always free from the danger of falling into disrepute on account of the rapidity of its action. Summary procedure which, especially in criminal matters, has to a very great extent supplanted the old order of things, may, and in many cases undoubtedly does, lead to the administration of but summary justice. The machine which has been devised for the swift and certain punishment of the criminal may, unless carefully handled, become a source of danger to the innocent. There is nothing which it is more important for those who are concerned in the conduct of Courts of summary jurisdiction to keep in view than this—that summary powers must not be hastily administered. Where procedure is summary, regularity must be the more strictly observed. This, in effect, was the lesson which was read to those who are engaged in the administration of the law in Courts of summary jurisdiction — procurators-fiscal, police magistrates, and others — by the High Court of Justiciary in the cases of *Mackenzie* v. *M'Phee*, decided on the 28th of January 1889. The circumstances of that case, briefly stated, were these. Mrs. Mackenzie, the wife of a brass-finisher in Glasgow, happened to be on the 20th November 1888, in the City Cloth Market in Glasgow. She was carrying an infant in her arms and was accompanied by two daughters, aged ten and five years respectively. While they were in the market the girl of ten years of age was found by a policeman in possession of certain articles of clothing which were amissing from the stalls, and the mother and child were taken to the Police Office. There they were interrogated; the story of the child being that she had picked up the articles from the ground believing them to be useless, that of the mother being that she had not noticed that the child was in possession of the articles. No charge was made against them. They were requested to appear at the Police Court the following morning and allowed to go home. No bail was demanded for their reappearance. Two police officers called at the Mackenzies' house in the afternoon and again told the mother and daughter to be at the Police Court on the following morning. They attended at the Police Office in the morning as requested, were called into Court and placed at the bar, and, a charge of theft of the articles found upon the daughter having been read over to them, they were asked to plead. They pleaded not guilty. Evidence was led, the witnesses being certain stall-keepers in the market who identified the articles but could not state whether they had been hanging in their stalls or lying upon the ground. At the conclusion of the evidence the magistrate stated that he had no doubt about the child's guilt, and in spite of a strong protest by the mother ordered her to be sent to an industrial school for five years. He convicted the mother of the theft, as art and part, and sent her to prison for thirty days. The accused were not brought into Court either by virtue of a warrant for their apprehension, nor upon a regular citation. They were not informed by the magistrate that they were entitled to an adjournment of

the trial in order to prepare for their defence and to call witnesses in exculpation. No intimation was given to the husband that his wife and daughter were to be charged with theft, or that there was any intention of sending the latter to an industrial school, and he was not present when the sentence and order were pronounced.

The whole proceedings were brought under the review of the High Court of Justiciary by a Bill of Suspension and Liberation. The Court held that the proceedings upon which the conviction of the mother had followed were contrary to the recognised principles of criminal procedure and were *funditus* null, and suspended the sentence. The order for the detention of the daughter in an industrial school was also set aside on the ground that it had been pronounced without intimation to the father of the accused; his fitness and willingness to look after his child being the most important element to be considered by the magistrate in inquiring into the "whole circumstances of the case," as he is required to do, under the Industrial Schools' Act, before availing himself of its provisions.

The propriety of the judgment of the High Court will commend itself to every one. The proceedings complained of were most irregular and oppressive. No doubt, had the case been one in which known criminals taken *in flagrante delicto* were concerned, no practical injustice would have been done, and the irregularity would have passed unnoticed. But the case of the Mackenzies was not one of that nature. It was a case in which the persons accused were persons of apparently respectable character, and whether, in the result, justice was administered or not, the interests of the accused were undoubtedly sacrificed to despatch of business. The tendency so to treat accused persons is not unnatural in those who are daily dealing with the criminal classes, and it is important that it should be restrained. In this point of view this judgment of the Supreme Criminal Court is one of great moment, emphasising, as it does, the necessity of a strict observance of regularity of procedure in all cases in Summary Courts.

R. T. Y.

Partnership.—In his opinion in *Parnell* v. *Walter and Wright*, 5th February 1889, Lord Kinnear held, with regard to the question of jurisdiction, that as publication of *The Times* in Scotland would not alone give jurisdiction, the sole point for decision was whether it had been created by the pursuer having arrested funds belonging to the defenders in Scotland. As regards Wright, the publisher, it was clear that there could be no liability on this ground, as he had no proprietary interest in *The Times*, and the case against him was not pressed. The defender Walter maintained that the true creditor in the debt arrested was a copartnery or firm of which he was only a member, and on this point evidence of legal experts was taken. This evidence showed that by English law the assets of a company belongs to the copartners jointly, each of them having an undivided share

in the whole; the share of a partner, in other words, being his portion of the assets after they have been realised and all debts and liabilities discharged. In this respect the laws of England and Scotland are similar. The point, however, which was relied upon by the pursuer, and to which his main argument was directed, was that the relation between Mr. Walter and the other proprietors of the *The Times* was rather one of co-ownership than of partnership, and that, as a co-owner, Mr. Walter had a separate and definite share in the particular funds arrested. Lord Kinnear, without directly negativing this contention, put his judgment on the footing that, as the diligence of arrestment cannot affect debts payable to anyone except the person named in the schedule of arrestment, and as the debts arrested in this case were due, not to the individual defender, but to him and a number of other persons jointly, no decree could be carried into execution which ordered payment of these debts to the separate creditors of the defenders; consequently no jurisdiction could be held to be established.

The decision suggests one or two considerations upon the relation to each other of the laws of England and Scotland in the matter of partnership. It shows how the distinction, once so sharp, between the English and Scottish conception of a mercantile firm has become to a great extent obliterated, and gives another instance of the gradual assimilation of the mercantile law of the sister countries. The fusion of Law and Equity, inaugurated by the Judicature Acts 1873 and 1875, and carried out in detail by the rules of Court of 1883, has introduced more logical ideas into the English Courts, and though still leaving intact the theory that a firm is not a fictitious person, but a mere collection of individuals, has, in fact, brought about practical results in harmony with the invariable custom of merchants and the legal conceptions of Scottish lawyers. Actions may now, under the provisions of Order IX., rule 6, of the Rules of the Supreme Court 1883, be brought by, and against partners in the names of their firm; and this provision probably, though as yet there is no direct decision on the point, destroys two of the leading results of the English theory—viz., that an action between a partner and a firm, or between two firms having a common member, is impossible at Common Law. Lord Justice Lindley is clearly of opinion that there is now no reason why such actions should not be maintained and probably in the firm's name; and he distinctly points out that it was from the Scottish law as stated to the English Courts in the case of *Bullock* v. *Caird*, L.R. 10, Q.B. 276, that the rule in question was taken. In other respects the practical results of the English and Scottish theories of the fictitious *persona* and partners who are co-obligants with it, has its counterpart in the theory of every partner being a principal, and therefore bound by what he does himself and also what his partners do on behalf of the firm, and also being at the same time an agent, and therefore able to bind all his co-partners, provided he keeps within the limits of his authority. No doubt some cases occur, and many more may be imagined, where the

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differences of theory may still produce practical differences (and the rule as to ranking of partnership creditors in bankruptcy is one of these), but these differences are year by year growing less; and bearing in mind what has always been the process of healthy development of English Jurisprudence—viz., when a principle was growing out of date or obsolete, it has been first evaded by a fiction, then the fiction has been taken under the protective wing of equity, and finally when the new theory is well proved and strong enough, so to say, to run alone, the old one has finally disappeared from the Courts,—bearing in mind also the strong preference of both English and American jurists for the Scottish theory, there is little doubt that before many years all distinction between the laws of England and Scotland in the matter of partnership will have passed away. J. W. B. I.

Sale.—The recent decision in *The Distillers' Co.* v. *Russell's Trustee*, 9th February 1889, brings into prominence a fundamental distinction between the laws of Scotland and England relative to the contract of sale. By the common law of Scotland, it is necessary in a sale of goods that there be delivery, actual or constructive, in order to transfer the right of property from the seller to the buyer. By the law of England, on the other hand, speaking generally, the simple completion of the contract of sale gives a right of property to the buyer, and the seller has only a lien for the price. In giving his opinion in the House of Lords, in the well-known case of *M'Bain* v. *Wallace*, 1881, 8 Ret. (H.L.), 156, Lord Blackburn stated that, by the Mercantile Law Amendment Act 1856, this distinction between the two systems was, for all practical purposes, put an end to. This *dictum* was *obiter*, and is not quite accurate. No doubt it is correct so far as regards purchasers who are not indebted on other account to the seller. But his Lordship could not have had in view that a seller's right of retention over undelivered goods is by Scottish law a *general* one—that, in other words, a seller who is undivested by delivery can at common law retain the goods, not only for the price, but also for all debts due to him by the purchaser. This rule was first recognised in the leading case of *Mein* v. *Bogle*, 1828, 6 S. 360, and was subsequently conclusively established by the decisions in *Melrose* v. *Hastie*, 1851, 13 D. 880; *Mathison* v. *Alison*, 1854, 17 D. 274; and *Anderson* v. *M'Call*, 1866, 4 Macp. 765.

The question in the case before us arose with a sub-purchaser (Russell & Co.), who happened to be indebted on general account to the original sellers, the Distillers' Co. By a majority of three to two (reversing the judgment of the Lord Ordinary, Lord Trayner), the judges who heard the reclaiming note decided—1st, That such facts as intimation of a delivery order, and entry of sub-sales in the sellers' books, and charging warehouse rent for the custody of the goods, were not equivalent to *constructive*

delivery; and 2nd, That a sub-purchaser of goods, which have been left in the original seller's possession undelivered, is simply the assignee of a personal right to demand delivery, and as such has no higher right than his cedent. The opinions of the judges in the majority were based on the legal principle that a seller who has not parted with the natural or civil possession of the goods retains the *jus in re*, and that purchasers and sub-purchasers in such case, having acquired no more than a *jus ad rem*, can always be met by a plea of general retention. The decision is in strict conformity with the earlier cases above cited, though the accident of the sub-purchasers being themselves debtors to the original seller made the case one of novelty. It was conceded that the Mercantile Law Amendment Act had no direct application. One result of the decision must be to finally overrule (if not indeed previously overruled) such cases as *Broughton* v. *Aitchison*, Nov. 15, 1809; *Lang* v. *Bruce*, 1832, 10 Sh. 777, and, so far as it turned upon the question of constructive delivery, *Gibson* v. *Forbes*, 1833, 11 S. 916. These cases have hitherto kept their place in the books, though cited by text writers with doubt and hesitancy, and we notice that even the learned editor of the last edition of Bell's Principles (§ 1303) seems to regard them as still authoritative. But in future they must be ignored, or treated as of value only as examples of the historical development of our law of sale.

In another respect this case of the *Distillers' Company* may be noticed, involving as it does an anomaly in the matter of Court of Session practice. It will be observed that the decision in the Inner House was by a majority of three judges to two. The question arises—Was such a tribunal in the circumstances competent? Originally the Reclaiming Note was heard by two judges of the First Division (Lords Mure and Adam), along with an Outer House judge (Lord Kinnear). These judges not having come to a decision, the case was afterwards ordered to be re-argued before the whole four judges of the First Division, along with Lord Kinnear. No objection was taken by either party to this course, but it would rather appear that there is no statutory authority for such a tribunal. By the 59th section of the Court of Session Act 1868, permission is made for re-hearing before five judges in case of equal division of opinion. But that section only applies to cases where the four judges of the division are equally divided in opinion upon a question of fact—power being given to the President of the division in such case to call in a fifth judge. Under section 60 of the same statute there is also power given to order cases of difficulty and importance to be heard before seven judges. But neither of these sections could be read as applicable to the case in question, and there is apparently no other statutory warrant.

H. G.

Slander—Authorship of Calumnious Letter.—There is a good deal of slander perpetrated in anonymous letters to newspapers, because ever since the case of *Lowe* v. *Taylor* in 1843, 5 Dunlop, 1261, it has been held that, if the editor and proprietors of a newspaper are willing to accept the whole responsibility for the letters which they publish, they cannot be compelled to produce the original letter or to disclose their correspondent's name, and, upon the whole, editors and proprietors have been wonderfully chivalrous in protecting the confidence reposed in them. This was described by Lord Cuninghame as "A question of great moment in municipal and even in constitutional law." Of course, if the correspondent can be discovered he is also liable in damages, and the newspaper might be forced to give up the original letter, if required as part of the independent case against its author, but the action against the newspaper cannot be used to force the discovery of the author. But where the editor declines to disclose the author, "The law is, that the editor accepts the position of the anonymous writer with every liability which could have been laid on that writer if he had been disclosed." (*Per* Lord President Inglis in *Brims* v. *Reid & Sons*, 12 Rettie, 1020.) Of course this means absolute liability, because the writer is not disclosed, and therefore no plea can be founded on his character or interest. It is difficult to see how, as suggested in the case of *Brims*, the liability of the newspaper could be less where the calumnious statements were adopted in a leading article; and this distinction has been properly questioned by the learned editor of "Bell's Principles," eighth edition, sec. 2055. But the suspicion has often been expressed that some anonymous letters in newspapers are not *bonâ fide* outside communications at all, but are written in the newspaper office to support the policy or to gratify the spite of its proprietors: that, in fact, to use the language of Lord Deas in *Drew* v. *Mackenzie & Co.*, 24 Dunlop, 662, "the veiled prophet sitting behind the curtain" is the same person as the anonymous contributor. This suspicion was converted into fact in the recent case of *Duncan* v. *Jamieson*, Feb. 2, 1889, 26 Sc. L.R. 316. The action was one directed against the printers and publishers of a provincial paper for slanders partly contained in a series of letters which had appeared in the paper, and which were signed by such impressive names as "A Trader," "A Baker Street Elector," "Another Trader," &c. The defenders refused to give up the names of their too-modest correspondents, and the pursuer averred that the letters were really written by the defenders, or at least that they procured them to be written. The general charge against the pursuer in the letter was that, being a Town Councillor, he had accepted a bribe from the Caledonian Railway Company to act in a particular way with reference to a Railway Bill. The pursuer said the letters were written as part of a systematic plan to destroy his reputation as a public man. The Court had no difficulty in allowing the pursuer to recover documents instructing the authorship of the letters, and that without taking any issue as to authorship. This was done because it was said the pursuer was

entitled to prove the state of mind of the defenders, with a view to the aggravation of damages. It is difficult to follow, at first sight, the reasons assigned for this decision, because in the ordinary case as already explained, the publisher accepts the whole responsibility which at the worst could have been established against the anonymous correspondent. The admission of such evidence against the publisher, in the ordinary case, is certainly not justified by the fact that according to Scots Law (which on this point has gone far beyond the law of England) the publisher might be entitled to prove in mitigation of damages many facts (*e.g.*, that he got the letter from a well-known correspondent) tending to show that he, the publisher, believed the slander to be true, or had reason to do so. (See *Browne* v. *Macfarlane*, Jan. 29, 1889, 26 Sc. L.R. 289.) The true ground of decision seems to be that the newspaper had manufactured a false appearance of independent public opinion, and thus induced the public to attach more importance than they would have done to a mere quarrel with a newspaper. Such conduct on the part of a journal certainly deserves punishment, but it seems a reasonable inference upon which to ask the jury for increased damages, in most cases where the publisher refuses to give up the names of a series of contributors writing to the same effect.

W. C. S.

Foreigners Trading in Britain—their Liability for Income-Tax.—The volume of the *Journal de Droit International Privé* for 1888 commences with an article on our treatment of foreign merchants in regard to income-tax. The writer, M. Alfred Michel, is a judge of the Civil Tribunal at Rheims, and the case which he especially criticises was one in which the appellants were his fellow-citizens. This case is reported under the name *Werlé & Co.* v. *Colquhoun*, 20 Q.B.D. 753, and was decided by the Court of Appeal, March 13, 1888. The following were the circumstances upon which the judgment was based:—Messrs. Werlé & Co., a firm of champagne merchants at Rheims, employed a London firm to obtain orders in England for their wine, and to issue circulars intimating terms of sale. These agents advertised the wine in this country, and caused the name of their principals to be put up at their own business premises in London, and to be inserted in the London Directory under the designation of "wine merchants." Payments by customers were made to either agents or principals, but in either case the Rheims firm sent a receipt direct to the buyer. The London firm were paid by a commission on all wine sold, and the appellants alone were interested in the gain or loss on the sales. Upon this state of facts it was decided that the appellants exercised a trade within the United Kingdom, within Schedule D of 16 & 17 Vict. c. 34, and were assessable to the income-tax in respect of the profits arising therefrom. Various earlier decisions were referred to in argument, and a perusal of these shows that the

judgment in question is a wide interpretation of the statutory taxing powers of the Income-Tax Commissioners. In *Pommery* v. *Apthorpe*, in which, curiously enough, another Rheims firm were the appellants, the London agent had powers to bind his principal much wider than in the present case; and in *Erichsen* v. *Last* (the Telegraph Company action), the appellants themselves, who claimed exemption, directly employed a number of servants in carrying on business in this country. No attempt to give a definition of "carrying on trade" was made in Werlé's case,—the Master of the Rolls indeed stating that an exhaustive definition was impossible, as it was a question of fact in each case, and he expressly adopted the language of his predecessor, Sir George Jessel, in *Erichsen* v. *Last*, who said: "There are a multitude of things which together make up the carrying on of trade, but I know no one distinguishing incident, for it is a compound fact made up of a variety of things." M. Michel's reasoning is that in all the sales of wine by Werlé, the *locus contractus* was Rheims—their London agent being, as he expresses it, a mere hyphen connecting the buyers with the sellers, and, so far as the law is concerned, he might be entirely left out of consideration. An agent who has no power to bind his principal, but merely receives orders and transmits them, is no more than a "living prospectus or walking advertisement." As an illustration he figures the case of a French merchant who has no representative in England, but extends his business by placarding the walls of London with eulogies of his wares. Would such a trader be assessable for income-tax in respect of profits derived from his English connection? Possibly not; but in view of the reasoning of the judges in Werlé's case, it is by no means to be assumed that he would not. The French critic fails to keep in view that the *carrying on of trade* is something more than the making of contracts within the meaning of the statute. At the same time there is a good deal of force in M. Michel's reasoning, and the decision in question is by no means free from criticism. A taxing statute must plainly be construed *stricto sensu*, and the construction adopted by the Court of Appeal seems in some respects more elastic than rigid.

It is to be noticed that since the date of the above decision an attempt by the Income-Tax Commissioners in Liverpool to enforce payment of income-tax from the English agents of another foreign firm of champagne merchants, has led to representations by the French Minister of Foreign Affairs, with the result apparently that the Government has been induced to desist from making similar claims, until some diplomatic understanding on the subject between the nations interested has been arrived at.

F. P. W.

Revenue Law.—What is a Charitable Trust?—This question, so far as it relates to the exemption from income tax, has lately been considered by the Courts, both in England and in Scotland, with the result that they have come to different conclusions. In the case of *Baird's Trustees* v. *Lord*

Advocate, June 1, 1888, 15 Rettie, 682, it was held by the Court of Exchequer in Scotland that the income of a trust for the promotion of religion and the mitigation of the spiritual destitution which prevailed among the poor and working population of Scotland, was not entitled to exemption from income tax, because the trust was not one "for charitable purposes only," within the meaning of the Income Tax Act. The income it appeared had chiefly been applied in assisting the erection of churches. Lord President Inglis in giving his opinion took the opportunity of formulating a general rule of construction—to wit, that words in an Imperial Taxing Statute must be read in a popular and non-technical sense, so as to apply equally to all parts of the United Kingdom, and in conformity with this rule he held that in their ordinary and non-technical meaning the words "charitable purposes" have reference exclusively to the relief of the poor, and not to purposes of general benevolence and public utility. In the case of *The Queen* v. *Commissioners of Income Tax*, December 21, 1888, 22 Q.B. Div. 296, the English Court of Appeal had to decide a question which is in substance indistinguishable from the general question raised in the case of Baird's Trustees. The Trust claiming exemption there was one of land held for the purpose of maintaining missionary establishments of the Moravian Church among heathen nations, for the maintenance and education of the children of ministers and missionaries of that Church, and for maintaining "choir-houses," which are houses for the residence and support of certain classes of single people among the *Unitas Fratrum*. When the case was considered by the Divisional Court, Lord Coleridge adopted not only the reasoning, but the very language of Lord President Inglis in Baird's Trustees, and accordingly held that the Trust was not entitled to exemption. Grantham J., who dissented, seemed to think that the language of Schedule A of the Income Tax Act—viz., "or vested in Trustees for charitable purposes," might be construed differently from that of Schedule C—viz., "for charitable purposes only," which was considered in Baird's Trustees. But in substance he held that the word "charitable" included what the Equity Courts of England have decided it to mean under the statute of Elizabeth. Upon appeal a singular result followed. All three judges of the Court of Appeal agreed in thinking that the Trust was entitled to exemption. But the Master of the Rolls and Lopes L. J. did so on the ground (following the above-mentioned rule enunciated by the Lord President) that the word "charitable" must be taken in its ordinary and popular sense, and that so taken it was not confined to the mere relief of poverty, but would include such trusts as those of the Moravian Mission. "The intention of the donor to assist poverty was the substantial cause of his gift." L. J. Fry, on the other hand, proceeded on the ground that the words were to be taken in their technical sense, but that the technical sense was substantially the same in all parts of the United Kingdom, and certainly included the Moravian Trust. It is regrettable that there should be any difference of opinion on this important question of exemption under an

Imperial Statute. Possibly the two decisions are in one sense not wholly irreconcilable. Lord Esher might think that the main intention of Mr. Baird in founding his Trust was not to assist poverty. Other motives have been ascribed to people who, as Pope says, "die and endow a college or a cat." But the application by the Scottish Court of the rule of construction enunciated is inconsistent with the general definition given by Lord Esher, because the former would exclude—*e.g.*, an educational trust founded with the intention of assisting poverty. On the other hand, the view taken by the minority of the English Judges is equally inconsistent with Lord Esher's definition. The Court of Chancery includes under charitable purposes almost every trust by which the natural objects of a testator's bounty are disappointed. The Royal Society and a Home for Lost Dogs, are both within the meaning of this doctrine. It is to be hoped that a judgment in the House of Lords will settle the matter. In the meantime, the state of the opinions reminds one of the story of J. Cresswell, who, when two contradictory opinions had been delivered, stated that he agreed with his brother A. for the reasons stated by his brother B.

W. C. S.

COLONIAL APPEALS.

THE decision of the Privy Council in *Mahomed Buksh Khen* v. *Hosseini Bibi* (L.R. 15 Ind. App. 81, 1888) deserves notice. The High Court of Bengal set aside a *hibbanama* or deed of gift, executed by a lady, on the ground of undue influence. This decree has now been reversed. Lord Macnaghten, who delivered the judgment of the Judicial Committee, gives an admirable summary of the questions which a Court, dealing with the issue of undue influence, ought to consider:—1. Was the transaction one which a right-minded person would enter into? 2. Was it improvident under the circumstances? 3. Was legal advice, if wanting, necessary? 4. Did the transaction originate with the donor?

His Lordship comments with a freedom, rare in Indian, though sometimes to be met with in Colonial, appeals, upon the discretion of the Court below. "The learned judges," he says, "suspect everybody; they suspect everything. Everyone who took an intelligent part in the transaction, the dead as well as the living, even the sub-registrar of the district who attended only in the discharge of his official duties, one and all are alike involved in general and indiscriminate suspicion."

The circumstances under which the Privy Council have just granted "special leave to appeal" from the judgments of two Colonial Courts, exercising a criminal jurisdiction, clearly point to the kind of cases in which such applications may be made successfully:—

(1.) *In re Dinizulu Ka Cetewayo.*—The prisoner was arrested at Bishopstowe, in Natal, on a charge of having committed an offence in Zululand. The chief Justice of Natal, in terms of "The Fugitive Offenders Act 1881," interdicted his removal from the colony for a period of fifteen days. The Supreme Court discharged the interdict. The petitioner applied for special leave to appeal to the Privy Council. Among other grounds, he alleged that full particulars of the nature and date of his alleged crime had not been supplied to him, that the provisions of the Fugitive Offenders Act had not been observed, that the warrant on which he was arrested was bad in law, &c.

(2.) *Reece* v. *Reg.*—The petitioner, a West African palm oil and general merchant, with a factory on the banks of the river Benin, was tried before the local Consular Court on a charge of having unlawfully wounded certain natives, and was sentenced to a fine of £60, and to deportation from the Benin River Settlement for a period of ten years. Petition for "special leave" granted on the grounds that the sentence of deportation, which was obviously very serious for the petitioner, was *ultra vires*, and contrary to the order in council (March 26, 1885) which regulates the Settlement.

The general principle of law which these cases illustrate may be stated thus: The Queen in Council will review criminal proceedings in Colonial Courts, when it can be shown that by a disregard of legal forms, or otherwise, grave and substantial injustice is (presumably) being done. (*Cp. Re A. M. Dillet*, 12 Appeal Cases, at p. 467.) J. W. R.

The Sun Fire Office v. *Hart and Others.*—This was an appeal—not yet officially reported—from a judgment of the Court of Appeal for the Windward Islands, affirming a decision of the Court of Common Pleas for Barbadoes. The question which came before the Judicial Committee was this: What is the proper construction of the following condition in a policy of fire insurance effected by Hart and others, respondents, with the Sun Fire Office, appellants—"If, after the risk has been undertaken by the Society, anything whereby the risk is increased be done to the property hereby insured . . . or if any property hereby insured be removed—without the assent or sanction of the Society—the insurance as to the property affected thereby ceases to attach. If, *by reason of such change or from any other cause whatever*, the Society or its agents shall desire to terminate the insurance effected by this policy, it shall be lawful for the Society or its agents so to do (upon terms) by notice to the assured." The property insured (to wit, several acres of uncut sugar canes), was in part injured by alleged incendiary fires, and the appellants received notice by an anonymous letter threatening a continuance of the incendiarism. The appellants paid for the loss sustained, and then gave notice terminating the policy, under the condition quoted above, tendering at the same time repayment of a rateable proportion of the premium applicable to the

uninjured portion of the property. The Judicial Committee, reversing the decisions of the Courts below, held—(1) that the canon of construction whereby such words as "or other" following a particular enumeration are limited to matters *ejusdem generis*, unless enlarged by the context, was inapplicable; (2) that the general words included in this case any and every cause which could reasonably induce an insurer to desire the termination of his risk; and (3) that the condition, above set out, did not bind the insurers to allege and prove, to the satisfaction of a Court or jury, the reasonableness of their grounds for terminating the policy. The case was accordingly sent back to the Court of Common Pleas for Barbadoes to pronounce the proper order. J. W. R.

Jex v. *M'Kinney and Others.*—This was an appeal—not yet officially reported—from the Supreme Court of British Honduras, in which the point at issue simply was, Is the English Mortmain Act (9 Geo. II. c. 36) in force in the Colony of British Honduras? Through the whole of the colonial enactments, which were relied on in support of an affirmative answer to this question, the condition ran of *applicability to the position and circumstances of the colony;* and the Judicial Committee, affirming the decision of the Chief Justice in the Court below, have now held that the Mortmain Act was framed for reasons affecting the land and society of England, which do not exist in a new colony. Blackstone's Commentaries; *Attorney-General* v. *Stewart* (per Sir William Grant), 2 Mer. iv. 143; and *Whicker* v. *Hume*, 1 D. M. & G. 506, were referred to in the judgment. See also *Mitford* v. *Reynolds*, 1 Phill. 185, and other authorities in Tudor's Conveyancing, p. 566. J. W. R.

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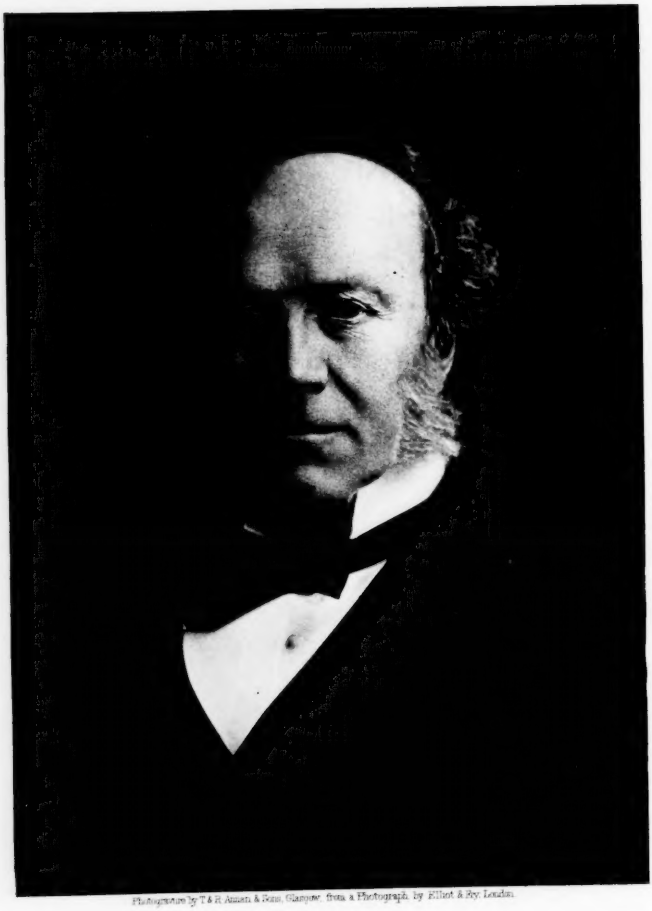

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The Hon. Lord Fraser.

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INSANITY IN ITS RELATION TO THE CRIMINAL LAW.

Part I.

IN making a few practical observations on this difficult and interesting department of jurisprudence — sometimes incorrectly called Criminal Insanity—it is proposed to select the illustrations to a great extent from what is comparatively the small country of Scotland, partly because the facts are there confined within a moderate compass, and exhibit themselves with all the clearness and distinctness of a miniature, and partly because the writer has been for many years a spectator, and often an actor, in the continuous struggle in the Courts of that country, identical with, or at least analogous to, those of England and other countries, between law on the one hand and inductive science on the other, and has witnessed the advance of the judges, through obscure metaphysical notions, towards a distant point which they have not yet reached. He is in this way enabled to trace the contest, not merely from the official reports, but from his personal recollections of the opposing views which were urged from the bar, and the observations made on these discussions by the judges, which observations exhibited more warmth, vehemence, and intensity of feeling, than is shown by any report which has come down in documents. There is also an important circumstance which renders this mode of illustration possible—viz., that Scotland has produced numerous trials of many different species of crime—murder, stabbing, assault, rape, fire-raising, theft, and others, which were

actually committed, or alleged to have been committed, under one or other of most of the representative forms of mental unsoundness. The progress of the law, however, in Scotland very nearly represents its progress in England and elsewhere.

Scotchmen, from peer to peasant, have been for centuries more or less metaphysicians, and indeed have been compelled to become so through the absolute necessity they were under of defending their favourite dogmas. Their metaphysics, indeed (omitting a few illustrious examples such as Sir William Hamilton), were not so broad or so far-reaching as the lofty conceptions of that great German series which included Kant, Fichte, Hegel, and Schleiermacher; but at the same time, if narrow, they were clear and definite, and bore directly and distinctly upon such practical questions as the nature and treatment of criminal lunacy. Scotch lawyers, accordingly, being thus metaphysically inclined in times when inductive science, so far as mental subjects were concerned, had not acquired the predominant power necessary to combat popular predilections, could scarcely fail to succumb to the prevalent metaphysical conceptions. The very word *Insanity* lent itself to self-deception. Though perhaps in one respect the brilliant writings of Plato have, more than any others, stimulated the human race to philosophical investigation, they have, in another, formed one of the most formidable obstructions to the progress of true science, through the personification of abstract general ideas, and the vague notions which for centuries proceeded from these. Even in our own day their influence is still unconsciously operative, and it is sometimes difficult to divest one's mind of the impression that a general term represents something different from, and additional to, the mere particulars which it sums up. This has been more or less the case with the general term Insanity. In point of fact it means nothing more than the numerous individual morbid phenomena of mental unsoundness, just as bodily disease means all those of the body; in both cases

including maladies of entirely different kinds. The former is no more mysterious or singular than the latter, and is only obscure where inquirers have yet failed to acquire a distinct knowledge of the facts. Yet, though that is now quite clear to really scientific observers, it was not so formerly, and it is not so yet to vague and confused intellects. People cannot, in spite of themselves, keep from regarding insanity as some separate entity, distinct from the mere phenomena of which it is the name, some mystic curse descending like a plague upon the human mind, which, itself regarded as a metaphysical being, is thereby affected or destroyed as a whole, and throughout its whole substance. Indeed, insanity is sometimes considered and spoken of as a God-sent affliction, like the fall of the tower of Siloam; and is even treated by some German writers as something which can never fall upon prayerful men, a view on which a lurid light is shed by the now established fact of hereditary madness. The Scotch clergy at one time regarded it as a "visitation," as they called it, and possibly some of them do so still.

The ages of classic antiquity were the palmy days of the insane and the imbecile. Maniacs were popularly regarded as the special favourites of heaven; their incoherent utterances were revelations from the gods; and neither law nor violence could venture to lay hands on these organs of inspiration. Cassandra was an object of reverence—not a subject for medical treatment or curative restraint. So it was with the witch of Endor, and the dame who presided at the oracle of Delphi. We see, however, that among the Stoics — the great jurists of antiquity — the mode in which criminal lunatics should be dealt with had been a subject of consideration; but they were a sect who stood alone as systematic philosophers. When the ancient gods were dethroned and transformed by the new religion into demons, lunatics came logically to be looked upon as the servants of evil spirits and the instruments of their deceptions; and, as dangerous allies of the wizard and the witch, were often relegated with them

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to the rack and the fire. When the belief in witchcraft began to die away, their fate was little ameliorated. Their acts were then regarded as purposely wicked and criminal, and they escaped from the fire only to be hung upon the gallows. Even after they were medically recognised as diseased, their treatment was not much improved, and death itself would often have been better than the sufferings they were in many respects compelled to endure. It is not much more than half a century since the only forms of insanity known in Scotland, except to enlightened medical experts and those professionally in charge of the patients, were first those wretched imbeciles, one at least of whom was known in every town and village, and hooted and hunted by boys about the streets; and, second, those violent maniacs who, when loose, were a terror to society, and, when confined, were whipped and loaded with chains in the bedlams of the time. Since then the continuous and laborious inquiries of medical men and scientific observers — themselves long denounced as "mad doctors," and as little less mad than the objects of their study—have thrown a blaze of light over some parts of a subject still obscure. It is now seen to spread and, as it were, to cover the whole horizon of science, whether physical or ethical, and to touch upon and commingle with the most important questions of morals and philosophy.

It is, however, unfortunate that, though really depending on the inductions and deductions of positive science—which is the only kind of science properly so called—the subject has raised disputes which are analogous to similar disputes in metaphysics and theology; two departments which, as they have hitherto been treated, are so apt to be coloured, and are in fact so coloured by the predilections and illusions of the thinker's mind as not to be really, even in such brilliant writers as Fichte and Hegel, branches of pure science or philosophy at all; and, except as mental stimulants like alchemy and astrology, have been, even in Germany, formerly their native home, absolutely barren of all beneficial or trust-

worthy results. Their influence has indeed exercised a most deleterious effect on the science and law of insanity. A striking personal illustration of this in Scotland was the late Lord Justice-Clerk Hope, who, from the impetuous and despotic character of his will, and his total incapacity for philosophical inquiry, should have carefully avoided all such subjects. These, however, were what he specially affected and taught from the judicial Bench itself; and, in his charges to ordinary juries on questions of insanity, he did not hesitate to lay down for their guidance dicta on half-a-dozen different topics of controverted speculations. In one single case alone, that of *Gibson's* trial for Fire-raising in the High Court, 1844,(*a*) he discussed in his charge matters theological, metaphysical, ethical, sociological, and critical, and that not as topics of theoretical speculation but as practical and settled propositions which ought to influence the verdict of ordinary men entirely unaccustomed to such matters. He plunged without fear into the endless disputes about necessity and free will, and though an orthodox Scotsman championed (probably unconsciously) the doctrine of Arminius alike against the fate of the Stoic, the predestination of the Calvinist, and the causality of the modern scientist. As he indicated his view on this head as being unfavourable to the accused, he must have transfixed him with horror by the dark and horrible picture he painted of him. The wretch, as he told the jury, had "not been tempted beyond what he was able to bear," but was a "wilful rebel against the Almighty." In the domain of the theological, he favoured the jury with his fixed opinion that, if the law did not treat a lunatic labouring under partial delusions on the same principle as if these were really actual facts, there would be an end to man's 'responsibility,' meaning thereby, not his legal and ethical responsibility, but his theological responsibility, that is his liability to future Divine punishment.

(*a*) Justiciary Reports, 2 Broun, 332.

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He resolved in the same school-bred way a new question of Biblical criticism, declaring that our then law was the same as "the Bible," and "perfectly conform" to the principles of religion, though the main instances given of what we would call insanity, either in the Old or New Testament, were the melancholia of Saul and the mania of those dangerous beings who ran naked and rattling their chains among the tombs, which were merely mentioned as cases of possession by devils or evil spirits. In short, there was, in our view, no proper law of insanity at all to be found amongst the writings of the Jews, and nothing with which it was possible to predicate either the conforming or non-conforming of the law of Scotland. He also urged upon the jury the necessity of combating these "false notions," which were "creeping" into morality, by which he meant the conclusions to which scientific experts were driven by following the strict rule of *à posteriori* investigation. The same tendency to *à priori* and metaphysical dogmas was almost universal among the judges of Scotland of that period, when discussing the principles of law in cases of criminal insanity, and this exercised a most prejudicial effect upon the progress of our jurisprudence. The Lord Justice-Clerk (Hope) was only a flagrant instance of this general perversion, and, to a considerable extent, we must attribute the arrival of better times to his successor, the present eminent Lord Justice-General (Inglis), whose breadth of view and openness of mind were shown to great advantage in the case of *Alex. Milne.*(*a*)

It can never be too strongly impressed on all judges and jurymen engaged in these painful trials that they must rigorously exclude from their consideration every question of theology and metaphysics, and depend solely on the proved results of actual experience and observation applied to the particular case before them. It is entirely irrelevant to their task whether the mind is an immaterial entity, of which the brain is the organ, or whether the brain possesses spiritual qualities

(*a*) Justiciary Reports, 4 Irvine, 301.

and is itself the mind, or whether mind and matter are simply two faces of the same duality. Nor is it of importance whether the will is absolutely free, or rigidly determined by causes, or whether it is partly the one and partly the other. It is also of little consequence whether man has a clear and instinctive knowledge of right and wrong, or whether conscience is a growth which, as it develops from experience, may give different judgments in different nations, races, or individuals. In short, the whole doctrine of responsibility is entirely alien to the matter. The question is of a practical and concrete character, and has nothing to do with mere abstraction; and the sole question to be settled by the verdict is to determine the point at which, in the case of insanity—or, to translate the term into simple English, unsoundness of mind — the liability to criminal punishment should cease.

There is one point, however, on which an understanding must necessarily be come to before the position of lunatics towards the criminal law can be discussed with any real or practical advantage. What is the object of the penal law at all? Is it preventive or is it wholly or partially vindictive? The very word "pœna"—punishment, indicates that the original source was in the passion of revenge—as it still remains in the majority of animals and in men in the savage state, who unconsciously, through anger, arrived at a kind of means, but a very insufficient one, of checking a repetition of the offence. But as reflection progressed, it began to be suspected that revenge only made matters worse; for, as the crime itself could not be recalled, and its essence lay in the pain (using the word in its widest sense) which it had produced, the law, on this theory of revenge, was only producing additional and even greater pain, without relieving that already inflicted. Further, the high-flown metaphysics of Kant and Fichte, which regarded the *will* as a kind of omnipotent and independent entity within the *mind*, which could act with absolute freedom, and independent of causes, began to crumble beneath everyday observations and scien-

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tific inductions. It gradually became manifest that habitual crime was often indicated by the very features and form of the criminal. Lombroso, the great Italian jurist, who has embodied in his massive work, "L'uomo delinquente," a mine of information which ought to be a manual on this subject, the continuous experiences and studies of a lifetime, has shown this fact in the clearest light. The bodily frame also often presents physical defects. The skull exhibits various points of want of symmetry, precocious synostoses, an abnormal simplicity of the sutures. Often, when no defect is visible before death, an autopsy brings to light something abnormal. Chronic meningitis is often revealed; the posterior cornua of the brain are found adherent; a bony point has pierced the tissue of the frontal lobe; the folds of the brain are rudimentary; the pigmentary have got mixed up with the cerebral cells; the central canal of the spinal marrow is obliterated. In short, as will afterwards be again noticed, crime and lunacy have close relations to each other; they often spring from the same causes; sometimes the one precedes, sometimes follows the other; occasionally both end in the same results; not infrequently they co-exist in the same individual; and very often the one alternates with the other in successive generations of the same family, where the grandfather may be a criminal, the father a lunatic, the son a drunkard, and so on, *da capo*, till the race becomes eliminated; and, between the affected individuals, persons may be intercalated apparently sound, or merely eccentric. The further fact that the criminal law often leaves untouched immoral acts, even of a more odious and prejudicial character than some which are dealt with, tends to raise a suspicion that it is not revenge which the modern penal law is really seeking, but another and much more justifiable purpose—that of prevention, or, to use the words of the old Scotch indictment, "That others may be deterred from committing the like crimes in all time coming." This view was predominant in almost all the schools of classic Greece, which in their ethics were almost uniformly utilitarian—a word, how-

ever, which very imperfectly expresses what is meant. Plato propounded this view in the most emphatic terms. "No wise man," he says, "inflicts punishment because crime has been committed, but in order to prevent its commission; it is because past (criminal) acts cannot be recalled, that future ones are prohibited. Therefore, when he (the wise man) desires to give an example of the unprofitableness of guilt, he will kill (the offender) publicly, not in order that he should die, but that others by his dying should be deterred (from following his example)." Zeno and the Stoics, the most scientific thinkers and jurists of ancient times, who are in some respects ahead of many modern thinkers, taught this doctrine both in Greece and Rome. "We ought not to punish a man," says Seneca, "because he has transgressed, but to prevent him transgressing; nor must punishment have reference to the past, but to the future, for it feels no anger, but merely takes precautions (*cavet*)." As the cruel vindictive Middle Ages began to pass into better times, this view spread steadily among scientific jurists and practical lawyers, and has now taken a firm hold in all countries where law is discussed upon principles deduced from observation. In England, it is the doctrine in the schools of Bentham, J. Stuart Mill, Darwin, and Spencer, and indeed in all the utilitarian, inductive, and scientific philosophies. It stands in the same dominant position in Germany, and it passed over with Condillac into Italy in the middle of last century, and was subsequently taken up by Romagnosi, and adopted by the Italian jurists, perhaps the most accomplished and philosophical lawyers now in the world. Romagnosi expresses their view in a few emphatic words. "The object of punishment," says he, "is not the satisfaction of the outraged law, it is simply the defence of society; it attains its end by the fear which it inspires." We may therefore relegate legal revenge to the same category as the serpent which has been trod upon, or the savage who has been assaulted, and assume at once the safety of society and self-defence as the sole object of this infliction of punishment. It is thus possible to get rid at the outset of

the whole subject of free-will, which is mixed up with this question of revenge. "If you please," says the younger Herzen, "why do you kill a mad dog? Is it because to become mad, to bite, to poison by a virulent bite, depends on its free-will?" You punish the man for the same reason as the dog, to deliver you from the danger to which his unbridled actions expose you; the general safety imperatively requires it, without concerning ourselves the least in this world with the existence or non-existence of free-will." We shall therefore assume the offender, when arraigned before the law, to be a natural product, and the result of a preceding series of causes. Whatever view theology or metaphysics may take, he must be regarded when in the dock as the result of previous influences operating upon him, and as capable of being operated upon by an additional cause to be intercalated by the Court, and thereby to be turned into a new and more wholesome direction. In any other view the penal law would be a mockery. The subject then, as treated here, if represented algebraically, stands thus. Suppose the powers of a and b, &c., to represent the conditions operating in the panel against crimes; those of p, q, &c., those operating in favour; and all when taken together insufficient to prevent it; the unknown quantity, x, the additional cause sufficient to give the requisite preventive power; and ω, the reformed condition to be produced. Then $([a+a^1+b, \text{ &c.}]-[p+p^1+q, \text{ &c.}])+x=\omega$. The problem with regard to the insane is precisely the same with that regarding the sane, either to find the unknown power x, or to be satisfied in regard to the prisoner that no x in point of fact exists.

Keeping these fundamental considerations in view, the question requiring solution in regard to the insane is—*if* and *when* their liability to punishment should be held to cease? But here an enormous difficulty arises. What is insanity? where does it begin, and where does it end? No physician or jurist has ever defined it. Scotch judges have said in their charges that it cannot be defined. It is literally interpreted "unsoundness of mind," and contains almost as many different

kinds of mental disorder as are contained in the expression "disease of the body." Had we some distinct physical or material test, by weighing or measuring or other precise process, the question would be easier. The classic nations had noticed that mental affections were correlated with certain physical phenomena, as grief with tears, joy with laughter, extreme anxiety with a perversion of the secretions, and hard mental labour with a waste of the tissues. In the same way insanity is very often accompanied by a great rise of temperature, extreme impairment of the digestion, morbid insensibility to cold, epileptic tendencies, congestion of the brain, a peculiar appearance of the eyes, and the like. But all these physical conditions may exist without the presence of either imbecility or insanity; and thus, though these symptoms are always significant in a diagnosis, none of them is a sure test of an unsound condition of the mind. Whether we shall ever obtain a physical test of the existence of serious mental disease, at least in some of its forms, cannot be predicated. If we do so, the light is likeliest to come either from Germany or Italy, and that, perhaps, not from special inquiries into insanity. In the former country, the new development of biology in a separate division of science, known as Psycho-physics, has made enormous strides. The territory on which it extends includes all inquiries lying on the confines where mental and physical phenomena touch each other, the border-land between soul and body. These phenomena are investigated by the ordinary appliances of physical science, and with the aid of extremely accurate apparatus, which is well described in the great work of Wilhelm Wundt. The accuracy of the results is assured by precise weighing, measuring, ascertaining the degree of temperature, and the rate of speed, just as in the department of physical science. The results are very singular, and such as could not have been anticipated beforehand. A striking illustration is afforded by the ascertainment of the speed and duration of different mental operations—of a perception—of a memory—of an imagination—or of a volition. These

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psycho-physicists — now including a large section of the ablest physiologists of Germany—do not yet appear to have specially turned their methods to the investigation of mental unsoundness, but that they will some time or other do so is almost certain, and possibly—as insanity has unquestionably an effect on the intensity and rapidity of mental movements—with very valuable results. In Italy physicists and medical jurists, particularly those of what is called the Florentine School, have applied their brilliant genius to the question of the localisation of different mental powers in separate portions of the brain and its appendages. Schiff has directed his experiments to determine with precision the physical actions in the cerebral centres, particularly the exact variations of temperature, a matter coming very close to the rise of temperature in the case of insanity. By one of his experiments, the planting of the needles of a thermo-electric pile in openings in the surface of the brain of the monkey, he succeeded in proving that, in the absence of any reflex motion, the stimuli impressed on the nerves abutting on the surface of the body were conducted direct into the cerebral lobes, and that the psychic activity thus brought into play caused a distinct elevation in the temperature, which diminished on repetition till it ultimately became constant. Herzen, *père*, and Mantegezza have followed in the course of Schiff, and Tamburini and Luciani (eminent disciples of the Florentine School) have carried out further the peculiar researches of Hitzig and our own Ferrier into the localisation of the mental faculties. But their success has chiefly lain in the reflex nervous processes, and what may be called the executorials of the brain, and it admits of very great doubt whether the higher powers are localised in the same way or to the same extent as the organs of sense, and whether they do not work in the whole ingoing complexus of sensation and perception, and are thus present in the whole extent of the cerebrum.

But, although there has not been found any exact, or indeed any physical test of insanity, the jury are still

required to answer the question whether the prisoner is insane, and, if their view is affirmative, to state that he is so in their verdict. Is the panel mentally unsound? Has he disease of the mind? This is the puzzle to be solved by fifteen average men, and without the aid of any definition of insanity to assist them in their investigations. Now, it is possible in some cases to answer this clearly in the affirmative. When the panel is a violent maniac, or manifestly the victim of irresistible hallucinations, or a born idiot or imbecile, it is easy for any one to see that he is mentally unsound. But mental unsoundness is a class of disease which, like physical unsoundness, admits of very different degrees of intensity, and may range from a scarcely appreciable amount of eccentricity at its commencement to an almost total extinction of reason at its close. But even at the commencement the disease has already begun, and may run on continuously and without break to the end, there being no point at which the series can be severed either in fact or in thought. The patient, unknown to himself, is already unsound, just as a man who has caught a fever, but has not yet clearly discerned its symptoms, is already under the disease. In the thousand-and-one subtle and varying phases which insanity presents at the present day, it seems almost impossible for jurymen in many cases to say with certainty that a panel *de facto* really unsound is so, and almost always impossible to give a prisoner a clean bill of health and to certify him as absolutely sane. It has very frequently happened that a person showing signs of eccentricity or mental peculiarity, but otherwise a moral and respectable member of society, and believed by all his friends and neighbours to be entirely sane, has suddenly committed some crime, and there has been no explanation of the event until long after, when the latent madness bursts into full view, or till a *post-mortem* has revealed some lurking physical defect in the brain. But the difficulties which are caused to the jury from the varying state of the individual, and from what are called "lucid intervals," are

multiplied tenfold when it is found that in many cases a particular family must, in respect to insanity, be regarded as a continuous individual, of which the several members are merely organs; and the state of mind which is under investigation is simply one stage in the progress of a disease which has begun generations back, and which may run on for generations to come. Hitherto, the judges of Scotland have laboured successfully to keep this striking phenomenon out of sight, and to bury their heads in the sand like the ostrich, so that this clearer knowledge may not reach them. But the fact of the heredity of insanity, like the heredity of every other quality and condition, is now proved beyond all rational doubt, and will be referred to more at length as another part of the subject. But even this complex state of matters is made more complex to the jury by the now equally ascertained fact that, in successive generations, one state of mental unsoundness in numerous cases seems to disappear and to be replaced by other states, by which it is successively represented till the whole series is again repeated. Thus dipsomania may be replaced in a succeeding generation by suicide or murder; these again by madness; madness by hypochondria or hysteria; these by apparent sanity; then dipsomania may again burst out, and the whole dreadful series may be repeated, till the race becomes extinct by dementia, or idiocy, or by suicide, or at the hands of the law, by the guillotine or the gallows. Who shall say that the individuals in such unhappy families, when apparently sane, are really so, or when and how the latent evil may break out? It is not, therefore, to be wondered at, seeing juries have no intelligible definition of insanity given them, that some panels, who are to all intents and purposes insane, are found guilty, while others, apparently not less sound, are acquitted on the ground of insanity. Thus, in the case of *Gibson*, above referred to, tried for wilful fire-raising in December, 1844, the prisoner, though when younger a good workman, but of rather weak intellect, some years before the crime began to exhibit eccentricity in his actions. In 1836, he became

affected with the fixed delusion that he was constantly haunted by demons. He often spoke about the devil, and on one occasion he proceeded to single combat with this potentate in his workshop, uttering a wild roar, striking violently at the wall, and seriously cutting and bruising his hands in the encounter. He trembled with terror at the thought of these terrible enemies. His excitability increased in following years, and he told his landlady that he could not get sleep for the harassment of devils. His eye became restless and his manner excited. His habits changed—one of the most frequent marks of the advent of insanity. From being clean, he became dirty and unshaven; from being steady, he became unsteady; he could not rest, and walked about during the night. He went away from home for days and nights, and returned famished, and with his feet torn and swollen. He became suspicious of every person, even of his mother, whom he believed to be anxious to become his wife or to murder him; and he openly declared that he must necessarily take her life. He supposed he was assailed by galvanic shocks, and that he was once knocked down on the highway by electricity, drawn by a doctor from the equator. While he was in this excited condition, a depression of trade occurred in Brechin, accompanied by a reduction of wages, and he fell into the additional delusion that he was employed by the landed gentry and Lady Carnegie to punish monopolists, and, amongst other things, to set fire to a mill belonging to a large firm in the town. It was no use, he said, hanging back, as Queen Victoria was lying off in a ship, and was ready to fire the place if it was not done. He was aware that it was a great offence, and that he might suffer for it, but his mind, after long hesitation, was relieved by what he had done, and he was well pleased with his act. Then came other, even more absurd delusions, and he was convinced that he had acted according to the will of his Maker. This man was manifestly mad, but he was found guilty of fire-raising, which implied, according to the form in which the issue went to the jury, a negation of insanity. The symptoms in

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his case were far more marked than in the case of *Lillie Smith*, tried in the High Court for fire-raising in January, 1855, and acquitted; and it seems plain that, unless the judge and jury understood the word "insanity" in a non-natural or artificial sense, the verdict in Gibson's case would seem to be against the facts.

There are other cases open to the same observations. In that of *Alexander Milne*, tried in the High Court for murder, in February, 1868, it was proved that Milne, in his usual state of mind, though eccentric, could carry on his usual business as a jeweller. He was addicted to occasional drinking to excess, and after one of these bouts, at a time, however, when he was rather depressed than excited, he fell under the dominion of a singular hallucination. One day, shortly before his offence, when a working-jeweller in his employment, named Paterson, with whom he had been on friendly terms, was calling on him, he imagined that Paterson gave him a poisoned cigar, and that he saw him putting poisonous papers, or other substances, into the ears and nostrils of his children. Paterson himself seemed to him to be smoking a magical cigar, from which thick and deleterious mists arose that filled and darkened the whole room. These mists at intervals blew aside, and, on one of these occasions, Milne, who was himself laid prostrate and powerless under these enchantments, saw Paterson committing adultery with his wife upon the sofa. Again the mist opened, and Milne saw through it upon the wall a paper, or kind of theatre bill, on which were the words, "To-night—The Robbers." He was thus supernaturally warned that a band of robbers, of whom Paterson was the leader, was to break that night into his house and shop, which were combined, to carry off his stock, and murder him and his family. In the afternoon, under the influence of this overpowering passion, he proceeded to get a strong iron bar fixed within the shop door, but even this did not soothe him. During the night he became excited with fear, screamed aloud, and struggled. He imagined that the robbers were breaking in the door, and

that he heard the voice of Paterson, as leader, urging them on. Next day he tried to get a firm of auctioneers to take over his whole stock of jewellery, as he felt assured that he would be quite unable to prevent its falling into the hands of Paterson. The auctioneers, however, who saw that there was something seriously wrong with him, declined to purchase, and he subsequently went and bought a dagger, and, sending for Paterson, immediately on his entering stabbed him to the heart. His delusions continued with him in his cell, and he jumped from his bed in fear, screaming that his children were being murdered. He even fell, though intermittingly, into the delusion that the murdered man was not dead, but was keeping out of the way till he should be hanged, and that he would then come forward, marry his wife, and carry on his business. If this was not a temporary access of insane hallucinations, which led directly to the crime, it is difficult to suppose how any such hallucination can exist; but the jury found him guilty, by a majority of eight to seven, thus affirming his sanity. The present Lord Justice-General, who had succeeded Hope as Lord Justice-Clerk, tried this case in the most calm and impartial manner, and it was unquestionably owing to him that Milne's sentence was afterwards commuted to penal servitude for life. The prisoner, however, was not grateful to his lordship, for years afterwards the writer saw a letter from him, by that time sobered by confinement, in which he expressed his poignant regret that he had not been hanged.

One more illustration, that of *Whelps*, tried in the High Court for assault by stabbing and cutting, in July, 1842. The prisoner came wandering into Dunbar on the 18th of June, 1842, in a most wretched plight. His legs were bare, and his beard long and straggling. He had taken lodgings in the place, but he was afterwards turned out, and went straying about the streets, with a crowd of boys following at his heels. His delusions were of a very extraordinary kind. He believed himself to be a son of the Duke and Duchess of York, and thus of Royal blood; and that his title was Prince

of Osnaburg and Count of Dublin. He declared that he had at one time got lessons from George IV. in person, but through some Court intrigue had been carried off to a hut in Ireland, and confined there to get him to forget his high descent. From this hut he said he had escaped almost naked in 1814, and had since roved about, though once he had appealed personally to George IV. in the interval, but without success. This wretched creature, thus pursued and hunted by boys, naturally made some disturbance, and he was taken by the policeman to the jail, where, according to his story, he was beat by him with a stick. This was too much for a royal prince to endure, and accordingly he took out his clasp-knife and stabbed his alleged assailant. It is quite plain that Whelps lived in a continuous circle of insane delusions, which led more or less directly to his overweening self-importance, and to the crime for which he was tried. He was, however, found guilty, and thus by implication declared to be sane. It will, however, be distinctly understood that, in making observations upon the verdicts of the juries in those cases, it is not meant, by any means, that upon correct principles of jurisprudence the results were or were not justifiable, but only to indicate that, if they were justifiable, they ought to have been possible without the necessity of finding panels sane who were manifestly the reverse.

It seems clear that, in order to procure verdicts so apparently contrary to the facts, some influence must have operated in the minds of the juries. In the case of *Milne*, the influence was caused, not by anything said by the presiding judge, for that, so far as could be conjectured, went rather in the other direction, but from the intense popular indignation caused by the murder of a respectable young man, who was just on the point of being married. But in most other cases of the kind the cause lay in the charges of the judges, who were bewildered by the ever varying forms of insanity which were continually coming before them, and assuming the *rôle* of moralists, as some of them had occasionally assumed that

of judicial preachers and theologians—a most pernicious mixture—expressed the fear which they emphatically felt, lest wilful and atrocious acts of wickedness should come to be metamorphosed into spasms of disease; and thus, in their view, the whole foundation of morality and responsibility be undermined. It was a terrible thing to contemplate, that the prisoner, whom they conjured up as a hardened villain, by his own diabolical and unbridled will committing some abominable crime, was to be metamorphosed into an irresponsible agent, linked in a chain of causation out of which he had no escape. Yet it cannot be said that their fear was altogether inexcusable. The analogies between crime and insanity are so striking that it is often difficult to make the distinction; sometimes they are identical. Indeed, taking mental disease or unsoundness in its widest signification, habitual vice or crime must be included under this term. An individual who has surrendered himself to the continuous practice of degrading vice—for it makes no difference whether the law does or does not make it criminal—is always mentally unsound. He is already on the direct road to madness, strictly so called, and not unfrequently reaches the end of his journey. Yet there is no break in the course of the progress downward; vice is the first stage of insanity, and insanity is the last stage of vice; no one can tell when the one ends and the other begins. Further, as already mentioned, vice or crime, like insanity, is marked by physical and corporal phenomena, which, as Lombroso has observed, are only more accentuated in the madman than in the criminal. The tendency to criminality is produced by congenital influences, confirmed by the effect of the surrounding medium. The same author, in his constant and life-long visits to prisons and asylums, ascertained for the most part, not only that criminals, as he found them in Italy, were often distinguished by physical characteristics, but that offenders of special kinds—murderers, thieves, forgers, and those addicted to unnatural crimes—had sometimes their own special characteristics. Habitual homicides were often distinguished by having the eye glassy, cold, immov-

able, sometimes sanguinolent and injected, the nose aquiline, recurved, always voluminous, the jawbones powerful, the ears long, the hair crispy abundant and deep in colour, the beard thin, the canine teeth highly developed, the lips thin, the face agitated by unilateral contractions which uncover the canines. Habitual criminals he found to be marked generally by great physical insensibility and extreme apathy. Work was odious to them, and the power of continuous labour was entirely wanting. Their thoughts were unstable, and incapable of fixity or of foresight. Their cunning was not true penetration. Their literature was wretched, and in their songs the sentiment was as low as the idea. Yet their self-esteem was enormous, and their susceptibility fierce and vindictive. They were often superstitious, and had a religiosity which had no effect whatever upon their morality.

Another striking analogy between insanity and crime is that both are transmissible by heredity. Of insanity we shall speak in a subsequent part of the subject, but the heredity of crime is established beyond doubt, in almost all its phases. Thus, in the case of robbery, its transmissibility is so well-known as scarcely to require to be mentioned. A curious instance is noticed by Dr. Despine in his "Natural Psychology," referring to a family of the name of Christian. John Christian, the common ancestor, had three sons—Peter, Thomas, and John Baptiste. Peter, the eldest, had a son, John Francis, condemned to hard labour for life for robbery and murder. The second son, Thomas, had two sons—1st, Francis, condemned to hard labour for murder; 2nd, Martin, condemned to death for murder. Martin had a son executed at Cayenne for robbery. The third son, John Baptiste, had a son, John Francis, who married Mary Tanres, one of a family of incendiaries. He had issue—seven children—(1.)John Francis, condemned for several robberies, who died in prison; (2.) Benoit who was killed by falling from the top of a house which he was trying to break into; (3.) Clain, condemned for various robberies, died at 25; (4.) Mary Reni, who was imprisoned for robbery and died in prison; (5.) Marie Rose,

same fate, same acts; (6.) Victor, imprisoned for robbery; (7.) Victorine, who married a man named Lemaire, had a son condemned to death for murder and robbery. The heredity of alcoholism or dipsomania is oftener the rule than the exception. Suicide descends in families in the most extraordinary way, the act being often committed by successive generations, not only in the same fashion, but at the same age. The number of facts of this kind is prodigious. Voltaire mentions the case of a person who committed suicide in mature age. His father and his brother killed themselves at the same age. Esquirol mentions a family where the grandmother, the mother, the daughter, and the grandson, committed suicide. Morel, amongst many other cases, notices one where a person committed suicide whose father and one of his brothers killed themselves at the same age and in the same manner. But the pure heredity of crime is not even the most alarming feature. In the course of the heredity, crime is often replaced by madness, and madness again by crime. "The best proof," says Lombroso, "of the affinities of crime and of lunacy is that, in the successive generations of these fatal families in which physical and moral health is an exception, mental diseases of every kind alternate with all kinds of criminality among both sexes." "The passion," says Ribot, in his interesting work on Heredity, "known under the name of dipsomania or alcoholism, is so often transmitted that all are agreed in considering heredity as the rule. Not that the passion for drink is always transmitted under this form to descendants, but that it degenerates into madness, idiocy, hallucinations. In the same way, the madness of ascendants may become alcoholism among descendants. Nothing is more calculated than this continual metamorphosis to show how near passion approaches to lunacy. Ribot mentions a case which occurred in America, on the Upper Hudson, more than half-a-century ago. A woman of a perverse disposition, having, by good fortune, escaped the gallows, married and had several children. At the time this fact was narrated, she had eighty descendants

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in the direct line. One fourth had been struck by justice, the other three-fourths were composed of drunkards, madmen, idiots, and beggars. "The conclusion," says Ribot, "to which everything conducts us is that nothing resembles passion more than madness, and this must be understood in the strict sense. We see cases in which passion in the first generation becomes lunacy in the second, and lunacy in the first becomes passion in the second." Neither Lombroso, however, nor Ribot identifies crime with madness. "We do not maintain," says Ribot, "that every violent passion or every crime is merely a variety of insanity, but only that, in many cases, the conditions which produce them are identical." Lombroso enumerates some striking points which show the difference between madness and crime. It is those nearly connected with themselves that lunatics first begin to hate; where they attack people unknown to them it is either without motives or from motives which are ridiculous. The criminal forms associations with his accomplices. The lunatic is radically incapable of organisation. But though the distinction between crime and lunacy was, in most cases, sufficiently marked, the lines of separation were so faint and ill-defined, and their affinities so evident, that the alarm of the Scottish judges, and, indeed, of English judges, was not to be wondered at, especially when it was sometimes accentuated by the loose pleadings of counsel; and it was excusable that they should try to make sure that the numerous army of criminals, in their war upon society, should not pursue their raids under the guise of irresponsible madmen. Notwithstanding this natural bias, however, it was necessary for them, by artificial definitions, to make out the sanity of prisoners who were clearly insane; hence the invention of judicial definitions of insanity — what is called *legal* insanity in contra-distinction to *actual* insanity. These we will treat of in the succeeding portion of this paper, and afterwards try to eliminate the true legal principle of responsibility.

CHARLES SCOTT.

INSURANCE COMPANIES AND THE INCOME-TAX.

ON 8th February last the Court of Exchequer in Scotland gave judgment in four cases, stated on behalf of as many Scottish Insurance Companies, with reference to the extent of their liability to income-tax.(*a*) About the same time a decision,(*b*) having reference to the same subject, was pronounced by the Court of Appeal in England in a question between an English Life Assurance Society and a Surveyor of Taxes. On both occasions reference was made to a decision about income-tax pronounced by the Court of Appeal and the House of Lords three or four years ago.(*c*) Some attempt will be made in this paper to set forth the various questions at issue in these cases, and how far they have been set at rest by the judgments pronounced.

Insurances offices are of two sorts — proprietary and mutual. It will tend to clearness if we refer for the present to proprietary offices alone—that is, to joint-stock companies carrying on the business of insurance with the primary object of earning profits for their shareholders. The business may be fire, or life, or marine, or any other kind of insurance, or may embrace two or more of these in combination, but we have at present to do only with life insurance companies carrying on that department of business, either

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(*a*) *Scottish Union and National Insurance Company, and Others* v. *The Commissioners of Inland Revenue*, 26 Sc. L.R. p. 330; 16 Ret. p. 461.

(*b*) *Clerical, Medical, and General Life Assurance Society* v. *Carter*, 21 Q.B. Div. 339; 22 Q.B. 444.

(*c*) *Last* v. *London Assurance Corporation*, 12 Q.B. Div. 389; 14 Q.B. Div. 239; 10 App. Cas. 438.

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by itself or in combination with one or two other departments.

Such a company, transacting life assurance, or fire and life, or fire, life, and marine, for the profit of its shareholders, is assumed to be directly liable to pay income-tax on the amount of its aggregate profits. There would be some gain to simplicity, but possibly some loss to the public revenue, if these profits were taxed only when they reached the pockets of the shareholders, and as forming a portion of their individual incomes. But it appears to be conceded that the corporate body must pay the tax before dividing its profits, and the questions we have to deal with have all of them reference to what these profits are, and how they are to be ascertained for purposes of assessment.

In the case of *Last* v. *The London Assurance Corporation*, above referred to, three questions were raised. Two of these went no further than the Court of first instance, where they were decided in favour of the company.(*a*) The principle involved in one of these questions (which was present also in the Scotch cases above mentioned) is of great importance, though it was not seriously impugned in either the English or the Scotch Courts. It has reference to the mode of assessment to be adopted in the case of an office transacting more than one kind of insurance business. The Scotch decision (*b*) answers the question in these terms:—"The profits of the whole business, fire and life, from all sources must be massed as one undivided whole, assessable under the first tax of Schedule D." A company might make a profit in one branch of its business and a loss in another; this decision enables it to set the loss against the profit, and renders it liable to pay only on the net balance of profit, if there be any. The principle appears to be no less fair than obvious. No doubt an ordinary trader would not be entitled to deduct from the assessable profits of his business a loss

(*a*) 12 Q.B. Div. 389.
(*b*) 26 Sc. L.R. 334; 16 Ret. 461.

arising out of a bad investment, still less one incurred by gambling; but this is not analogous. A trader's business proper, though made up of several parts, is, in a question of profit and loss, a *unum quid*. In the case of a grocer, for instance, he could not be expected to pay on his profits from the sale of tea if he could show that they had been swallowed up by his losses from the sale of sugar.

This principle of *solidarité* was carried a great deal further by the House of Lords.(*a*) It is a familiar fact that life assurance companies do not keep all their profits to themselves. At one time many of them did so; but there is probably no company now in existence which does not offer to share its profits with its customers, and, indeed, to give its customers the lion's share of them. We need not inquire here into the origin or motives of this custom, but it is a fact often enough brought under notice, that a proprietary insurance company will appropriate to its shareholders not more than one-tenth, perhaps, of the profits of the business, and will distribute nine-tenths among the holders of its policies, under the familiar name of *bonus*. What the House of Lords decided in Last's case, reversing the judgment of the Court of Appeal (though not without differences of opinion among their Lordships), was that the profits of such a company assessable to income-tax were to include that portion of them, whether two-thirds, or four-fifths, or nine-tenths, or whatever it might be, which is distributed by way of bonus among the policy-holders, no less than the portion retained by the company itself.

The leading arguments for and against this view were these. On the one side it was urged that profits were profits, whoever got them; that if the shareholders instead of retaining them chose to give them away, doubtless for a sufficient consideration, that was no reason why such profits should escape taxation; that any question as to their distribution did not affect their amount; and that all profits

(*a*) 10 App. Court (H. of L.), 438.

were taxable whatever became of them. On the other side it was represented that the word "profits," though constantly used by the insurance offices themselves, was in this connection a misnomer; that all prudent offices knowingly and professedly charged higher rates of premium for the policies they issued than were likely to be required, but bound themselves to account to the policy-holders for a portion of the excess as soon as the amount of it should be ascertained; that the handing over to the policy-holders of a share of these so-called profits was as much in fulfilment of a legal obligation as the payment of the original sums assured; that no real profits arose until both of these obligations had been fulfilled, and that consequently the only assessable profits were what remained to the company after all their legal obligations, original and supplementary, had been discharged or provided for. These arguments for the insurance company, however, did not prevail.(*a*)

The whole of the so-called profits of a life company being thus assessable for income-tax, the next question to be decided was how the amount of these profits was to be ascertained. In practice, each company ascertains the amount of its own profits, by means of a periodical valuation conducted by actuaries; and the Life Assurance Companies Act, 1870, compels all companies to make such periodical valuations. A subsequent Act indicates some of the principles on which they must be made in the case of insolvent companies; but otherwise the law in this country does not prescribe any particular method, or any special data on which to proceed. Elaborate accounts, however, have to be deposited with the Board of Trade for presentation to Parliament, and a yearly

(*a*) Since the above was put in type, it has been decided by a majority of the House of Lords (1st July, 1889), in the case of the *New York Life Insurance Company* v. *Styles*, that the principle given effect to in *Last's* case does not apply to purely mutual insurance offices. The Lord Chancellor and Lord Fitzgerald held that it did, but Lords Watson, Bramwell, and Herschell decided, reversing the decision of the Courts below, that the divisible surplus, or so-called profits of a mutual society are not profits assessable for income-tax.

Blue-book gives the returns of all British insurance offices; so that those who choose, and who are capable of understanding them, have it in their power to judge of the soundness of both principles and data. The Institute of Actuaries in London and the Faculty of Actuaries in Scotland have, during the last thirty years and more, directed a great deal of attention to the investigation of sound data, and the perfecting of the mathematical processes by which these are applied to the valuations in question. In America, the law in many of the States has interfered much more definitely with these subjects, and has aimed at preventing offices from taking too sanguine a view of the future, and estimating their immediate profits too highly. The honesty and prudence of British actuaries have, for the most part, proved sufficient to prevent such over-estimates of profit; but it may be taken as natural that there will be a desire on the part of all persons connected with a life office rather to magnify than to conceal the extent of its prosperity, and that whatever profits are announced and divided are not likely to be much less than what might prudently be reckoned on.

The Commissioners of Income-Tax for the County of Mid-Lothian were unfortunately led to adopt a different view. Being accustomed presumably to the duty of guarding the revenue against too low an estimate of gains and profits in income-tax returns, they assumed that a similar precaution would be required in dealing with insurance offices, and they tried to throw discredit upon the methods observed by these offices in estimating their profits. They originated another principle of assessment, under which the actual receipts and disbursements of the year were to be held as indicating, on an average of years, the profits earned. It seems doubtful whether in the case of any kind of business such an account would serve the purposes of a profit and loss account. The pettiest trader in estimating his profits would be bound and entitled to take into account his stock in hand, the debts due to him, and the debts due by him. A life policy may be regarded as a "bill payable," coming to matu-

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rity, indeed, at a date which cannot be named beforehand, and liable to certain conditions, but which, subject to these conditions, will certainly mature some day. On the other hand, the premiums which the insured have undertaken to pay as a condition of their policies being kept up are so many "bills receivable," and any estimate of profits, to be trustworthy, must take into account the present equivalent of the obligations on both sides. The Scotch Court of Exchequer did not fail to perceive the unsoundness of the contention of the Commissioners, and at an early stage of the discussion indicated that they had no doubt whatever that the profits of a life office must be taken according to its actuarial valuations. In doing so, they repeated the view previously taken by the Queen's Bench Division on the second point in the case of *Last* v. *London Assurance Corporation*, as to which there was no appeal.

It is happily unnecessary at present to explain or defend the methods of valuation adopted by actuaries, although they were described by the Mid-Lothian Commissioners as embracing considerations all problematical and hypothetical, and some of them purely arbitrary. It is true that some hypothesis has to be adopted as to the rate of mortality likely to be experienced, and the rate of interest at which the funds may be securely invested, and that not merely during the next few years, but during the whole period over which the existing contracts may be expected to last; nor does the actuary pretend that he can estimate exactly what the results will be; but the hypotheses which he adopts are not founded on guess, but on scientific inquiry, and his duty is to see that they are such as will not in the result be materially disappointed.

We have arrived, then, at these conclusions, that a life office must pay tax upon the whole of its profits, whatever becomes of them; that these profits are to be ascertained by actuarial valuation, made in accordance with the company's own regulations and with the Act of 1870; and that, if a company transacts other insurance business, the results of that other business are to be massed with those of its life

business. These conclusions, which have not been arrived at without a great deal of discussion, may now perhaps be regarded as practically settled. We come now to a further question, which we have hitherto purposely refrained from alluding to, although it is the question which practically has led to the whole of the recent litigation.

Into all the finance of a life office, interest enters very largely. It was stated in one of the cases before the Scotch Court, as an illustration, that a man of a certain age might secure a policy for £1000, payable at his death, by making an immediate payment of £450. To enable the company to pay £1000 in return for £450, they must obviously, in the course of his life, convert the £450 into £1000 by investing it at compound interest. Another illustration may be given. A man of twenty has, according to the experience of the insurance offices, an expectation of living for forty-two years; that is, of any given number of men of that age, the average future lifetime may be expected to be forty-two years. Now, such a man may insure his life for £100 by paying £1, 15s. yearly. If he pays this for forty-two years he will have paid £73, 10s., and, consequently, the insurance company must earn £26, 10s. from interest before it can afford to pay his heirs £100. The accumulation at compound interest of the premiums which it receives is, therefore, a large part of the business of an insurance office, and its obligations can be fulfilled only in the event of its doing this successfully, and at a rate, all through, not less than it had reckoned upon when it fixed its scale of premiums.

Now, it so happens, that under the income-tax laws of this country the whole or the greater part of the interest which an insurance company receives is taxed at its source; that is, the persons who pay interest, rents, dividends, or other returns upon its investments, retain the income-tax chargeable upon these, and if a company has to receive £100,000 of interest, and the rate of income-tax is sixpence in the pound, it will practically receive only £97,500. Two ques-

tions have arisen—1st, Whether the company is bound to suffer this taxation upon its interest, and to pay income-tax besides upon all its profits; and 2nd, whether any interest payable to it which escapes taxation at its source, may be the subject of direct assessment. We may deal first with the latter of these two questions. A portion of the funds of a company may be invested in foreign or colonial securities, the returns from which do not suffer deduction on account of income-tax. The extent of such investments is being daily increased in one way and diminished in another, that is, the companies on the one hand are looking farther afield for suitable investments for their money, and on the other the Home Exchequer is endeavouring to secure that even as regards these income-tax shall be charged at their source. Thus until lately the deposits with Indian and colonial banks, and the coupons for foreign and colonial bonds and debentures could be received free of deduction, but recent legislation has stepped in to prevent this. Still it may be assumed that some proportion of the interest receivable by insurance companies will escape taxation at its source, and that it will be a question of more or less importance to them and to the public revenue whether such interest can be directly assessed. The question chiefly turns upon the terms of the Income-Tax Acts, which directly specify as subjects of taxation the interest and other returns from foreign securities. Schedule D of these Acts aims at embracing every form of gains and profits not arising under any of the other schedules, and naturally specifies such things as interest, dividends, rents, &c., in addition to the profits of ordinary trades and professions. As it happens, there is perhaps no business or trade other than life assurance in which interest has to be reckoned on antecedent to any profit, and there is no doubt room for argument upon the literal terms of the Acts that profits are one thing and interest another, and that both are directly taxable.

This, however, in the case of a life company would be

obviously a gross injustice and a misapplication of the principle of the Income-Tax Acts. A company may acknowledge that it has earned a certain amount of profit, but not only has this profit been made largely out of interest, but the company has had to apply a large amount of interest, both what it has already earned and what it looks forward to earning, towards meeting its obligations irrespective of any profit. A company which has had an income from interest of £100,000, and has paid out of that by way of deduction £2500, has already had its profits diminished to that extent, and has to that extent contributed out of its profits to the public revenue. It is a quite possible thing that such a company might have received the whole £100,000 without earning a penny of profits, and may therefore have paid £2500 of tax without having had any taxable profits. To tax, therefore, both its interest and its profits seems to be out of the question. A farmer might make a profit out of his grass parks by letting the grass to a grazier, and would properly be chargeable with income-tax upon the profits thus made. He might, on the other hand, feed cattle upon the grass, and might make profit by their increase in value and have to pay tax upon that profit, but he certainly could not be taxed both for the value of the grass and for the increase in value of the cattle which were fed upon the grass.

If interest were taxable only by direct assessment instead of by way of deduction it would more easily be recognised that this double sort of taxation was unjust, and could never have been contemplated by the Income-Tax Acts. The principle the companies contend for is, that if they are assessable upon their whole profits, and if a large portion of the interest which they have received has entered into these profits, first with the effect of enabling them to meet their obligations antecedent to profit, and then of contributing towards profits, they cannot be further assessed in respect of such interest. If they have already paid income-tax by way of deduction upon an amount larger than their whole profits they have an equitable claim to a return of the excess payment, but the

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Income-Tax Acts provide no machinery for this purpose, and they may therefore have to submit to the over-taxation. They claim, however, that the injustice done to them by such over-taxation ought not to be aggravated by any further demand for tax upon interest which has escaped taxation at its source.

The case of the *Clerical Medical and General Life Assurance Company* v. *Carter*(*a*) was decided by the Court of Appeal in England, on 16th February, 1889. Lord Esher, in giving judgment, said that the Court had "heard a long argument, a most able argument, and a puzzling argument, as all arguments about this Income-Tax Act seemed to be: it was enough to puzzle one's head off nearly." They decided that according to the natural meaning of the words used in the statutes, all interest was chargeable with the tax, either by way of deduction, or if it escaped thus, then afterwards by direct assessment. But the Master of the Rolls added that he thought the Act must be so read as to create no hardship, and to prevent the tax from being charged twice over, once on interest and then on profits. The judgment of the Court of Exchequer in Scotland was somewhat enigmatical on this point. "Interest on investments which had not suffered deductions of income-tax at its source, must be taken into account in ascertaining the assessable amount of the profits and gains of the company."(*b*) The precise meaning of these deliverances may possibly still be called in question. To take certain interest into account is not necessarily to hold it taxable, and the theory which appears to reconcile the English and Scotch decisions is, that a distinction is to be drawn between interest which has gone to form an element in the calculation of business profits and interest which is outside and independent of such profits, and that it is only any portion of the latter which may have escaped taxation at its source, that may perhaps be liable to direct assessment.

(*a*) 21 Q.B. Div. 339. (*b*) 26 Sc. L.R. p. 334.

A strong confirmation of this view is to be found in the Scotch case, *Smiles* v. *The Australasian Mortgage and Agency Company*,(*a*) where it was held that the company was not liable to be assessed on interest received from foreign and colonial securities, except in so far as it entered into their profits and gains under the first case of Schedule D. A distinction was drawn between companies whose business it is to make such investments, and companies transacting other business but making investments as an incident of such other business. The judges recognised the principle that such a company might earn interests from its loans, and at the same time suffer loss from other parts of its business, that it was entitled to set the loss against the profit, and that consequently its assessable profits could only be reckoned under the first case of Schedule D. and (in the words of the Lord President), that "it is impossible to distinguish one part of the business from another, and to hold that one part falls under the fourth case, and the other part under the first." This is very much what the insurance offices claim to be their case. They invest the premiums they receive as a necessary incident of their insurance business and entirely "ancillary" (to quote Lord Shand) to that business. The gain from interest may be in whole or in part required to counterbalance a loss arising (for example) from an excessive rate of mortality. It is (to quote Lord Adam) "neither more nor less than trade profit, and being so falls under the first case in Schedule D, and not under the fourth case." Moreover, many of the foreign and colonial investments the interest from which it is proposed to tax are made in obedience to the requirements of the countries in which the offices are transacting fire or life insurance. Certain deposits have to be made to enable a British company to carry on business in some of the States of the American Union, in Canada, South Africa, and elsewhere. The investments

(*a*) 12th July, 1888, 15 Ret. 872.

entered into to meet these requirements are not made for purposes of investment, and may, or may not be a source of profit. A low rate of interest may be submitted to for the sale of the business from which the company would otherwise be excluded, and a high rate of interest be neutralised by the losses arising on such a business; the interest in either case is simply a part of the trade profit or loss, and ought to be assessed only under the first case in Schedule D.

One other point was decided in the first-mentioned Scotch case,(a) — viz., that where a gain was made by a company by realising an investment at a larger price than had been paid for it, the difference was to be reckoned among the profits of the company. This refers only to profits actually realised, and would no doubt permit realised losses to be set against realised profits, before the latter were assessed for income-tax.

The questions involved in the cases we have had under review, are partly legal, partly actuarial, and partly economic. The decisions of judges must be determined by their view of what the law is, not of what it ought to be; but economic considerations may reasonably influence their interpretation of doubtful and contradictory Acts of Parliament. Legislation in this country has favoured life assurance offices for the most part by wisely leaving them alone, but it has made one concession which is not to be overlooked in connection with this subject. A man who insures his life is not liable to pay income-tax on that part of his income which he devotes to this purpose, provided it does not exceed one-sixth of the whole; and the public accounts show that claims to deduction under this head are made and allowed to the extent of several millions yearly. But this concession may be entirely neutralised by taxing the life assurance offices. If the profits of these offices are diminished by undue taxation, the whole of the burden in some cases, and far the larger portion of it in most others, falls not on the shareholders of the company,

(a) 26 Sc. L.R. p. 334.

but on the insured. They are the persons who benefit most largely by the company's so-called profits, and who will suffer from any cause which tends to lessen them. The fight, therefore, which the offices have been maintaining with a too zealous and aggressive Revenue Department, has not been fought so much on behalf of greedy bodies of shareholders desiring to evade their fair share of taxation, as for the sake of tens of thousands of thrifty and self-denying persons struggling to provide for their families by means of life assurance.

JOHN M. M'CANDLISH.

ADMINISTRATION OF JUSTICE ON THE GOLD COAST.

THE following sketch of some of my judicial experiences on the West Coast of Africa, during the last eight and a-half years, may not be inappropriate to the pages of the *Juridical Review*, and may be instructive to those who are interested in the administration of justice in our British dependencies, and possibly also useful to those whose thoughts turn towards a career similar to that which I have passed through.

I ought to explain, at the outset, that in this paper the terms, "Gold Coast Colony," or shortly "Colony," must be understood as including not only the colony proper, but also those large tracts of adjacent country, more correctly designated "Protected Territories." The judicial work of the colony so defined is very heavy, for negroes are a most litigious people, and they have an abundance of Courts in which to gratify this propensity.

Directing attention to the matter of jurisdiction, let us see what is the nature of that exercised by the various existing tribunals. In the first place, the ancient jurisdiction exercised by the native kings and chiefs—before the white man stretched out his protecting arm over these immense tracts of country—still exists, though much curtailed in actual practice. No native chief, within the protected territories of the colony, now exercises jurisdiction in cases of serious crime, but merely causes the suspected criminal to be arrested and handed over to the nearest representative of the Colonial Government. Kings

and chiefs, however, do still possess and exercise a considerable amount of jurisdiction in minor offences, as well as in disputes of a civil nature between parties who are their own subjects. (The terms, "kings" and "subjects," let me remark by the way, are convenient for use, though, as may be imagined, the royal prerogatives are now sadly limited.) Strictly speaking, these native tribunals are no more than optional courts of first instance, with limited jurisdiction. Thus no European is ever required to submit to their jurisdiction in matters of either a civil or criminal nature. Secondly, natives are not finally bound by their decisions, for, subject to some exceptions, they can appeal to the British tribunals. Thirdly, natives are not always bound to resort to their own tribunals, for they can, in certain cases, bring their suit in the British Courts in the first instance. It might appear that these restrictions rendered native tribunals practically useless, but that is by no means the case. Without their aid, it would be impossible for the Colonial Government, with its present resources, to administer justice over the vast territories which it protects. In fact, of the thousands of cases that are annually decided by native tribunals, comparatively few are brought on appeal to the white man. The negroes believe in their own ways of administering justice, and there is a regular hierarchy of courts, beginning with the headman of a hamlet, and ending with the king in a solemn assembly of his chiefs and people.

In recent years the aim of our Government has been to purge these native tribunals of some of the bad qualities characteristic of them. This has been sought to be effected by means of travelling commissioners. These officials move about, accompanied by competent interpreters, from village to village, and are in the practice of taking their seat, without notice, in any native tribunal, and assisting in the deliberations. This plan has been found to work exceedingly well, and I have little doubt that, as time rolls on, these native tribunals will, in the more distant parts of the

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colony, become even more useful than they are at present. In one important respect I should notice they are superior to the white man's tribunals—namely, in never having any difficulty in executing their judgments. It is impossible for a judgment debtor to hide either himself or his property from the eye of his king, though it is very easy for him to outwit the white man.

Further experiments in the way of improvement of the native tribunals are now being tried. Thus it has been recently made incumbent upon suitors to apply for a remedy, in the first instance, to a native tribunal in all ordinary cases, and the former absolute right of appeal to the Courts established by the Government has been restricted.

Native Courts of course administer native law and custom after their own manner of procedure, which is in its simplicity admirably suited to the present condition of the people. They do not, however, keep any written records, and hence, though so eminently useful in causes which proceed no further, confusion arises when a litigant appeals to the white man. There is first of all great difficulty in ascertaining what the native tribunal did, and when that has been ascertained, the whole case has to be thrashed out again in order to determine whether the judgment of the native tribunal was right.

The Courts established in the Colony by Her Majesty are two—the Courts of the District Commissioners and the Supreme Court. The Colony is at present divided into fourteen districts, in each of which there is a resident Commissioner, who has both executive and judicial functions to discharge. In criminal matters his jurisdiction may be roughly described as extending to the summary trial of all charges which can be adequately punished by imprisonment with or without hard labour for three months, or by a fine of £25, and to the committing for trial before the Divisional Court of all persons against whom there is *prima facie* evidence of guilt of more serious crimes. From his decision in criminal matters there is no appeal upon facts, though

upon points of law a convicted prisoner has right of appeal to the Divisional Court of the province within which the district is situated. In civil matters the District Commissioner has jurisdiction over all causes in which the claim does not exceed £25, but he cannot hear any cause which involves a question of title to land however small the claim may be. There is an appeal to the Divisional Court both upon questions of fact and of law in all civil causes where the claim is beyond £5.

It is also a duty imposed upon the District Commissioners to send in to the Chief Justice from time to time returns setting forth full particulars of all criminal causes decided by them. The perusal of these returns was a most anxious part of my work as the Chief Justice, as it devolved upon me to suspend, alter, amend, vary, or reverse the judgment of the District Commissioner as justice might require, and that summarily if need be. I am happy to think that my successors will find this work much lighter than I did, because owing to a new regulation of the Colonial Office it is now required that the resident District Commissioners in the principal districts shall be barristers of several years' standing, and not, as formerly, either military men or superior officers of Customs.

The Supreme Court consists of a Chief Justice and a Puisne Judge. They sit either separately in what are called Divisional Courts, or together as a full Court, and to each of them there is assigned one of the two Provinces into which the Colony is divided. As Judges of first instance their powers are equal. In criminal matters a Divisional Court has power to try summarily all trivial offences, such as ordinary assaults, and also all charges of larceny or embezzlement, which can, in its opinion, be adequately dealt with by a sentence not exceeding nine months' imprisonment, with or without hard labour. This is a jurisdiction, however, that is rarely exercised by the judges. Upon questions of fact there is no appeal from their judgment; but on points of law a convicted

prisoner who has been tried summarily may appeal to the Full Court, which is constituted by the two judges. It is also to be observed that in questions of serious difficulty it is competent for the two judges of the Gold Coast sitting as a full Court, to request the assistance of the single judge of the sister Colony of Lagos.

Apart from this rarely-exercised summary jurisdiction, the initial step in all criminal causes before the Divisional Court, is the filing of an Information by the Queen's Advocate, who prosecutes for the Crown, and to whom are sent copies of the depositions taken by the committing District Commissioners. The Queen's Advocate, in fact, takes the place of the Grand Jury. There are two methods of trial on Information—(1) by Jury; (2) by the Court with Assessors. Trial by jury is conducted in precisely the same way as in an English Assize Court. The great majority of jurors are of course black, but all white residents (with a few official and professional exceptions) are also liable to serve. In empannelling a jury no attention is paid to colour. A white prisoner may be tried on a capital charge by a jury of full-blooded negroes. I may say I have a very high opinion of Gold Coast jurors, and if I had the misfortune to find myself in the dock with my fate in the hands of black men, I should confidently expect from them as intelligent and just a verdict as from a Scots jury. To obviate any possible miscarriage of justice, however, the governor possesses in every criminal case an absolute power of pardon, and no capital sentence can be carried into execution, until it has been confirmed by the governor, with the advice of his Executive Council.

The great majority of trials on information are by jury, but there are a few charges, the trial of which it has not yet been thought expedient to intrust to a jury, and these are tried by the Court with assessors. A Court with assessors is constituted and its procedure is conducted in this way:—The Court selects from three to five of the special jurors in attendance, and with their assistance hears the cause, which in all other respects proceeds as in jury trials. When all the

evidence has been led, and counsel have been heard, the Court invites each assessor to give expression to his opinion as to the innocence or guilt of the prisoner. The Court records these opinions, but is free to act upon them or not as it seems to it just, and I have occasionally found myself compelled to convict, even against the unanimous opinions of five assessors. But such a thing is rare, as the Court is naturally unwilling so to act, for an appeal to the Full Court only lies on points of law.

I can best indicate the classes of cases set apart for trial by the Court with assessors by saying that prominent among them are charges of slave-dealing.

In civil causes the jurisdiction of a Divisional Court is unlimited, and there is no such thing as trial by jury in civil causes. The procedure is closely modelled on that of the English Judicature Acts, but the Divisional Courts have large discretionary power over the procedure—*e.g.*, in actions between illiterate natives regarding the title to large tracts of land I rarely allowed any written pleadings, because experience taught me that they caused delay and enriched counsel, while they did the litigant no good. In such cases, as a general rule, at the issue of the summons, a day was appointed for trial. On that day all the parties with their witnesses were in attendance, and a little preliminary examination of the plaintiff and defendant disclosed the points in issue. The parties knew exactly what they were fighting about, if their counsel did not, and, consequently, had all the necessary witnesses ready. Thus a case could be satisfactorily disposed of in as many days or even hours as it would otherwise have taken months.

In very many other cases written pleadings are found extremely useful; indeed, without them justice could not well be done, and the consideration of a motion for pleadings was a most anxious part of my work. One felt that he had no right to make things easier for himself by allowing them when they could only cause the litigants useless expense, while, on the other hand, as a new judge, it was necessary

to feel one's way with a skilful and by no means uncritical Bar.

When pleadings are ordered, the whole subsequent procedure is that of the Supreme Courts in England, subject to the observation already made that there is no trial by jury in civil cases, and also subject to little differences incidental to the country. Thus I have very frequently made long journeys by hammock to inspect personally alleged boundary marks of land, the title to which was in dispute. This might seem at first to be a waste of judicial time, but I almost invariably found that it saved time, for, it must be remembered, that there have been no official surveys of the greater portion of the colony—and surveyors or persons competent to make a reliable sketch of property were hardly to be obtained. True, I might have appointed a commission to go and take the evidence on the spot, but I entertained a great dislike to decide upon the merits of a cause on evidence heard by another, and so in such cases I proceeded to the land, set up my Court under some spreading tree, and took the evidence of the witnesses on the spot of which they were talking. This, however, is not altogether safe procedure, unless the judge possesses the secret of controlling excited crowds; for whenever the title to land is in dispute far in the interior, the dispute is not between individuals, but between the inhabitants of one village or district as against those of a neighbouring village or district, and feeling runs very high. It is necessary for some of them to carry cutlasses to clear the path for the judge's hammock as he journeys from point to point, and I have now and then had to take energetic measures to prevent riots, which would have been certain to end in bloodshed. So long as the assembly sits, not a sound is to be heard, save that of the witness who is giving his evidence. The plaintiff chief with all his people sit on one side of the judge, and the defendant chief with his people on the other; but directly the Court rises to visit another spot, and the people get somewhat scattered, control is not easy. For the same reason, however clear a view of a

case I was able to form in the bush, I never delivered judgment until I had returned to the stated court-house on the coast; and even there I chose as far as I could an early hour in the forenoon, for it is impossible to conceive the excitement that follows the delivery of judgment in an important cause. Both sides leave the court-house in perfect silence; but directly they are beyond its precincts, the victorious party chalk themselves, and march through the town to the sound of many tom-toms, drinking rum, and singing songs derisive of their defeated antagonists, while the constabulary consider themselves fortunate if they are able to prevent the opposing bands from coming into collision. I need hardly say that I never ventured on expeditions into the bush until I had had several years' experience of African life, and I found it a great relief to be able to see with my own eyes what the witnesses were talking about, not to mention that it put an effectual check on the manufacture in the witness-box of land-marks which had no existence in fact.

My anxiety to save litigants expense in connection with these journeys very nearly led me on one occasion into a very awkward predicament. When a judge is about to travel for the purposes of some particular civil cause, he generally orders the parties to lodge in Court such a sum of money as will probably cover the expense of conveyance; but on the occasion in question, as both plaintiff and defendant had a great number of men, I arranged that the one side should carry me to the bush, and the other side carry me back. We proceeded early in the morning from the village where we had our headquarters, and, after reaching the land, spent the whole day in going over it, and not until dusk were we able to turn our faces towards the village. Just as it got pretty dark I was horrified to find my hammock laid gently on the ground, in consequence apparently of a dispute as to whose turn it was to carry me, with the final result that none of them would do so. I had not the remotest idea where I was, I could not talk a word of the language of my carriers, and my interpreter had gone on ahead. I had a stout stick in

my hand, but I could recollect no legal principle which would justify an assault and battery, and I was rapidly making up my mind to the necessity of spending the night in the bush under the heavy night-dew, in the company of snakes and perhaps a stray leopard, when, to my great relief, the solicitor of one of the parties came up. He also had a useful stick, and I gathered from his action that he took a different view of the law of assault and battery, for, under his magic influence, the hammock-carrying was resumed ; but I never again endeavoured in that way to save the expenses of litigants.

These expeditions were very enjoyable and comfortable, for whatever town or village I visited, the king or chief placed an excellent house at my disposal, but great care had to be taken by preliminary inquiries so as not to find myself indebted for house accommodation to any relative or dependent of either of the litigants. In one case I could only get accommodation by arranging to spend part of my time in a village belonging to one of the parties, and the rest in a village belonging to the other party.

When I had occasion thus to travel, I tried to economise time by arranging for the hearing of several cases along the same route, for I could ill afford time for a separate journey for each cause of this kind, but however long I was away, I always returned to the coast with a fresh stock of vigour and health. Perhaps I took occasion to enjoy these expeditions too much, for when I entered my hammock I left behind me much of that etiquette which is so proper and becoming in buildings where a Court holds its sittings in state. For instance, now that I have retired and can no longer shock the sensibilities of my more dignified brethren, I may as well confess that if they had happened to stray on one of our open-air legal assemblies, they might have found the judge with a cutty in his mouth, and hundreds of the spectators similarly engaged.

I would fain linger over these delightful judicial picnics, but must hasten on to say a little as to the law administered by the Supreme Court. Native law and custom are administered whenever justice so requires, and in all other

cases the law of England modified by Ordinances of the Legislative Council to meet the requirements of the people and of the country. These ordinances are published in a single volume of moderate size.

There is no native literature, and the question as to what native law or custom applies to any given set of circumstances is one of fact to be ascertained by examination on oath of chiefs of good repute. I do not wish to say a word against the chiefs. Many of them are most honourable men; but the difficulty is to get the evidence of any of them who have not been already approached by the parties, or are not otherwise personally interested in the matter in dispute. The ascertainment of native law and custom is very up-hill work for a new judge, and it was only after several years' diligent study of the prior records of the Court that I felt myself competent to take in hand the examination of these experts and get at the real native law or custom applicable to a difficult case.

One or two illustrations will indicate the fact how far the white man must lay aside previously conceived legal notions. Throughout the greater part of the colony succession is through the female—*e.g.*, when a man dies his children do not succeed, but his property is taken by the children of his sister. A chief explained the reason thus:—"My sister's children are my blood relatives, but whether the children my wives bear are so or not, I cannot tell." When I told him how different the white man's law was, he gave me clearly to understand that in this respect he considered the white man somewhat credulous and soft-headed.

Again, in the greater part of the colony such a thing as individual property or private ownership is unknown. Property belongs to families, larger or smaller as the case may be, but ever increasing in number. Each individual of the family has rights in the property, and can enforce them, but he has no power of alienation. Such property is managed by the head of the family for the family benefit, and as these two doctrines of succession and family property

must be applied together, the power will not perhaps appear so strange, for though, when a man dies, his sister's child becomes head of the family, and succeeds as such head to the property, yet the deceased's children are members of that family, though occupying a very subordinate position. A knowledge of these and other elementary principles is easily acquired, but it is no easy matter to apply them, for the increasing tendency of the native to imitate the white man is introducing serious complications, and this is so especially in the coast towns, where large fortunes made in trade by individuals are by no means uncommon, and where Christian marriages after the requirements of the English law are fashionable. These are elements which have given rise to legal points of great nicety.

In criminal causes there is, as I have already indicated, an appeal from the Divisional Court to the Full Court only in points of law, but in civil causes both on questions of fact and of law, provided the claim in the summons exceeds £50. From the Full Court there is an appeal to the Privy Council in civil causes where the claim exceeds £500, but the Privy Council does not entertain appeals in criminal causes except where some clear departure from the requirements of justice is alleged to have taken place.

A Gold Coast Judge (and I suppose the same will be said of every one who has to administer justice to an uncivilised or semi-civilised community), ought to be a man endowed with great patience, for no other will be able to extract the truth. As a rule all the parties and their witnesses have a more or less material interest in the subject-matter in dispute, and I am afraid they have a tendency to say anything they think will help their cause. Many a time have I seen a cause which appeared in all respects well-founded and just, seriously endangered by the utter disregard of truth shown by the witnesses called to support it. This lying propensity (for I fear it must be so designated), makes it often necessary to call a greater number of witnesses than is usual in this country, and the sifting of the evidence requires

a special experience. The merits of a cause are often still further obscured by the number of interpreters through whom the evidence has to be filtered. There is a Court interpreter, but there are so many languages that it is impossible to obtain men who have a thorough knowledge of more than two or three, and it is no uncommon thing to have three interpreters on the floor at once. In each province the languages are different, and I was never long enough in one place to acquire an accurate knowledge of any of them. Possibly it was only the spur of necessity that was wanting, for I must confess that my "boy" (*i.e.*, my servant) who was under the necessity of procuring food and comforts for himself and his master, acquired several new languages while in my service.

In the conduct of proceedings in the Supreme Court, a certain amount of ceremonial was always sought to be observed. No doubt, under the trying atmospheric conditions, one could scarcely be blamed if the judicial robes were seldom donned. (Judge's wig and scarlet silk in Crown causes; judge's wig and black silk in civil causes.) I found a day in robes more exhausting than two days without them. In so far as clothes form an essential element in the administration of justice (and therein I am in accord with "Sartor Resartus"), I certainly fell far short of the standard; but I am glad to reflect that some of my colleagues, who did not feel the heat so exhausting, made up for my deficiency in this respect.

Each Divisional Court sits on the first Monday of every month for the purpose of opening the criminal assize, and as soon as the calendar has been exhausted, the hearing of civil causes is resumed. There is no vacation either long or short. So long as there are causes to be heard, the Courts must remain open, and the only judicial holidays are Sundays, Christmas Day, New Year's Day, and the Queen's Birthday. There are no blank Mondays and no half-holidays. The actual amount of work varies very greatly in the different provinces. I was first sent to Lagos, which, though now an

independent colony, was then one of the provinces of the Gold Coast Colony, and there the judicial work was very light indeed. One week in the month frequently sufficed to dispose of all the pending legal business. I had no reason to regret this, for I was thereby enabled to study the prior records of the Court, and obtain some mastery of the procedure. After I had completed two terms of service there, I suppose the Government thought me sufficiently seasoned for harder work, and removed me accordingly to the province of which the famous Cape Coast Castle is the capital. There the work was very exhausting, almost too trying indeed for any European. During the first four months Sunday was my only holiday, and immensely I enjoyed those Sundays of absolute rest. On no other day during those four months did I sit in Court less than nine hours (8 to 11 A.M., 1 to 4 P.M., 8 to 11 P.M., and often on past midnight). I broke the day up in this manner because I found it less exhausting than continuous sitting. At the end of the four months I felt sufficiently rewarded when I saw the last of the litigants take his departure, and there was no one left who required the Court's aid. That was a Saturday, and on the Monday began the Criminal Assize, but the burden of arrears had fortunately been got rid of. During the four months I speak of, we all—judge, Court officials, counsel, litigants, and witnesses—had a hard time of it. Counsel had most of my sympathy, and, so far as I could, I arranged to take at the night sittings causes where no counsel were engaged, though one of them (and he was not a native), will not, I am sure, readily forget three successive days and nights he spent in my Court, finishing up his comments on the evidence at 2.30 A.M. A severe attack of fever relieved him from further duty for some weeks. During those night sittings, the witnesses who were waiting examination naturally fell asleep; and it was my practice, about half-an-hour before a witness was expected to be called, to order him or her to be wakened and marched up and down the verandahs of the Court under official escort, so that when he

or she came into the witness-box, the sleepiness had all disappeared. Litigants and witnesses were only too happy to humour the Court in these vagaries for they were anxious to return to their homes whence, owing to the delay caused by the accumulation of arrears, many of them had been detained for weeks. This over-pressure of work, which I have described, was exceptional, and arose in consequence of the absence from the colony on leave of two judges, the death of a third, and the resignation of a fourth, so that, probably, such an emergency will not again occur for many years. Fresh out from home, I felt quite fit to grapple with the requirements of the situation, but the work at Cape Coast Castle is always heavy, and I was not sorry when I was promoted to be Chief Justice and assigned to the other province, whose chief town, Accra, is the capital of the colony. There I got more pay, had less judicial work, and was elevated to the dignity of a legislator.

The practitioners in the Courts of the colony combine the duties of advocate and solicitor, and they are of three classes —(1) English or Irish barristers or Scotch advocates; (2) English, Irish, or Scotch solicitors; and (3) Native pleaders, who practise in virtue of a license, a renewal of which must be applied for to the Chief Justice every six months, and may be refused without reason assigned; but though I thus classify them, they all enjoy equal rights and privileges at the Bar of the Courts of the colony, and none of them can practise until admitted to do so by the Chief Justice. I have no hesitation in saying that I derived most assistance from the native pleaders. In many cases enormous fees are received, but these are principally where kings and chiefs are concerned. When the king has finished his series of law-suits and returned to his country, he apportions his outlay among his chiefs, they again sub-divide their shares, and so on, as all the king's subjects have a direct proprietary interest in the subject matter of the litigations. The arrival at Cape Coast Castle of a king or chief with his followers causes great joy among the practising lawyers, for, though the ball be opened

but by a simple action of ejectment, that is pretty sure to lead to a series of prosecutions for perjury, these will lead to assaults in the town, and will be followed by actions of damages. Meantime there will have been fresh acts of trespass upon the land in dispute, for while the king and his followers remain at Cape Coast Castle, they must be supplied with food (the produce of the land in dispute) by their wives and daughters. So the fun goes briskly on until the poor king has exhausted the Royal Treasury, and is forced to retire broken-hearted to the bush, but probably no worse off than his antagonist.

It is a melancholy fact that litigation is one of the great curses of the Gold Coast, and it is not easy to see any remedy for it. I did all I could to cheapen it, but the only apparent result was that it lasted longer. It seems to be a kind of craving (like that for gambling or rum) that the people cannot resist so long as the money lasts. I can call up before me now the faces of many litigants, the mere sight of whom coming into Court caused me pain, for I knew what misery they were storing up for themselves. One poor chief in particular was seldom out of Court save for an interval of eighteen months, during which he languished in prison under a conviction for perjury. He came out more eager than ever for the fray, and specially eager to get his antagonist chief convicted of perjury, the alleged perjury being the evidence on which he himself was convicted. I must express my feeling of thankfulness that I was not there to try such an involved issue, and I have never heard how it terminated.

Such is a rough sketch of a few of my experiences. It is a beautiful country, and the climate was on the whole kind to me. I attribute my premature break-down to over-work, for which no one was to blame but myself. I liked the people and I liked the place, and though I like home better, I shall always have pleasant recollections of those years spent among the negroes of West Africa.

HECTOR MACLEOD.

THE HISTORY OF THE COLONIAL OFFICE.

FROM the colonisation of Virginia in the beginning, to the enactment of the Navigation Laws about the middle, of the seventeenth century, the colonial administration of England was inspired by what may, without substantial exaggeration or misdescription, be termed the *demesnes theory*. The earliest settlements and plantations abroad were regarded by the English sovereign as his personal property, over which the State had no jurisdiction or right of control. The origin of this convenient conception is by no means clear. According to Governor Pownall(*a*), who is nothing if not ingenious, it was suggested to the mind of King Charles the First by the contemplation of the history and constitution of the Channel Islands. Pownall's elaboration of this view, although highly imaginative, and not distinguished by a nice regard for chronological order, deserves a brief notice. Upon the final severance of England from Normandy in 1204, Jersey and her sister islands remained, or were forcibly kept, faithful to the crown of King John.(*b*) As a reward of their fidelity, the royal Angevin established a Royal Court in Jersey and in Guernsey (with the latter of which Alderney and Sark were for judicial purposes united), and directed that all appeals should thenceforward be brought before himself and his Council in England. Now Pownall contends, and his argument has received the assent of at least two able writers on colonial law, that at

(*a*) "Administration of the Colonies," 1774, p. 49.

(*b*) Falle, "Account of Jersey," Durell's Edit., 1837, pp. 32 *et seq.* Forsyth's "Cases in Constitutional Law," pp. 390, 391.

the time when the problem of colonial administration first pressed itself upon the attention of the sovereigns of England, the only precedent for their guidance was that afforded by the Channel Islands. This seemed to present an obvious solution of the difficult question of how to regard and to govern the new plantations. As from the Royal Court of Jersey, so from the decisions of the colonial governor, appeals lay to the King and his Council, and not to the House of Lords, or to the superior Courts of law and equity. The ordinance made by the King and his Commissioners, and transmitted to Jersey by the Council Board, became the colonial Order in Council; and the right enjoyed under their constitution by the people of Jersey, to hold a convention of the three estates of the island at which public money was voted, and at whose deliberations the royal Lieutenant-Governor had a negative voice, was now extended to the English colonies. Under the influence of this historical analogy, so plausible and so complete, "the foreign plantations," like the old feudal duchies of Normandy and Gascoigne, came to be regarded as the *King's demesnes.* Whether the *demesnes theory* can with any propriety be considered as the creature of the administrative imagination of King Charles the First it is not here proposed to inquire. Perhaps a simpler explanation might be found in the apathy with which the English public, during the seventeenth century, looked upon their possessions beyond the seas, and the consequent temptation—irresistible to the mind of a Stuart—quietly to extend the royal prerogative in the one direction where it was not likely to be disputed. But whatever may be the origin of this theory, the evidence of its existence is overwhelming. 1. The charters by which the earliest colonial settlements were established expressly assert the King's personal rights within the territory disposed of by his grant. Thus the Virginian charter (10th April, 1606) provides that all inter-colonial grants of land shall be confirmed by royal letters patent, and *that lands so granted shall be held of the King, as of our manor of East Greenwich in the county of Kent*

(sections 18 and 19). Other territories in North America were granted to be held *as of our castle of Windsor*, and others *as of Hampton Court.*(*a*) 2. The "demesnes theory" was acquiesced in by the early colonists themselves. "The plantations," says Pownall,(*b*) speaking of the original royal grants, "were settled on those lands by the King's license and grant. The constitutions and powers of government were framed by the King's charters and commissions, and the colonists, understanding themselves as removed out of the realm, considered themselves in their executive and legislative capacity of government in immediate connection and subordination to the King their only sovereign lord." 3. The prerogative, so insidiously concealed in the verbiage of the American charters, and so tamely consented to by the American colonists, was also recognised by the House of Commons;(*c*) and an attempt to pass laws establishing a free right of fishery on the coasts of Virginia, New England, and Newfoundland, was met, and to all appearance met successfully, with the ministerial criticism "that this bill was not proper for this House, as it concerneth America."

Throughout the period during which the "demesnes theory" prevailed, the administration of colonial affairs was actually, and, as will shortly be apparent, was necessarily, conducted by the Sovereign himself, and the Privy Council. A short digression into the history of this famous body, over whose constitution and functions successive commentators, from Coke and Hale to Hallam and Hearn,(*d*) have waged a doubtful battle, is unavoidable. The Kings of England had *two* councils—(1) the *magnum* or *commune concilium*, roughly corresponding to the modern Parliament, and (2) the *concilium ordinarium*, also called *privatum et assiduum*, from

(*a*) *Cf.* Mill's "Colonial Constitutions," p. 2; Burge's "Colonial Law," i., Preliminary Treatise; also the "Charters of the British Colonies in America" (Almon, London, date not given).

(*b*) P. 50.

(*c*) *Cf.* Jour. Ho. Com., 25th April, 1621, and 29th April, 1624; also Mill's "Colonial Constitutions," p. 2.

(*d*) "The Government of England," edit. 1887.

which the modern courts of law, the privy council itself, and the judicial committee are descended. The *concilium ordinarium* was a permanent body, consisting of the great officers of State, was in constant attendance upon the King, and, besides sifting and advising upon the business which was to come before the *magnum concilium*, was consulted by the Sovereign upon every weighty matter of private or public interest. This brief description of the character and functions of the *concilium ordinarium*, if the reader will keep it in view, will enable my subsequent remarks to be the better understood. The foreign plantations were the King's demesnes, and, therefore, lay beyond the cognisance of Parliament. But the administration of these plantations, under the royal charters, became gradually more and more complicated, and gave rise, with increasing frequency, to questions of a *quasi*-public character, and to problems, in the solution of which the whole State was interested. Upon such questions and problems the Privy Council was naturally and properly consulted. But when I speak of the Privy Council being consulted, I do so subject to two qualifications. (1.) There was no permanent committee of the Privy Council charged with the administration of colonial affairs. There was nothing in the nature of a State department, before which all questions of a particular character necessarily came. Colonial problems were referred to the Privy Council, not because they were *colonial*, but because they were matters with which the Sovereign had to deal, and in solving which he required advice and guidance. (2.) It is highly probable that Parliament interfered occasionally in the administration even of "the King's demesnes." This consideration may perhaps account for the instances, cited by Mr. M'Queen in support of his contention that the Privy Council entertained colonial petitions in virtue of a reference by the House of Peers.(*a*)

After the restoration of Charles II., the history of colonial

(*a*) Appell. Jurisdiction of the House of Lords, edit. 1842, p. 6. See also p. 682.

administration, while apparently more confused and complicated, becomes in reality, for the first time, intelligible. The old *curia regis*, with its protean forms, lies behind us; the old disputes as to the precise relation between the Privy Council and the *magnum concilium* seem to lose their significance. We are face to face with three factors of new and abiding interest—(1) the growth of the Cabinet system; (2) the recognition of the commercial importance of the colonies; and (3) the germ of the Colonial Office.

(1.) The Cabinet system had been steadily growing for some time. When the business of the country increased, the functions of the Privy Council were distributed. The Lord Chancellor, who seems to have acted originally as the King's private secretary,(*a*) became a permanent Judge of Chancery —that mighty and historic tribunal which adjusts, or used to adjust—at least in theory—the inelastic rules of the common law, to the changed conditions and new relations of a growing society—and handed over his secretarial duties to a Secretary of State. The position of the Secretary of State, on the other hand, rose in importance as the diplomatic correspondence, which passed through his hands, became more voluminous; and in a statute of 31 Henry VIII. (c. 10, sec. 4), he was included among the great functionaries of State as "the King's Secretary." The practice adopted by most European sovereigns, after the peace of Westphalia in 1648, of keeping resident ambassadors at their Courts, instead of sending special embassies to England, still further increased the work and the dignity of the royal Secretary; and he speedily was recognised as the permanent administrator of foreign affairs. The same process of differentiation went on in other departments of State. The number of secretaries increased, and a general supervision came to be exercised over all the public business of the country, by a special committee of the Privy Council known as the Cabinet.

(*a*) Hearn's "The Government of England." 1887, pp. 297-298.

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(2.) The nation too was gradually awakening from that "fit of absence of mind"(*a*) in which it had hitherto carried on the work of colonisation. That large and statesmanlike conception of a Greater Britain, in which all the tiny currents of separate national existence shall be swept into the ocean of an Imperial Federation, under the sceptre of the Sovereign—which seems so familiar to us now—was then, of course, impossible. But a growing sense of the commercial importance of the colonies, to which the Navigation Acts gave a formal though short-sighted expression, and an increasing readiness on the part of the colonists to appeal for the direction and support of the mother country, seemed to show that any danger of the English plantations becoming, like the Greek ἀποικίαι, separate entities with no political ties to the parent stock, was passing away.

(3.) The various stages in the development of the colonial office may now be noted and appreciated. Perhaps it may suffice to enumerate them, almost without comment or illustration.(*b*)

(*a.*) By an Order in Council, dated 4th July, 1660, Charles II. appointed certain members of the Privy Council to sit as a committee every Monday and Thursday, at three o'clock in the afternoon, to receive colonial petitions and memorials, and thereafter to report to the full Council the result of their deliberations. The instructions of this committee limited both the subject-matter of their inquiry—viz., questions arising in the American islands and colonies, and the scope of their authority—viz., to report their proceedings.(*c*)

(*b.*) Thereafter, by letters-patent, of 1st December, 1660, the King established a "Council of Foreign Plantations," to sit in the Star Chamber at Westminster, as a permanent Council, for administering colonial affairs.(*d*) Its powers

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(*a*) Seeley's "Expansion of England," p. 17.
(*b*) *Cf.* Mill's "Colonial Constitution," p. 2.
(*c*) Mill, p. 3.
(*d*) *Ibid.*—See an enumeration of its powers at pp. 4 and 5.

were wide, and the patent contained a provision enabling it to obtain direction, and further powers if necessary, from the Privy Council.

(*c.*) In 1672 the Council of Foreign Plantations was united (24 Car. II.) by letters-patent to another body, established by Charles II. on 7th November, 1660, and known as the Council of Trade. The new committee was called the "Council of Trade and Plantations."

(*d.*) By letters-patent of 21st December, 1677, this Council was abolished, and, during a period of nearly twenty years, colonial administration was in the hands either of the Privy Council or of the committee appointed by the Order in Council of 4th July, 1660.

(*e.*) In 1695, by letters-patent, of 16th December, William III. restored and reconstituted the Council of Trade and Plantations, which combined some of the present functions of the Board of Trade with those of the Colonial Office. In 1748 the affairs of India were put under its charge, and so remained till the establishment of the Board of Control in 1784.

(*f.*) The office of Secretary of State for the Colonies was created in 1768, and temporarily abolished, together with the Council of Trade and Plantations, in 1782, by Burke's Act (22 Geo. III. 82, sec. 1), which empowered the King, by Order in Council, to reappoint a committee of the Privy Council for the administration of colonial affairs. Pending the exercise of this power, the duties of the old Council of Trade and Plantations were discharged at the Home Office—then the *Northern Department*—by an Under-Secretary and three clerks, in what was called "the Plantation branch" of that office.

(*g.*) By an Order in Council, dated 5th March, 1784, the committee of the Privy Council, first appointed in 1660, was revived; and subsequent Orders in Council—22nd and 25th August, 1786—gave this committee a more representative character, and an organised establishment.

(*h.*) The office of Colonial Secretary, which the successful revolt of the North American colonies had for the time

rendered an expensive and useless burden to the country, was restored in 1794, and the Secretaryships of War and of the Colonies were united, in the person of Lord Melville. This continued till 1854, when the outbreak of the Crimean War brought about a definite and final separation of the two departments.

The old Committee of Council became merged in the Board of Trade. As a Committee of Plantations it has acted upon two comparatively recent occasions as the referee of the Colonial Office. Thus in 1847 Lord John Russell's Government, of which Earl Grey was Colonial Secretary, proposed to amend the Constitution of New South Wales—(1) by erecting what was then the district of Port Philip into a separate colony (Victoria); and (2) by reverting to the earlier constitutional model of having two Chambers in each colony. This proposal was communicated to Sir Charles Fitzroy, then Governor of New South Wales, and met with vehement colonial opposition. By Order in Council, dated 31st January, 1849, the Queen added to the Board of Trade Lord Campbell, then Chancellor of the Duchy of Lancaster; Sir James Stephen, and Sir Edward Ryan, to whom she referred, among other questions, the best mode of effecting the contemplated changes. The Board reported in favour of a single Chamber in each Colony. A Bill was framed in accordance with this recommendation, and the decision was welcomed in the Colony. In the same year—by Order in Council, 31st January, 1849—the question of representative institutions, and the franchise, in Cape Colony, was referred to the same historic Committee, who reported to the Crown on 19th January, 1850, and their report was approved of on the 30th January thereafter.(*a*)

Speaking of the body to which he thus appealed, Earl Grey says: "At the time when there was no separate Secre-

(*a*) "Colonial Policy of Lord John Russell's Administration," by Earl Grey, 1858. Vol. ii. p. 91. Appendix A, and at p. 441.

tary of State for the Colonies the most important matters relating to them were habitually referred by the Crown to the Committee of Council for Trade and Foreign Plantations; but although this committee retained its ancient name, and though, with reference to the confirmation or disallowance of Colonial laws, the decision of the Crown was always made in the form of Orders in Council founded on the report of this Committee, for many years the real functions of this department had been confined to matters of trade, and it had been in the habit of rendering very little assistance to the Secretary of State in the administration of colonial affairs."

The advantages which Earl Grey claims for the system of referring colonial questions to the Council of Trade—viz., the independent and valuable character of its advice, and the placing on record, in a more formal shape than that of a mere despatch, the reasons for the course adopted by the Crown on the recommendation of its servants—have now, however, been rendered otherwise attainable by a more elaborate organisation of the Colonial Office itself. As at present constituted, this department consists of a Chief Secretary, who is invariably a member of the Cabinet; a *Parliamentary* Under Secretary—an office created in 1810, and continued ever since, except from 1815 to 1822—a *permanent* Under Secretary of State, before whom all papers come before being submitted to the Parliamentary Under Secretary and the Minister; three *Assistant* Under Secretaries of State, between whom the general business of the Colonial Office is distributed, partly according to its character, partly also on geographical lines; and a staff of *clerks*, appointed after competitive examination, and divided into the chief clerk, and principal, first-class, and second-class clerks.

A short time ago an indignant colonist, writing to the newspapers in London upon some local grievances, inveighed against the system under which the island of Cyprus was practically governed by "a clerk at the Colonial Office." The objection is ignorant, but not new; and it is difficult to condemn the Cypriot taxpayer, when one recollects that a

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proposal to confer the status of Assistant Under Secretary of State on one of the most accomplished and influential colonial officials (also "a clerk at the Colonial Office") was rejected by the Treasury upon purely technical grounds.(*a*) "Marked features of English administration," says Sir Henry Drummond Wolff, "are the presence of real and the absence of recognised system. Of these, the gradual change in the organisation of the Colonial Office is a remarkable instance. As often occurs in public departments, the real policy of the Colonial Office has to a great extent resided in the permanent officers. Their influence, though unrecognised, has been powerful. In France we find high-sounding designations given to very inferior offices. In England we find the converse of this proposition. In the Colonial Office, under the somewhat humble title of clerks, those behind the scenes recognise functionaries exercising many of the powers, and often endowed with many of the qualities of statesmen."

In the admirable paper from which I have been quoting, Sir Henry Drummond Wolff make a number of practical suggestions as to the reform of the Colonial Office, on which I neither desire, nor feel qualified to offer an opinion.

1. "The Colonial Office might be made an intermediate region in which to accept the local knowledge of some, and to train others in the qualities of generalisation." This dark saying is explained in the next sentence. "It should be a depôt and clearing-house for colonial functionaries, adjuncts at home to the Minister, as purveyors of practical colonial experience, and in turn emissaries of the Minister to the colonies." 2. The offices of Under Secretary and Assistant Under Secretary of State for the Colonies should be made convertible with certain governorships, and the lower degrees in the Colonial Office should in like manner be assimilated to certain positions in the colonies, so that a young man entering the service would enter on a general colonial career, his mind

(*a*) "The Colonial Office," by Sir Henry Drummond Wolff—a paper read at a Colonial Conference in 1871.

strengthened and improved by the theories of London and the practice of the colonies. 3. "Colonies should be taught to regard the Colonial Office not as the residence of cold official formality for the mere transaction of business, but as a favourite resort, where they could find a colonial atmosphere, and meet with, in their absence from home, the formal sympathy and friendship, springing from old recollections."

A. Wood Renton.

THE JUDICIAL SYSTEM OF GERMANY.

Part III.

II. *Criminal Courts.*—The Criminal Courts of Germany are arranged in a fivefold gradation: the *Schöffengericht*, the *Landgericht*, in its criminal chambers (*Strafkammer*), the *Schwurgericht*, which is, theoretically, a division of the Landgericht, the *Oberlandesgericht*, and the *Reichsgericht*.

Of these the lowest in rank, with which it will be convenient to deal first, is the *Schöffengericht*, and in point of composition it differs more than any of the others from the tribunals with which we are familiar in this country. It is composed of three judges, one being a trained lawyer, an Amtsrichter, or inferior district judge, who presides in the Court, and two Schöffen (*Echevins*) or lay assessors selected from the community in which the Court has its seat, and destitute, as a rule, of legal knowledge or training. The origin of this Court dates back to the time of Charlemagne, but it owes its establishment in its present form to a popular outcry, raised during the revolutionary period of 1848, against the despotic and inquisitorial system then existing, for which it was felt to be absolutely necessary to devise some substitute. Teutonic pride rebelled against the direct adoption of the jury systems of England or France, but it was pointed out that in the "Schöffen," who acted as lay assessors in an antiquity so remote that their existence was known only to the learned, there was to be found the germ of a Court which would combine the impartiality of a jury with the legal knowledge and trained intelligence of a professional judge. A tribunal upon the ancient model was

accordingly established in Saxony and in some of the minor states, and an attempt was made, though unsuccessfully, to give it a prominent place in the new Code. It now occupies the lowest position in the organisation, and deals only with minor offences. Every male inhabitant of the community who is between the ages of thirty and sixty-five, and who is not disqualified or entitled to state any exemption (the grounds of which are very similar to those pleadable by our jurymen) is liable to serve as a Schöffe. A list is made up every year by the chief municipal officer of each community, and is transmitted by him to the Amtsrichter of the district, along with any objections that may have been lodged against it. These are disposed of by the judge, and he then summons a commission of selection, consisting of an administrative official and seven "*Vertrauensmänner*," or men of repute in the district, to consider the names. The commission goes through the lists which have been sent in by the magistrates, and selects from them the necessary number of Schöffen. A certain number of supplementary Schöffen is also chosen in case of failure of the principals. The number of Schöffen selected is always sufficient to ensure that no one shall be called upon to serve more than five times in any one year. The days upon which the Court is to sit are also fixed, and the order in which the Schöffen are to serve is determined by lot. The office is honorary, and entitles the Schöffe to no more than than his travelling expenses, while neglect of duty subjects him to a penalty varying from 5s. to £50. To the competency of the Schöffengericht belong the minor offences known as *übertretungen* (contraventions) delicts punishable with a maximum imprisonment of three months, and fine up to £30, actions for defamation or bodily injury (when they can be pursued at the instance of the party injured), and theft, forgery, embezzlement, and malicious injury to property when the subject misappropriated or destroyed does not exceed 25s. in value. It can also punish accession after the fact, and reset, when the principals are triable by the

Schöffengericht, and it also deals with any cases remitted to it by the Landgericht. Certain of the offences above mentioned may, however, be disposed of by the Amtsrichter, sitting as a single judge, and without the assistance of the Schöffen — *e.g.*, cases of simple contravention where the Public Prosecutor consents; and the lighter offences of the other classes where a maximum penalty of £7, 10s., or six weeks' imprisonment, would be sufficient; or when the Prosecutor makes a written request to that effect, and the panel pleads guilty, or consents to be tried by the Amtsrichter alone. The Schöffen take an oath *de fideli* before the trial begins. During its course, and in deciding upon the guilt or innocence of the accused, they have equal voice with the Amtsrichter, but the judgment of the Court is pronounced by him as president, and any matters which have to be dealt with prior or subsequent to the trial, are disposed of by him alone.

The Criminal Court next in order of importance to the *Schöffengericht* is the *Landgericht.* For civil as well as for criminal purposes it is composed exclusively of professional judges, and in its criminal chambers takes cognisance of such crimes as, not being proper to the Schöffengericht, involve a penalty of not more than five years' imprisonment, crimes committed by persons under eighteen, certain cases of theft, forgery, reset, and embezzlement, and breaches of certain particular statutes in which it has special jurisdiction. It has also power, on the motion of the Public Prosecutor, to remit to the Schöffengericht offences proper to its own jurisdiction, upon being satisfied that the maximum penalty which can be imposed by the lower Court will be sufficient to meet the requirements of justice. The Landgericht is also the Court of Appeal against the decisions of examining magistrates, of the Schöffengericht, and of the Amtsrichter when sitting as a criminal judge. Appeal on the facts is allowed, and evidence may be taken afresh. Criminal appeals to Courts other than the Landgericht can be based only upon an alleged violation of law, and the judgment of the inferior Court as to matters

of fact is taken as final. The criminal chambers of the Landgericht generally consist of five judges, but in certain appeal cases only three are necessary. Where the district subject to the jurisdiction of the Court is large, and it would be inconvenient to bring prisoners and witnesses to its ordinary seat, a criminal chamber may be formed at any Amtsgericht within the territory, and in such cases the Amtsrichter may act as a judge.

The *Schwurgericht*, which is a jury Court, has cognisance of all offences involving a higher punishment than can be competently pronounced by the Landgericht, excepting only treason. It has also retained, after a struggle in the legislative assemblies, the jurisdiction conferred upon it by previous legislation in regard to press offences, even though involving a trivial punishment. It can pronounce sentence of any degree of severity, including the death penalty. It meets periodically at the seat of a Landgericht, and consists of three judges and a jury of twelve "*Geschworenen*" or jurymen. A President of the Court is appointed for each sitting by the President of the Oberlandesgericht, and he may be either a member of the Oberlandesgericht or of a Landgericht. The other judges are members of a Landgericht. The preliminary procedure for the election of the jurymen is the same as in the election of the Schöffen. The Commission which meets to prepare the list of the latter is also bound to make out a provisional list of jurymen, which, along with any objections to it, is sent to the President of the Landgericht. From this the judges of the Landgericht prepare lists of jurymen and supplementary jurymen for the year. A fortnight before any sitting of the Schwurgericht thirty jurymen are chosen by lot from the lists, and their names are sent to the judge who is to be President of the Court. He in turn causes intimation to be made to them that their presence is required at the ensuing sittings, and this intimation must be given at least three days before the meeting of the Court. From among the thirty thus summoned a jury of twelve is balloted for and empanelled in

manner very similar to that in use among us. The questions to be decided by the jury are submitted to it immediately after the evidence is taken. Then follow the speeches of the Public Prosecutor and prisoner's counsel, and the President directs the jury upon the questions of law involved in the case. He does not sum up the evidence, though it was the practice for him to do so prior to the introduction of the Criminal Code. The power was, however, greatly abused, and the judge not unfrequently played the part of second counsel for the prosecution. He is accordingly now prohibited from re-stating the testimony given or the arguments adduced. He has, however, as in France, still power to interrogate the prisoner at will—a dangerous prerogative, which is very apt, even with the most conscientious judges, to be fatal to the accused. At the conclusion of his charge the jury retires and deliberates in private, a majority of two-thirds being necessary for a verdict. The verdict is delivered in the absence of the accused, who is afterwards brought in and hears it read a second time. The President of the Court then pronounces judgment in accordance with the verdict; but should it be one of guilty, and the Court be unanimously of opinion that the jury is mistaken, it pronounces no judgment and orders a new trial. It cannot, however, order a new trial should the verdict be one of acquittal. A fresh jury is struck for each case. Jurymen receive their travelling expenses, but no other payment, and are subject to the same penalties as Schöffen for absence without sufficient cause. The Court may, if circumstances necessitate it, meet at any place within the territory of the Landgericht, and in this case a special list of supplementary jurymen, whose residence is in the vicinity of the place chosen, is made out, and the jury is selected from it.

The *Oberlandesgericht*, in criminal as in civil matters, is purely a Court of appeal. It sits in senates of five members, and reviews the judgments of the Landgericht when sitting as a Court of first instance, if the appeal be founded upon the alleged violation of some provincial statute, or be taken upon

the ground of want of jurisdiction, or similar formal plea. When this is not the ground of appeal, the case is taken direct from the Landgericht to the Reichsgericht. The Oberlandesgericht is also the Court of Review of all judgments of the Landgericht pronounced on appeal from the inferior Courts and judges. Like the Reichsgericht it can enter judgment itself, and does not require to send the parties before an inferior tribunal in order that its decision may be applied. In states where there is more than one Oberlandesgericht, one may be designated by the legislature to which all criminal appeals shall be taken—a provision introduced to preserve uniformity in the application of the criminal law, just as the states are authorised to establish an Oberst Landesgericht to maintain continuity in the administration of the civil law. Only Prussia and Bavaria, however, have found it expedient as yet to take advantage of this provision.

The Supreme Court of the empire in criminal, as in civil matters, is the *Reichsgericht*. It alone has cognisance of the crimes of high treason and treason against the state, and it is the Court of review of the appellate judgments of the Landgericht in revenue offences, when the public prosecutor moves it to take action, and also of such judgments of the Landgericht, whether of first instance or on appeal, as are not competently brought before the Oberlandesgericht. It is further the sole Court of review of the judgments of the Schwurgericht.

The Reichsgericht is the only one of the higher Courts which does not designate one or more of its number to act as permanent *Untersuchungs Richter*, or examining judges. In all the other collegiate Courts an investigation is made before the trial by an examining judge and evidence taken by him, if necessary, and his report is read before the commencement of the proceedings. The Reichsgericht has no permanent examining judge attached to it, but it appoints an inferior judge in the locality where the crime has been committed to examine and report in cases where that is necessary. The

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examining magistrate questions the accused secretly and separately, his counsel not being permitted to be present, and makes investigations into his history, his character and habits, with a view to ascertain his probable motives, acting in fact more as a prosecutor than as a magistrate. At the conclusion of the examination, however, prisoner's counsel is entitled to inspect the evidence taken, and any productions, and also to hold such communication with the accused as may be necessary for the preparation of the defence.(*a*)

(*a*) The following may be useful as showing in tabular form the existing judicial hierarchy, and the relations subsisting between the various Courts; civil and criminal :—

I. Civil Causes.
- A. *Amtsgericht.*
- B. *Landgericht.*
  - (a) *Ordinary Chambers.*
    - (1) Review of judgments of Amtsgericht.
    - (2) First instance when Amtsgericht not competent.
  - (b) *Commercial Chambers.*
    First instance in commercial causes when Amtsgericht not competent.
- C. *Oberlandesgericht.*
  Civil Chambers.
  Review of judgments of B. (a) (2), and B. (b).
- D. *Reichsgericht or Oberst Landesgericht.*
  Civil Senates.
  Review of judgments of C., and Court for trial of cases formerly proper to Imperial Commercial Court, or assigned to it by special statute.

II. Criminal Causes.
- A. *Schöffengericht.*
- B. *Landgericht.*
  - (a) *Criminal Chambers.*
    - (1) Review of judgments of A.
    - (2) First instance when A. not competent.
  - (b) *Schwurgericht.*
    First instance when neither A. nor B. (a) (2) nor D. are competent.
- C. *Oberlandesgericht.*
  Criminal Chambers.
  Review of—(1) B. (a) (1).
  (2) B. (a) (2), when only a provincial law is violated, or formal plea is in question.

The secrecy which was one of the great reproaches of the old judicial system of Germany has now disappeared, and the new law insists upon publicity as one of its essential features. The Court may, however, order any proceedings, whether civil or criminal, to be conducted in private when it is of opinion that, in the interests of morality, the doors should be closed. For such a power as this in civil cases our judges have often longed, and it is surprising that they have not yet been put in possession of it. The public in Germany may be excluded from matrimonial causes on the motion of either of the parties, and the proof in cognition of the insane is also conducted in private. In every case, however, judgment is pronounced publicly. Disrespectful or disorderly conduct in Court is punishable by summary imprisonment for not more than three days, and fines up to £5, reserving any further criminal prosecution which may be competent in ordinary course. Any counsel guilty of disrespect may also be summarily fined by the Court up to £5, but may be further dealt with by the Ehrengericht or Court of Honour of the bar to which he belongs.

The vacation of the Courts extends from 15th July to 15th September, and they are also closed upon public holidays. With these exceptions they sit by one or more of their divisions six days a-week throughout the year, and judges and counsel hear with envy and astonishment of our long recesses. The Courts, however, sit as a rule only in the mornings, and, as the whole chambers or senates composing a collegiate Court rarely or never sit simultaneously, the judges have numerous "blank" days. As with us, the Courts meet periodically during the summer recess to deal with cases requiring despatch.

D. *Reichsgericht.*
Criminal Senates.
(1) Review of—
(a) Judgments of B. (a) (2), when not proper to C. (2).
(b) B. (b).
(2) First instance in treason.

Such, then, is, in brief outline, a sketch of the judicial system of Germany as established by the new Code of Civil Procedure. Its institution was hailed with enthusiasm, and ten years' experience of its working has given conclusive proof of the care and skill with which it is framed. The influence of the Code in diminishing the volume of litigation in the country has been very remarkable. In Prussia, for example, the number of processes instituted in 1878 in the district now under the jurisdiction of eight Oberlandesgerichte was 892,970. In 1880, the year after the introduction of the Code, the number had fallen to 567,679; and in 1886, to 538,263. The decrease is even more striking in regard to the cases taken to review. These numbered in 1878, in the same district, 52,896; in 1880, they had dropped to 45,732; and in 1886, to 26,063. Similar results have followed the establishment of the Procedure Code in the other States of Germany, and the delay and expense formerly attendant upon litigation have been greatly diminished. The "Civil-prozessordnung" has been, in fact, one of the most gratifying pieces of codification yet undertaken in Germany, and its success has greatly stimulated the demand for a general codification of the common law, to be applicable to the whole empire, which is even now in course of preparation. A committee of jurists has been engaged for several years past upon this great undertaking, and its labours are now approaching completion. The difficulties in the way of framing provisions to be applicable throughout a country in which at this moment so many separate and conflicting systems of law are administered have been very great, but most of them have now been overcome. Though the scheme has yet to undergo the criticism of the legislative assemblies, there is little doubt that in the course of a short time it will be proclaimed as law for the whole Empire; and it will form, when completed, a worthy consummation of the labours of the distinguished men who have, during the past half-century, done so much for the jurisprudence of Germany.

J. J. Cook.

XUM

Current Topics.

The late Francis Wharton.—By the death of Francis Wharton, in February last, International as well as American Jurisprudence has sustained a severe loss. Son of a distinguished lawyer of Philadelphia, and born in 1820, Francis Wharton was remarkable throughout his career for the versatile talents and nervous energy which are so characteristic of the *élite* of America's sons; and history will doubtless accord him a niche in the same temple of fame with such men as Wendell Holmes and Russell Lowell. After graduating at Yale, he was admitted to the Bar in 1843, practised law at Philadelphia, was appointed professor of logic and rhetoric in Kenyon College, Ohio, in 1856; was ordained a clergyman of the Protestant Episcopal Church in 1863; and afterwards held the chairs of ecclesiastical and international law in the Cambridge Divinity School and in Boston. In 1885 he was appointed Solicitor for the Department of State, and in 1888, under a resolution of Congress, he became editor of the diplomatic correspondence of the United States relating to the period of the Revolution. Kenyon College created him successively a Doctor of Laws and a Doctor of Divinity, and the University of Edinburgh offered him the degree of LL.D. on the occasion of her Tercentenary Festival in 1884, at which, however, he was unable to be present. A theologian and man of letters, he was at one time joint editor of the *Episcopal Recorder* at Philadelphia, and published original treatises and articles on Theism and other subjects, while his chief legal works are his Criminal Law, his State Trials, a standard treatise on Medical Jurisprudence (with Dr. Stillé as joint author), his well-known Conflict of Laws, and an admirable Digest of International Law. The fact that the International Institute and the "Juristische Gesellschaft Zu Berlin" both claimed him as a member suffices to indicate his European reputation. Generous and sympathetic in the midst of his exacting official labours, he wrote a letter a few weeks only before his death to one of the founders of this Review, warmly approving of its objects and promising to contribute to its pages. By us therefore his memory will be gratefully cherished, while on both sides of the Atlantic his death has created a void which it will be difficult to fill.

J. K.

XUM

Law of Public Health in Italy.—*L'Ordinamento dell'ammistrazione e dell'assistenza sanitaria del Regno*, or shortly, "*La Legge sanitaria*, 1888," the new Public Health Act of Italy, is of far wider scope than its title would suggest to English ears, and is a masterpiece of comprehensive and scientific legislation. Two ideas, which our law-makers have hitherto entirely failed to grasp, pervade the whole scheme. *First*, That important as sanitation may be, and urgently as it is demanded in that country, it is not all that is implied in the care of the public health, but that the medical relief of the poor, the hygienic aspects of manufacturing and other industries, including the army, navy, and mercantile marine, the practice of medicine and pharmacy, the control of the sale of food and the purity of potable waters, diseases of domestic animals, the pollution of rivers, &c., &c., are co-ordinate parts of one great department of social economy and legislation. *Secondly*, That these matters demand special knowledge, not only in the executive officers, but also in the administrative, and that, consequently, the control of the public health cannot safely be committed to boards, elected by popular suffrage on other issues than that of special competency—that is to say, the Sanitary Boards must be distinct from the Local Authorities, be composed of experts in the several branches of the science and art, and be appointed by an independent authority—viz., the Crown—so as to be uninfluenced by fear or favour of the ratepayers and the public over whose interests it has to watch. This last-mentioned principle is recognised in this country in the case of Inspectors of factories, mines, shipping, &c., but with strange inconsistency, is ignored in that department which concerns not fractions of the community, but the entire nation. Indeed, if any one should have the hardihood to propose in Parliament that Inspectors of mines, factories, and shipping should be appointed by and removable at the pleasure of the owners of these properties, it would be treated as a joke and an insult to the common sense of the House, though the Medical Officer of Health is no less an inspector, and the men at whose mercy he holds office are not seldom the greatest offenders against the Acts, the provisions of which it is his duty to enforce.

The essential features of the Act, which, though drafted under the direction of Signor Crispi, and introduced by him as a Government measure, was the last work of his old companion-in-arms, the patriot, soldier, physician, and politician, Dr. Macchiavelli, are the recognition of special qualifications for the work of sanitary administration, and the judicious balance of the relative claims of central control and local self-government, with a corresponding appropriation of the fiscal burden. While the administration of the public health, in the widest meaning of the word, devolves on the Minister of the Interior, the Prefects of the Provinces and the Syndics of Towns and Communes, or, as we might say, on the President of the Local Government Board, and the Chairmen of County, Burgh, and District Councils: the Minister and the Prefects respectively are advised by a General

and by Provincial Sanitary Councils appointed by the Crown, composed of specially qualified physicians and engineers, with chemists, veterinarians, pharmaceutists, jurists, and members conversant with administrative business in numbers proportioned to the population of the provinces. The heads for the time being of the medical services of the army, navy, and mercantile marine, the agricultural departments and the statistical office, with the principal law-officers of the Crown, are *ex officio* members of the General Board. The provincial Medical Officers of Health are nominated by the Crown, on the recommendation of the General Board, and are restricted to practice consistent with their official duties, such as that of medico-legal experts, university professors, &c., and they are irremovable *dum se bene gesserint*, the members of the boards being appointed for three years, but eligible for reappointment. The inferior or communal medical officers of health are appointed for three years, renewably, by the Provincial Board from the more competent, in their opinion, of the practitioners in their districts.

Space forbids any attempt to enter into the details of the Act, covering, as it does, a multitude of subjects, but we cannot refrain from noticing the rigid demarcation between medical and pharmaceutical practice; medical men being prohibited from dispensing, and pharmaceutists from prescribing; the sale of secret nostrums absolutely forbidden, and those medicines which a pharmaceutist may supply without a medical man's order indicated in the pharmacopœia. The medical profession is indeed so jealous of its honour, that the prohibition of dispensing is not felt as a grievance, and the single relaxation of the rule, under certain circumstances, proposed by the Parliamentary Committee, was withdrawn in deference to the protest of the Congress at Bologna.

Another matter in which Italy is already in advance of us, is the prohibition of poisonous pigments in textile fabrics, wall-papers, toys, and other articles of domestic use, no less than in those of food. Instead, too, of the precarious mode of "catching" a dealer in provisions or drugs unawares, or, more often, on the alert, required by our Adulteration Acts, the Italian law enjoins the deliberate examination of his wares at intervals of uncertain length, but not exceeding a year, while the penalties are much heavier than ours which, pecuniarily considered, are too small to have any deterrent effect, taking into account the chances of evading detection or conviction altogether.

It may be vain to hope for such a unification of public health legislation as shall bring into a single code, complete as an outline, but capable, as regards its details, of indefinite development, and administered by a single organisation, superseding our present chaos of statutes, each aiming at finality, but overlapping, partly repealing, and conflicting with one another, and worked by a like multitude of heterogeneous authorities; but if our Legislature could be brought to approach the vast question of the public health with something of the scientific and judicial spirit, and absence of

party feeling and factious opposition of that of Italy, we might learn much from that rapidly rising, intelligent, and practical nation, and find in this Act a guide, if not a model, for our own legislation in the future.

E. F. W.

Sale of Goods Bill.—Thirty years ago the codifying of the law was a favourite subject with law reformers. The country, it was said, was like the Roman emperor who hung up his laws in such small characters that no one could read them. But we had no Tribonian. The schemes propounded were all too ambitious; and gradually they resolved into the more modest proposal of an authoritative digest of rules and principles which would at least do away with the necessity of searching for what the law is in the huge collection of cases which are the despair of the practitioner. They were then estimated to be about 100,000 in number—exclusive of the judicial decisions in Scotland and Ireland—some worthless, others overruled, many contradictory, many also rendered useless by subsequent legislation, and not a few so involved in their facts as to furnish no general rule, but often cited in debate, nevertheless.

In 1866 a Royal Commission, consisting of Lord Cranworth, Lord Westbury, Lord Cairns, Lord Sherbrooke, Lord Selborne, and other distinguished persons, was appointed "to inquire into the expediency of a digest of the law, and the best means of accomplishing that object, and otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions." The Commission sat for several years without doing much. They selected three subjects by way of experiment—Bills of Exchange, Mortgages, and Easements, and appointed three very competent members of the English Bar to prepare a draft digest of each. The Commission, however, was evidently not quite satisfied with their labours, and it closed the inquiry in 1870 with a brief report to the effect that the work of digesting the law should be intrusted to a body of persons not exceeding three, and "provided with the necessary means and assistance"—a suggestion which was never carried out.

In 1878 the Criminal Code Bill of Sir James Stephen was laid before Parliament. This work has since passed through several editions. It has also been examined and revised by a Committee of the Judges, but has hitherto failed to obtain legislative sanction.

In 1882, however, the efforts of law reformers were at length crowned with a measure of success. In that year the Bills of Exchange Act—the 45 & 46 Vict. c. 61—was passed. This work has proved a most satisfactory performance in the way of codification. Originally intended to apply only to England and Ireland, its scope was most fortunately enlarged by the Standing Committee on Law of the House of Commons, being made applicable to the United Kingdom. It has proved a great boon to the profession of the law in both countries, and has no doubt stimulated the desire to have other branches of our jurisprudence dealt with in the same

manner. The Sale of Goods Bill of Lord Herschell (which is understood to be the work of the author of the Act relating to Bills of Exchange) is to be the next effort in the same direction, and it is not surprising that it has met with so favourable a reception.

That such an undertaking should be welcomed and encouraged by lawyers is, we think, beyond question. Some people object to a code, that it is not possible; and not expedient, if it were possible. That it is not possible in less than a lifetime to codify the whole law with proper accuracy, and that it would be very difficult to get it passed through Parliament were it accomplished, may be granted. But that we cannot do everything is no reason why we should not do something. There are evidently branches of the law which could be easily codified were the attempt honestly and seriously made. The Law of Evidence is an example, and the value of a digest of its leading rules and principles has been proved by Sir James Stephen's little book on that subject. The rules of procedure form another instructive example. Nothing can be more absurd than our method of putting these rules into an Act of Parliament—for they deal not with substantive law but administration; and an Act can only be repealed by another Act. A better plan was followed in the fusion of law and equity in England when the first rules were printed in a schedule to the Act, and the judges were empowered to alter them from time to time in accordance with their experience in working them. In the same way the rules for the prevention of collisions at sea have been altered several times by Order in Council, and in their amended form have been adopted by every important maritime state on the face of the globe, and now form a code of practically universal obligation.

In its present shape the Sale of Goods Bill, like its prototype the Bills of Exchange Act, in its original form is restricted to England and Ireland, and if enacted without alteration, the probable result would be to bring the mercantile transactions of Glasgow and Liverpool, or Leith and Newcastle, into sharper conflict as regards legal rights and remedies than is even now the case. The true policy seems to be to endeavour on this occasion to follow the plan adopted for Bills of Exchange, and to bring the laws of the two kingdoms, as regards sale, into closer agreement. To effect this, the first step which must be taken is to fix distinctly the points on which they agree. For this purpose the Committee of the Faculty of Advocates, which was appointed a few weeks ago to report upon the Bill, have wisely resolved, with the consent of the Faculty, to undertake the revision of the Bill, in the expectation that it may be ultimately extended to Scotland. More recently the Writers to the Signet and the Society of Solicitors before the Supreme Courts have offered to co-operate with them in the work of revision, and the offer has been cheerfully accepted. It is hoped that other legal bodies will interest themselves in this important work. Not much can be accomplished this session, but during the coming winter it is to be hoped that some progress will be made. J. G. S.

XUM

Reviews of Books.

The Elements of Jurisprudence. By Thomas Erskine Holland, D.C.L. Fourth Edition, 1888. Oxford: Clarendon Press.

The Nature and Value of Jurisprudence. By Chan-Toon. Second (enlarged) Edition, 1889. London: Reeves & Turner.

Professor Holland's admirable book reached its fourth edition a year ago. It would be difficult to overpraise it; and it is satisfactory to observe that its excellence has been recognised, not only in English-speaking countries, but on the Continent. Its learning is always profound, and never cumbrous; its definitions are precise without being inadequate; and, in statement, it is at once terse, accurate, and lucid. But, while we acknowledge the merits of his work, there is one fundamental point on which we venture to differ with Professor Holland. We cannot adopt his definition of a law. He says, "A law, in the proper sense of the term, is therefore a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society." Now, the theory that law has no existence apart from the State, and, until a separate sphere has been assigned to it, is completely discredited by the results of historical research. In societies, simple in structure, each member follows the custom and lives the life of the group to which he belongs. He regards the group not merely as the supply of his needs and the security of his existence, but as a Divine institution. In advancing the well-being of the group, he not only furthers his own material well-being, but he performs a religious duty; and an offence against the group is at once a sin and a crime. The common aim is here the universal rule of conduct; and in so far as the group regards the observance of that rule as essential to its existence, and, in consequence, makes its observance a condition of membership, that rule has a legal character. In the simplest forms of the group, the distinction between a rule regulating outward conduct and an internal principle affecting inclination and disposition is not felt; and it is not until a group has become complex in structure that its rule comes to be divided into rules which are,

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and rules which are not, of universal obligation,—that the sphere of morality comes to be separated from the sphere of law. It is quite true that elaborate explanation may show that Professor Holland's definition is applicable to law at any and every stage of social development. But such an explanation is required; and a definition which requires such explanation is, we venture to think, simply misleading. Professor Holland's chapters on "Rights" are refreshing in contrast to the vague writing of those who found right the correlative of duty, upon right, the opposite of wrong. A man's legal right is his might, supported, because approved, by the group to which he belongs. And, accordingly, when he asserts his right, he asserts the law in so far as it is coterminous with his right. Very interesting also is Professor Holland's criticism of the various theories as to the meaning of "consent" in contract. The question is—Does the law look at the will itself, or at the voluntary manifestation of the will? Professor Leonard is the most recent exponent in Germany of the latter view; for which he claims the authority of Savigny, and the use of the words "velle," "consensus," "sententia," by the Romans, in reference not so much to the inner will as to its outward expression. The question is one of great importance, and, on this side of the Channel at all events, has not received the attention it deserves.

We regret that we are unable to praise Mr. Chan-Toon's book; for any attempt on the part of a native of China to enter into and discuss the juridical notions of Western civilisation is most meritorious and praiseworthy. The author's object in writing the book was to guide beginners in the law, and it is in effect an attempt to apply to law the theory of evolution. Mr. Chan-Toon has read, and gives long extracts from, the analytical jurists, the best known modern English writers upon jurisprudence, the works of Maine, M'Lennan, Morgan, and Lubbock, and Mr. Herbert Spencer's "First Principles" and his "Sociology." As a curious example of classification we may note that he regards M'Lennan's method as historical, and Maine's as comparative. Such a book, in order to be of any use to the student, must be clear in expression and systematic in arrangement. This book is neither the one nor the other. The account, for example, of M'Lennan's and Morgan's theories is quite unintelligible, except to those who have a previous acquaintance with them. Savigny, Bachofen, and Nasse are named. With these exceptions no mention is made of Continental writers. Strangest of all, Mr. Lightwood's excellent book is ignored.

P. J. H. GRIERSON.

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Lorimer.—Principios de Derecho Internacional Traducidos al Francés y Extractados, por ERNESTO NYS, Miembro del Instituto de derecho internacional, Juez del tribunal de primera instancia de Bruselas. Versión Castellana de A. L. LOPEZ COTERILLA, Abogado del Ilustre Colegio de esta Corte. Madrid, 1888.

Revista de Derecho Internacional, Legislación y Jurisprudencia comparadas fundada y publicada, por Don ALEJO GARCÍA MORENA, VI. Principios de Derecho Internacional, por J. LORIMER, por JOAQUIN FERNANDES PRIDA. Numeros cuarto, quinto y sexto. Madrid, 1888.

Fundamentos del Derecho Internacional Privado. Conferencias pronunciadas en el Ateneo y Sociedad de Excursiones de Sevilla. Por JOAQUIN FERNÁNDES PRIDA, Catedràtico de Derecho internacional en la Universidad. Vitoria, 1888.

At the present moment there is hardly anywhere to be found a more interesting, more vital, or more promising activity in the sphere of juridical science than in Spain. By a variety of causes—political, social, and philosophical — the subtle and penetrating spirit which animated the scientific genius of Vitoria, Soto, and Suarez in the zenith of their country's greatness, has been quickened again, and is giving evidence of unexhausted vitality. The political struggles and aspirations that have imparted new life and purpose to the European peoples in the nineteenth century, could not leave Spain—the battleground for a time of the external forces—unmoved or unaffected. Within her own rigid social order, currents of the new thought and life continued to flow, although almost unseen; and every political conflict and change in her internal administration has widened the freedom of the ideas and speech of her ardent and eloquent people. The most potent philosophical influence has been that of Krause, whose comprehensive and humanising system of thought has been working for half-a-century with the most beneficent and liberalising influence on the best thinkers and leaders of Spain. Introduced into the University of Madrid by the noble-minded Don Julian Sanz del Rio in 1843, and diffused by the popular expositions of Ahrens and Professor Tiberghien of Brussels (the pupil of Ahrens, and now its greatest living expounder), the philosophy of Krause, and especially his "Ideal of Humanity" and "Philosophy of Law," have been like a new Gospel to Spain, and have shot inextinguishable rays of living light through all her ancient darkness. An intense and manifold interest in the problems of freedom and right and progress has been the consequence; and the inevitable antagonism and animosity of the Jesuits (to which the noble Del Rio fell a sacrifice) has only stimulated and increased the scientific devotion of the Krauseans (*Krausistas*) to the cause of humanity. It is not too much to say that Krause has been, in a manner, the intellectual liberator of Spain; nor does it seem too much

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to hope that the new movements of thought thus quickened and guided are destined to exercise the most beneficial influence on the future of that most naturally favoured of countries. The fatal errors, and even the crimes against humanity, of the Philips and Torquemadas of the sixteenth century are now scientifically recognised and overcome in the leading minds of Spain; the whole modern movement of the spirit of freedom and its new social institutions are being studied by them, comparatively and in the most generous spirit; and the fruitful results of this study are being popularised through the press and brought home to the intelligence of the most earnest and capable of the people. It can hardly be doubted that a political future full of progress and increasing influence lies before Spain, in consequence of this intellectual awakening and the humanising of her powers; and she may even yet rise again to some degree of her suddenly eclipsed greatness, and atone to the civilisation of the world for the errors which induced her decline. If the revival of the sense of freedom and the universal recognition of human right is to be regarded as the natural precursor of such movements in history, the recent juridical literature of Spain may be hailed as a happy presage of the better and greater future before it.

Of all this most interesting and instructive evidence was given recently by M. G. Rolin-Jaequemyns, the well-known founder of the Institute of International Law, and editor-in-chief of the *Revue de Droit International*. In his valuable review of "the Actual Juridical Literature of Spain, and of some of its most Recent Productions,"(*a*) M. Rolin-Jaequemyns, in continuation of previous notices, and with his characteristic thoroughness and discrimination, passes no less than eighty of the recent works of the Spanish jurists under review, all of them noticeable, and some of them of great value, and bearing on all the departments of juridical science. He has also indicated the important work done by the *Royal Madrid Academy of Jurisprudence and Legislation* and the *Scientific, Literary, and Artistic Athenæum of Madrid* in organising and sustaining the scientific work and enthusiasm of the Spanish jurists. There is much in M. Rolin-Jaequemyns' careful and accurate account not only to instruct, but to cover us, in our fancied superiority to things Spanish, with confusion and shame, at the haphazard, mercenary, and superficial study of law that obtains among us; but we can only refer to it here, and we point to it especially as confirming by high authority the view which we have given of the contemporary jurisprudence in Spain.

In view of all this, we note, with particular gratification, the fact of the appearance of a Spanish translation of Professor Lorimer's "Institutes of the Law of Nations," by Don A. L. Lopez Coterilla, a learned advocate of Madrid.

(*a*) See the *Revue*, t. xix., Nos. 6 and 7: *De la Littérature Juridique Actuelle de l'Espagne et de quelqes-unes de ses Productions les plus récentes*, par M. G. Rolin-Jaequemyns.

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The translation has been made from the French version of M. Nys(*a*), and, in so far as we have compared it with its original, we have found it accurately and elegantly done. It is made the subject of an able and luminous article by Professor Joaquin Fernández Prida, of the University of Seville, in Moreno's Spanish "Review of Comparative International Law, Legislation, and Jurisprudence," and is also referred to and quoted by the same writer in a series of attractive and thoughtful lectures on "The Fundamental Principles of Private International Law." All this we have gone over with the utmost interest. Don Joaquin Fernández Prida gives a very high estimate of Professor Lorimer's work. He expounds the fundamental principles of his system, and especially "the doctrine of international recognition," with sympathy and insight; and he sums up his judgment of the work of "the eminent Professor of Edinburgh," who is characterised as "one of the men to whom International Law owes most," in these terms: "New truths, new methods of investigation happily employed, appropriate and solid reflection, impartiality, and elevation of view,—this and much more is to be found in a book which cannot be read without the mind being constantly stimulated to reflection. Opposed to passionate exclusiveness, and recognising the importance which belongs to Philosophy and History; one who believes in liberty and the moral order, in Metaphysics and Theology, the eminent Professor of Edinburgh always shows himself an original and profound thinker. And as regards the traditional truths of the Science, without putting restraint on his judgment, he has produced a robust system, one of the most complete and solid that International Law has seen take form, from Grotius till our day."

This is high praise, and its value is enhanced by the evident competency and sincerity of the writer. In the importance which it attributes to Professor Lorimer's work and the estimate it gives of it, we are reminded of M. Rolin-Jaequemyns' articles on the same subject in the *Revue de Droit International*, which have been reprinted in a separate *brochure*(*b*). We congratulate the learned Professor of Public Law on these gratifying evidences of his widening reputation and influence. His sympathy for Krause's theory, while not lessening the independence and originality of his own system of International Law, will be both conciliatory and acceptable in Spain; and the healthfulness and humanity of his own special jural doctrines can do nothing but good. The privilege of directly helping forward the spiritual and political regeneration of the Spanish national life in any degree, is one that may well gratify the noblest ambition.

W. HASTIE.

(*a*) Principes de Droit International, par J. Lorimer, Professeur de Droit de la Nature et des Gens à l'Université d'Edimbourg, &c. Traduit de l'Anglais par Ernest Nys, Associé de l'Institut de Droit International, Juge au Tribunal de 1re Instance de Bruxelles. 1885.

(*b*) Les Principes Philosophiques du Droit International. Examen Critique du Système de M. J. Lorimer, par M. G. Rolin-Jaequemyns. Extrait de la *Revue*, &c. Bruxelles, &c., 1886.

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Lectures on Scots Law by T. C. Young, Jun., M.A., LL.B., Solicitor, Glasgow; and Robert Hislop, B.L., Solicitor, Auchterarder. Glasgow: William Hodge & Co.

These Lectures, which are dedicated to the Professor of Conveyancing in the University of Glasgow, and are stated to owe their origin to his suggestion, are probably part of the fruit of the Act of Sederunt of 1886, which provides that attendance at the classes of Scots Law and Conveyancing shall in future be unnecessary for any applicant for admission as a law-agent. They were delivered during the spring months of the present year, under the auspices of the Stirlingshire Faculty of Solicitors and Procurators. The authors are both able and competent lawyers, and the result is a little volume of which neither need be ashamed.

Mr. Young writes three lectures, the first of which deals with the law of possession, and the second and third with the principles of the law of contract. These subjects are handled in a masterly way, with a thorough grasp of legal principle and an ample command of illustrations drawn from decided cases. It is, however, open to doubt how far it is wise to attempt to cover so extensive an area as these subjects indicate within the limits of forty-four pages of print. The result shows that, even in the hands of so competent a lecturer as Mr. Young undoubtedly is, many important subjects have to be treated in so slight and hasty a manner that it is doubtful whether students can derive much benefit. Take for example the statement on page 28:—"There is a class of contracts which do not infringe the moral law, but which are said to be contrary to public policy, and therefore not enforceable. Such are contracts in undue restraint of trade, contracts tending to injure the public service, as assignments of salaries or pensions by public servants, agreements which tend to encourage litigation (as *pacta de quota litis*), gifts by a client to an agent, while that relation subsists between them, agreements in undue restraint of marriage, agreements among masters or among workmen to restrain the liberty of contract, agreements altering the rules of public law, as if a man were to agree to limit the days of charge on a bill from six to three. Into the details of these we have not time to go." This is a summary way of dealing with a wide range of legal contracts. Again the brevity rendered necessary by the method adopted leads not only to excessive condensation but in some cases to an imperfect view of the law being presented, which is apt to be misleading to students. The question of "penalty" is disposed of in the following sentence:—"The parties sometimes fix for themselves in the contract the amount of damages to be paid in the event of a breach; but even when they declare them to be 'liquidated damages' and not 'penalty,' the Court exercises its equitable jurisdiction in modifying the amount (*Forrest & Barr* v. *Henderson*, 1869, 8 M. 187)." This statement is no doubt accurate as far as it goes, but it is, of course, inadequate as a full statement of the law as it now stands on the subject. It might be well, if similar courses of lectures are arranged

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in future, to consider whether attention should not be confined, where time is necessarily so limited, to a narrower area, and the treatment of the subjects taken up made more exhaustive. Mr. Young has, however, made the most of his opportunity, according to the plan he has adopted. His style is clear and pointed, and his statement of the law accurate. It may be noted that the point discussed on page 13, and as to which a question is suggested by the author, seems to be conclusively settled by the case (not cited), of *Darling* v. *Wilson's Trustee*, 1887, 15 R. 180, and other cases there referred to. We find (p. 26) a novel illustration of the law of Scotland as to the effect of force or fear in voiding contracts. The case cited is "*Shylock* v. *Antonio*, decided by the Court of Venice, and reported by Shakespeare in the 'Merchant of Venice'"! It may still be an open question whether Shakespeare was not a Scotsman by birth, but apparently we are entitled to add to the long list of his accomplishments an intimate acquaintance with the principles of Scots Law.

Mr. Hislop's subject lends itself more readily to the historical method, and he has given us three thoroughly interesting and readable lectures on "The Relationship of Superior and Vassal." The first deals shortly with the feudal system, the origin and development of the tenure of feu-farm, and the superior's remedies for recovery of the feu-duty. In the two subsequent lectures the subject of casualties is discussed—the law prior to the Act of 1874, and the law as modified by that Act, being explained and illustrated by the leading cases. The other subjects treated of are:—redemption of casualties, method of ascertaining amount of composition, inherent conditions of the tenure, restrictions in feu-contracts, and how these may be enforced or defeated. The leading decisions are cited under each head, and their effect explained, in a clear and interesting manner. In view of the limitations under which he worked, Mr. Hislop has contrived to convey in these lectures an astonishing amount of information, well arranged and clearly expressed, on the subject he handles. It is evidently one at which he works *con amore*, and he has accomplished his task thoroughly well.

The whole lectures reflect credit on the legal learning and expository power of both authors, and although the students to whom they were addressed will scarcely be able to dispense with attendance at the Law Classes, they are fortunate in having had so excellent an introduction to their professional studies.

R. L. ORR.

The Lays of a Limb of the Law. By the late JOHN POPPLESTONE, forty years Town-Clerk of Stourmouth. Edited, with a Memoir and Postscript, by EDMUND B. V. CHRISTIAN. London: REEVES & TURNER, 1889.

There are some books which charm the reader by the intrinsic merit of their contents, while others prove attractive rather by way of suggestion

and impression than for any more absolute reason. To this latter class the above-named little volume of "Lays" seems to belong. As poems, —as metrical compositions, even,—its contents do not for the most part attain to any very high order of excellence. But the reader, as he skims through the volume, has always before his mind's eye a pleasant image or picture of the writer of the "Lays." He seems to see the features and hear the voice of the old attorney and town-clerk, a man at once more shrewd than Tulkinghorn, more simple (in the word's best meaning) than Pickwick or Tom Pinch, a Tory by conviction, a bachelor by the accident of fortune, kind, learned, upright, a lover of Shakespeare, Thackeray, Scott, and Dickens, the trusted adviser of his little municipality, but with a heart and sympathies warm enough and wide enough to comprehend the whole of humanity. A pleasant picture truly, and none the less so, whether it is in fact really near the truth, or whether, as sundry items of internal evidence tend darkly to suggest, the writer of these "Lays" and the editor thereof are not two persons, but one person, of whose fertile imagination the old "Town-Clerk of Stourmouth" is but the creature. Mr. Popplestone's "Lays" are partly narratives of actual "leading cases," and partly of a more general though always legal character. The latter are on the whole, as is perhaps natural, the more successful; but better than either, for the most part, are Mr. Popplestone's interludes in prose. It must, indeed, be confessed that legal lyrics, unless they be of the highest order, tend towards a rather wearisome and ponderous style of humour. That perfection in this style of composition can be attained, is evidenced by some of the efforts of Outram's pen. And a similar excellence is to be found, as applied to the narration of actual cases, in the inimitable "Battle of the Bottom Rooms," "Baird *v.* Baird's Trs.," and others of the best contributions to "Ballads of the Bench and Bar" (Edinburgh, 1882. Privately printed). Such "Lays" as Mr. Popplestone's necessarily challenge comparison with the above and similar writings, and, so challenging, must—at all events in the perhaps prejudiced judgment of the Scotch reviewer of this English bard—inevitably submit to defeat. Many of the "leading cases" done into rhyme by Mr. Popplestone appear also in "Touchstone's" (Mr. Brodie Innes') "Legends of Leading Cases" (London, 1881), and, in almost every instance, we confess to preferring the smart and graphic dash of the latter's "Ingoldsby" stanzas, to the more ambitious but less appropriate metres of the former. Mr. Popplestone as a rhymester is disappointingly unequal. Almost every one of his lays contains lines which positively halt, and others which can only by the most dexterous manipulation be conformed to the prevailing metre. But if no one poem, as a whole, is faultless, yet there is abundance of good lines and of elegant stanzas. Here, for example, is the last verse of his ode to the "Side Bar Rule,"—a now obsolete form of process:—

> "Come, let us still this mournful strain!
> What recks the world a jester's woes?

The motley 's off, and ne'er again
The bells shall sound. The darkness throws
Her mantle o'er the sea's repose;
And I—I turn me from the strand,
As one who takes his cloak and goes
By night into an unknown land."

The "Side Bar Rule" is the last, and perhaps the best, of the miscellaneous lays. Amongst these, "Old Father Antic, the Law," and "The Splendid Six-and-Eightpence," are also well worth reading. Of the leading cases, those of "Gandasequi" (in "Hiawatha" metre), "Manby *v.* Scott" (after the "Idylls of the King"), and "Frost *v.* Knight," are perhaps the best. Not the least readable part of this very readable little volume is the Postscript by the Editor on "The Comedy of the Law." But it was surely not Mr. Weller who "declared the law an ass." Bumble, the Beadle, it was, who, when informed of the marital supremacy and direction of husband over wife supposed by the law, was roused to exclaim—"If the law supposes that, the law is a ass—a idiot!"

D. D.

Wharton's Law-Lexicon.—The Eighth Edition. By J. M. Lely, Esq., M.A., Barrister-at-Law. London: Stevens & Sons, Limited, 1889.

For those engaged in the practice of the law there is no more valuable book than a good law dictionary or lexicon. It is indeed an indispensable part of the equipment of every lawyer's library. The work before us has long held a good reputation among English lawyers, and its value is perhaps sufficiently proved by the fact that it has reached an eighth edition. The first edition made its appearance in the year 1848, and the subsequent editions, preceding the present one, have had the good fortune to undergo revision at the hands of several competent editors. Mr. Lely, who is responsible for the seventh edition, published in 1883, as well as the present, seems to have performed his task carefully and well, and has adapted the work to the recent changes in the law so far as falling within its province. In particular, the effects of the changes made by such important English statutes as the County Courts Act, the Bankruptcy Act, the Registration Act, and the Local Government Act have been explained, and the other less important statutes affecting England, enacted prior to the commencement of the present year, have been duly noted. New or revised articles on various topics not discussed or insufficiently noticed in previous editions have been introduced—*e.g.*, Public Meeting, Incorporated Law Society, Succession Duties, and Marriage.

In comparison with such law dictionaries as those of Tomlin (now comparatively antiquated), and of Sweet in England, of Bouvier in America, and of Bell (Ed. Watson) in Scotland, this lexicon of Wharton

fairly holds its own. It is not altogether a competitor with them, however, being more of a pure dictionary—the dictionaries of Sweet and Bell being of the nature of cyclopædias. One serious objection to most law dictionaries, and to Wharton's especially, is the insertion of a vast number of words of a purely antiquarian character. Editors apparently want the courage to strike them out, and yet do not take the trouble to alter the definitions so as to bring them into harmony with the results of recent inquiry. What is the use of introducing into a modern law dictionary, as Wharton does, such words as *Hafne* (corrupt form of hafen or haven), *Haga* or *Hagia*, a hedge (Dutch *Haage*), and *Haia*, an enclosed park? For legal purposes the information given about such words is generally valueless, if not untrustworthy. An antiquarian lawyer will look for the definition in Du Cange or similar glossaries. On the other hand, terms of modern interest have been here and there overlooked. Thus, under *gale*, rent, one would expect to find some explanation of the Irish legal expression "hanging gale," which gave the Parnell Commission so much trouble recently.

In other respects we have not much in the way of criticism to make on the book. We miss that reference to authorities at the end of each article, which is such a valuable feature in Bell's Dictionary. Under the article "Incorporated Law Society," there is no reference to the Incorporated Law Society of Ireland. Under the word "Marriage," an attempt to define the Scotch Law as to irregular marriages is made, but not altogether successfully. There is, for instance, no explanation of the doctrine of co-habitation with habit and repute. And the editor, while referring to the well-known case of *Robertson* v. *Steuart*, apropos of the rule as to *de presenti* acknowledgment, seems not to have observed the recent case of *Macadam* v. *Macadam Trs.*, as bearing upon the doctrine of promise *cum subsequente copula*. The whole doctrine was fully canvassed in that case, and the supposed necessity for a declaratory judgment in order to constitute such marriages was greatly doubted by one of the appellate judges. The judicial dictum of Lord Moncreiff referred to in this connection is understood to be solitary. Some other statements as to Scotch Law are defective. Thus under "Reduction *ex capite lecti*," no notice is taken of the fact that the 34 & 35 Vict. c. 81 has been repealed by the Statute Law Revision Statutes.

It only remains to be said that the general plan of the work and style of printing are excellent in all respects.

H. G.

The Public Law of Finland.—The publication of a translation by Mr. Charles J. Cooke, British Vice-Consul at Helsingfors, of Senator Mechelins' Précis of the Public Law of Finland, is very opportune at the present time

when attention is being so prominently directed by certain of our statesmen to the constitutions of those countries which, while politically connected with others, retain an autonomous position. Finland is a very striking example of a country in this position. The Crown of the Grand Duchy is declared by the Russian fundamental laws to be inseparable from that of all the Russias, yet Finland is under a legal and political system of its own; and, in dealing with its affairs, the Russian autocrat becomes a constitutional ruler. His authority is limited by the statutes, and is exercised in the manner established by the fundamental laws. The legislative power lies in the Emperor and Diet. The latter consists of four orders, the nobles, the church, the representatives of the towns, and those of the rural districts. With a few exceptions, a measure which passes three of the orders (the orders sit separate), becomes law on receiving the Emperor's sanction. Imperial assent is given or refused, after consultation with the senate. The senate is the executive element in the constitution. It consists of two departments of ten members each, the one being the administrative department proper, and the other the judicial. The former consists of the ministers of home affairs, finance, control, war, public worship and education, agriculture and public works, chancery, commerce and industry, and two members (one being the vice-president of the department) without portfolio. The judicial department, besides having the duty of looking after the administration of justice, acts itself as a supreme court of appeal. The senate also prepares the Government measures to be laid before the Diet. Its members are appointed by the Emperor for three years, and they may be reappointed. Here, then, in Finland we find the features of probably the soundest system of government possible, namely, popular control of legislation, and executive independence. This is the system which prevails in Germany and in the United States; in the latter in the better form, because the executive, while independent of the popular representatives, is periodically answerable to the whole people. Under this constitution it seems that Finland prospers and lives content. How would Ireland take to a popularly elected assembly for the control of its legislation, with an executive dependent not on the assembly but on Imperial Parliament? It need only be said of M. Mechelins' book itself that it is as concise a work as exists on any constitution, and that Mr. Cooke's translation is admirable.

F. T. C.

Notes on Decided Cases.

Condictio Indebiti.—There is, perhaps, nothing absolutely new in the decision of the Second Division of the Court of Session in the case of *Dalmellington Iron Co., Limited* v. *Glasgow and South-Western Railway Co.*, Feb. 26, 1889, 16 Ret. 523. The decisions of that Court, however, have in recent times seldom contained statements of legal principle of permanent utility. It is therefore desirable to notice the following paragraph from the opinion of Lord Rutherfurd-Clark: "There is high authority for the proposition that a payment made in the knowledge that it is not due cannot be recovered. It seems to depend on the principle that such a payment imports a waiver of all objections, and an admission that the debt is justly due. When there is a question whether money is due, and when it is paid in the knowledge of the facts on which that question depends, it may be reasonably inferred that all objections are waived, and that the debt is admitted. To hold that a payment so made cannot be recovered is nothing more than to hold that the voluntary waiver and admission cannot be afterwards called into question; or, in other words, that a person who has paid a debt which he has admitted to be due will not be allowed to go back on his admission. I can see no other principle on which the rule of law can depend. I do not think we can apply this rule of law, unless we are satisfied that the presumption on which it is founded is or at least may be in accordance with the fact, nor in my judgment can this condition exist unless it be the case that at the time when the payment was made the knowledge of the overcharge was present to the mind of the person who made the payment. If it was not, he could not intend to waive any right, or make any admission. It may be sufficient, if the knowledge should have been present to his mind, on the ground that he cannot be allowed to say that he did not know what he ought to have known." This is a very distinct and valuable exposition of a doctrine, the meaning of which has sometimes been obscured, because it was approached from the wrong side. When money not due has been paid, it is not necessary, in order to support the remedy of repetition, to construct a relevant case of error or mistake, as if the reduction of a contract were in question. The right to get the money back arises from the

total failure of consideration, there being no debt due. It may be that this right is excluded by the special circumstances in which the payment is made, but that is matter of defence. Lord Rutherfurd-Clark rightly says the defence must amount to waiver, which generally implies actual knowledge. But he is disposed to admit that in this question there may be constructive knowledge. There is no doubt this is the common-sense view of the matter. It is probably inconsistent with a literal reading of the principle laid down in *Kelly* v. *Solari*, 9 M. and W. 54, to the effect that where the ignorance is of fact, negligence is no bar to repetition. But that decision may be construed as meaning that, although the ignorance be only of fact, there must be, in order to exclude repetition, such negligence as amounts to waiver. The opinion of Lord Rutherfurd-Clark seems to explode the distinction which has been taken in these matters between ignorance of law and of fact, unless the term "law" be restricted to general law. It was pointed out by Lord Westbury, in *Cooper* v. *Phibbs*, L.R. E. and I. App. ii. 170, that the maxim *ignorantia juris haud excusat* had no application where the *jus* in question was a private right—*e.g.*, of ownership or succession. We are surprised that Mr. Pollock (Law of Contracts, p. 409) should dispute this dictum of Lord Westbury. No doubt, the civil law laid down that the heir, who in ignorance neglected to claim the Falcidian Fourth, and paid the legatees in full, could not recover the excess, D. 22, 6, 9, 5. But such a decision is not consistent with modern ideas of equity. Mr. Pollock adds, that "ignorance of particular rights, however excusable, is on the same footing as ignorance of the general law." This is certainly not the law of Scotland, as we understand it. If it is the law of England, much difficulty will be found in discriminating what is law and what is fact in each particular case. Besides, everything depends on the mind of the individual. A solicitor may well be supposed to waive a legal right when no such presumption could be stated against a layman.

W. C. S.

Ecclesiastical Law—Ad Vitam aut Culpam—Munus Publicum.—Mr. Hastie's contributions to the literature of law, both as translator and philosopher, have been much more successful than his illustrations of it as plaintiff. On 4th June, 1889, the First Division confirmed the judgment of Lord Fraser against him in favour of the Foreign Missions Committee of the Church of Scotland, holding that the Church did not elect him to its Calcutta Mission *ad vitam aut culpam*. The Committee is admitted to have adopted certain "Regulations" by which they were to engage missionaries, not for life, but for twenty-five years at the longest, and with a power to either party at any time to break off on six months' notice. A great deal might be said against such a regulation as well as for it. But once it was adopted as the general rule, the burden apparently lay on Mr. Hastie to show that

it had been departed from in a particular case, even when the case was that of a man of exceptional ability, sent out not to an ordinary mission post, but as Principal of the Mission Institution at Calcutta. This burden the Court, following the judge of first instance, have found that he has failed to discharge, in so far as proving a special bargain with the Committee was concerned. But room was left for an ingenious plea, which was keenly argued, and which raised some interesting points of law. The Presbytery of Edinburgh, at the request of the Committee, had ordained the new missionary, and also "inducted" him, though in Edinburgh, to the office in the Calcutta institution. And he pleaded that while his *ordination* gave him the status of a minister of the Church, his *induction* gave him that status in this particular charge, and that without any restriction, and therefore by necessary consequence for life. The Court rejected this plea on various grounds. Lord Shand held the induction to be a gratuitous addition, and probably a mistake, on the part of the Presbytery, which could not in any case change the already completed bargain with the Committee. The Lord President held "induction" to be neither a *nomen juris* nor a *vox signata* in our existing ecclesiastical law; and in any case it could not have the effect pleaded, because the induction here was "not to a benefice in the Church, but to an entirely precarious office, depending for its subsistence on the continuance of voluntary contributions," and following on a bargain as to its tenure. He referred only to one recent case in illustration; but the principle he laid down is strongly supported by precedents in three separate groups of cases —those as to *quoad sacra* Churches, Town-Clerks, and Parochial and Burghal Schoolmasters.

The Lord President added, however, a statement of the law which has attracted attention by its sweeping generality. "The law applicable to appointments *ad vitam aut culpam*," he said, "may be summarised thus—Either the appointment must expressly bear that the appointee is to hold his office for life, or the office must be of such a nature that a life appointment is necessarily implied. In this last class are embraced only offices of the nature of *munera publica*. Public officers are irremovable except for fault. Holders of benefices in the Church are public officers, and these offices are *munera publica*. But the pursuer's office was not of such a nature, for the reasons already fully explained."

Literally construed, this would suggest that an appointment to an office, not a *munus publicum*, must have "for life" or similar words expressed in it, if it is to give such a tenure. But there are surely cases in which a *benignior interpretatio* would be applied. There are cases in which the office, though a private one, is so notoriously for life, and can be so clearly proved to have been so in the knowledge and intention of all the parties, that the mere repetition of the words in appointing a new holder to it could add nothing to the permanence of his tenure. In the Roman Catholic Church the decree of Trent (derived from much older sources), forbids bishops to admit to holy orders those who cannot show that they have a

right to a benefice, or to one of the provisions—in almost every case life provisions—which it holds as equivalent. Even in the case of a man being ordained *titulo missionis*, the latest Catholic Dictionary (Addis. 797) states that this "imposes on the bishop the responsibility of providing for the support of the ordinand, if he shall become incapable of discharging his functions, whether it be without fault (*emeritus*), or through his fault (*demeritus*)." All this suggests life appointment as a common or even the general case. At all events, there must be in that communion long-descended offices, which, though their endowment in this country is private, are notoriously and indeed expressly to be conferred for life, so that the nomination to them of an individual would be held to imply a tenure easily proved from their fixed constitution. And the same may probably be said as to the rule of the Protestant Churches on both sides of the Atlantic—a rule which comes down to us from the same date or a much earlier, and is, at all events, not municipal in its source, or due to the law of any particular realm, though each particular realm has imposed upon it its own modifications. The general rule in Protestantism is indeed stronger in favour of life appointments than in the case of Western Catholicism. Yet there is, probably, scarcely any Presbyterian communion of which it cannot be said, as the Scottish judge says of the Church of Scotland, that it is exceptionally "in use to ordain ministers who have no endowed benefice, or appointment *ad vitam aut culpam;* otherwise there could never have been ordained ministers in chapels of ease, and just as little could there have been ordained missionaries."

As to the other general proposition, that "public officers are irremovable except for fault"—what occurs to one is to speculate how long this will remain the law, seeing that facts around us so rapidly change. At the time of our Revolution every teacher, even in an adventure school, was a public officer, and had to subscribe the Confession of Faith. So late as 1815, two judges held it "*contra bonos mores* to appoint a man to a school during the pleasure of any set of gentlemen. It leaves him to the disposal of a numerous open body who, to a proverb, have no conscience." Even in 1838, the leading judicial opinion had to start with the question, "whether a law of nature exists, which all men are bound to know and recognise, that an appointment of a teacher cannot be effectually qualified with the condition of its being revocable at pleasure, but necessarily resolves into an appointment *ad vitam aut culpam.*" At that time, we had the Parochial School and the Burgh School, and had to make distinctions between them. Now we have the Public School, for the first time *eo nomine.* And yet, while early in the century it was held that no one could be appointed, even to a private school, except for life, now, no one is appointed, even to a public school, except at the pleasure of the Board! Formerly, a public officer was driven into his place by the Crown like "a stake in the country," and the feudal turbulence furnished many good reasons why he should remain there. Apparently these reasons are not equally powerful with our legislature

now. And, as years pass, the reasons and even the unreasoning practice of legislatures will act more or less as a solvent upon the aphorisms of law.

A. T. I.

Public Companies—*Ultra Vires.*—Promoters and directors of public companies should pay particular attention to the judgments pronounced in the Court of Session, on 21st December last, in *Klenck* v. *East India Co. for Exploration and Mining, Limited*, 16 Ret. 271, and *General Property Investment Co. and Liquidator* v. *Matheson's Trustees*, 16 Ret. 282. These judgments followed upon and gave effect to the decisions in the well-known English cases of *Trevor* v. *Whitworth*, 1887, L.R. 12 App. Cas. 409, and *Almada and Territo Co.*, 1888, L.R. 38 Chan. Div. 415, the former of which was decided in the House of Lords. All these cases show how strict is the construction which the Courts put upon the clauses of the Companies Acts, where anything is done either in the formation or the administration of a company which may tend to defeat the policy of the statutes. They definitely settle that it is *ultra vires* of a company to purchase its own shares, whether power be given in the memorandum and articles of association to do so or not.

In Klenck's case, power was taken, both in the memorandum and articles, for the company to issue shares "at par, or at a discount, or at a premium." In 1866, the company, in the course of its business, resolved to increase its share capital from 100,000 shares of £1 each to 300,000 shares of £1 each; and in the following year it was resolved by special resolution to issue 123,270 of the new shares at a discount of 12s. 6d. per share. Mr. Klenck, an original shareholder, applied for and obtained 300 of the new shares at the stated discount, and was duly registered in respect of them. Afterwards, as the concern promised to be unprofitable, he made application to have his name removed from the register in respect of these 300 shares, and the money paid by him returned, on the ground that the allotment was *ultra vires* and illegal. This demand being refused, he raised an action to give effect to his claim, and the Court decided in his favour, on the ground that the issuing of shares at a discount was equivalent to a reduction of capital, and therefore *ultra vires*. The argument, strongly urged by the company in defence, was, that as the original constitution of the company, by its memorandum of association, gave express power to issue shares at a discount, it could not be incompetent to do so. This was negatived, as was also a plea of personal bar based on the fact that the pursuer had been himself a consenting party to the special resolution for issuing the new shares. The Court took the view that the resolution was *funditus* null, as being directly in opposition to the intent and meaning of the Companies Acts, and having the necessary effect of defeating the object of these statutes. A dictum of Lord Macnaghten in

Trevor v. *Whitworth* (where the question raised was one as to the *power* of a company to purchase its own shares), was cited and given effect to. Lord Macnaghten's opinion is in these terms: "It seems to me that one way of trying whether it [*i.e.*, the power] is permissible or not, would be to read it into the memorandum in connection with the condition which states what the capital is to be. The condition would then run thus: 'The capital of the company is £150,000, in 15,000 shares of £10 each, but the board may buy back shares whenever they think it desirable for the purposes of the company to do so.' It seems to me that a condition so qualified would be repugnant and contradictory to itself. At any rate, the qualification would have the effect of reducing one of the statutory conditions of the memorandum to an empty form."

In the case of the *General Property Investment Co.*, the articles of association gave power to the company to hold its own shares, and indeed specially contemplated that it would be beneficial for the company to do so. The articles in question were in these terms: "IV.—No shareholder shall transfer his shares until he has first made offer of them to the company at the then market price;" and "V.—Any shares acquired by the company may be retained as the property of the company, or disposed of in such manner as the company in general meeting thinks fit to direct." These articles were held *ultra vires*, and the representatives of a deceased shareholder who had sold his shares to the company were, on the application of the liquidator, placed on the register in respect of them.

These cases of *Klenck* and *Matheson's Trustees*, and the English cases above mentioned, were all decided on the footing that they involved an unauthorised reduction of capital. In a more recent judgment (*in re* Licensed Victuallers' Mutual Trading Association, Limited, C.A.W.N., 1889, p. 71), the Court of Appeal in England refused to apply the same principle to the case of an agreement by a firm of brokers to underwrite shares at a discount of 15 per cent. in a company which was in course of being projected. The public having failed to take up the issue of shares, a large number of shares were allotted to the brokers in accordance with the agreement, and the company shortly afterwards went into liquidation. The Court held the transaction not to be *ultra vires*, and refused to remove the brokers' names from the list of contributories, on the ground that the arrangement as to 15 per cent. discount was properly commission to be given for underwriting, and not a deduction from the nominal amount of their shares. The issue of the shares to the brokers was treated as regular, as having been paid for partly in money and partly in money's worth.

It is not, at first sight, quite easy to reconcile with such cases as *Klenck* and *Matheson*, the decisions which have sustained payments of dividend out of capital as being *intra vires*—as, for instance, *The Neuchatel Asphalte Co., Limited*, L.R. 21 Ch. Div. 1. Such payments have the effect of reducing the amount of the company's capital fixed by its constitution. But the distinction is, that payment of dividends out of capital may be a neces-

sity in the carrying on of a company. It is practically necessary in all cases of working an undertaking which wastes in the working—*e.g.*, a lease of minerals, a patent, &c. If there is to be a division of any profits at all, it involves the gradual exhaustion of the capital stock. No such necessity exists in the formation of a company; and, on reflection, the distinction will be seen to be a sufficient one.

H. G.

Superior and Vassal—Personal Obligation in Feu-Contract.—The case of *Aiton* v. *Russell's Executors*, March 19, 1889, 16 R. 625, is one of interest to superiors and vassals. The vassal under a feu-contract, bound himself and his heirs, executors, and successors whomsoever to make payment of a sum yearly, in name of feu-duty, to his superior. The feu-duty was payable at Martinmas in each year. It was paid down to Martinmas 1886; and the vassal died in April, 1877. After the vassal's death, the heir of investiture declined to take up the feu; and, in consequence of his declinature, the superior who averred that, on the refusal of the heir to take up the feu, he had called on the executors to pay the feu-duties, and also to take up the feu or to pay damages, raised an action against the executors of the vassal—(1) for payment of the feu-duty due at Martinmas 1887; and (2) for damages for breach of contract in respect of their failure to take up the feu, on the heir's refusal to do so. The executors tendered the feu-duty so far as it had accrued up to the day of the vassal's death, and for such feu-duty the Lord Ordinary (Kinnear) gave decree, but *quoad ultra* assoilzied the executors from the conclusions of the action, in respect that they were not bound by the term of the feu-contract for payment of feu-duty accruing after the vassal's death, and that, if they were not so liable, they had committed no breach of contract. The superior reclaimed to the First Division, and the judges of that Court unanimously upheld the decision of the Lord Ordinary. In his opinion, the Lord Ordinary stated that he did not think it doubtful that the executors were liable for the feu-duties accruing during the lifetime of the vassal, but that he thought it equally clear in law that no action lay against them either for feu-duties which had accrued since the date of the vassal's death, or for damages on account of the heir's failure to enter. Dealing with the question of the executors' alleged liability for feu-duty, the Lord Ordinary pointed out that the obligation for payment of the feu-duty under the feu-contract was in the usual terms; and that the legal effect of it was that the feuar bound himself, as long as he lived and continued to be vassal in the feu, in the whole prestations of the contract; that he bound the heir of investiture in the feu, if he took up the feu, in the whole obligations of the contract after his death; that he bound his heirs and executors only for the sums which might be due at his death; and that, if the heir of investiture did not choose to enter, the superior's

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remedy was action under section 4 (4) of the Conveyancing Act, 1874, which has taken the place of declarator of non-entry under the old law. The Lord President, at the advising in the Inner House, observed that the feuar, under the feu-contract, had bound himself and his heirs, executors, and successors in such a way as he and they would have been bound by his mere acceptance of a feu under a feu-charter; and Lord Adam, answering the argument put forward by the superior that the feuar had bound himself by the contract that there should be a successor to him in the feu in all time coming, said that what was undertaken was that, if the heir of the vassal took up the feu, he should pay a certain amount of feu-duty. Whilst it cannot be said that the decision settles any point which was deemed to be open to grave doubt by the legal profession, conveyancers will be thankful for it as clearly settling what is the import of the personal obligation, in its usual terms, for payment of feu-duty in a feu-contract. The decision may suggest to them how far, in feu-grants to be prepared by them, it will be expedient to introduce an obligation for payment of feu-duty on the feuar, his heirs, executors, and successors whomsoever *conjunctly and severally.* Such an obligation in a feu-contract was held, in the case of the *Police Commissioners of Dundee* v. *Straton, &c.*, 11 Ret. 586, to render the feuar and his representatives liable in perpetuity for the feu-duty to the superior, although the feu had been disponed to a singular successor who had recorded the disposition in his favour, and although notice of change of ownership had been given to the superior in terms of the Conveyancing Act, 1874. It may often be both inconvenient and unprofitable for a superior to have a feu thrown into his hands on account of a refusal of an heir to take it up, or it may be difficult for him to get a singular successor to make payment of his feu-duty. Against these contingencies a conjunct and several obligation in grants of feu, such as was upheld in the case of *Dundee Police Commissioners* v. *Straton, &c.*, will be a useful safeguard, and it will be found, as a rule, to be more convenient to have the obligation in the deed of feu, than to have, as in the case of *King's College of Aberdeen* v. *Lady James Hay*, 14 D. 675, rev. 1, Macq. App. 526, a separate bond constituting a personal obligation against the feuar and his representatives in perpetuity for payment of the feu-duty.

J. C.

Maritime Law—Lien.—The House of Lords, in the case of *Hamilton and Another* v. *Baker* (the steamship *Sara*), May 27, 1889, 5 *Times*, L.R. 507, has overturned the practice of at least four and twenty years, and illustrated at once an important department of maritime law and its own powers as the final Court of Appeal. In 1865 (the *Mary Ann*, L.R. 1, A. and E. 8), Dr. Lushington, following out his own reasoning in 1855 (the *Glentanner*, Swaby, 415), in the new circumstances introduced by the Admiralty Jurisdiction Act, 1861,

decided in effect—though not in express terms—that a master has a lien over the ship under his command for repayment of necessary disbursements laid out by him. The lead thus given was followed in 1868 (the *Feronia*, L.R. 2, A. and E. 65), in 1877 (*in re* Rio Grande Do Sul Steamship Company, 5 Ch. D. 282), in 1886 (the *Ringdove*, 11 P.D. 120), and in 1887 when the judgment under appeal was pronounced (the *Sara*, 12 P.D. 158). In some of these cases Dr. Lushington's judgment was followed at the expense of his reasoning. And now the judgment has followed the fallacy on which it was founded. Both have been exposed. The justification alleged by their lordships—if any be required—for thus altering a rule which had been embedded in the practice of many years is that it proceeded on an obvious misreading of the 191st section of the Merchant Shipping Act of 1854, a comparatively modern statute. Besides that, it had had the effect of ignoring one of the principles which lie at the root of the doctrine of lien. In a maritime case that principle was thus enunciated (the *Two Ellens*, L.R. 4 P.C. 165). "It must be something which adheres to the ship from the time that the facts happened which gave the maritime lien, and then continues binding on the ship until it is discharged." Now the series of judgments in question made the lien depend (under the Act of 1854), on something else besides the happening of the facts which gave the lien (*e.g.*, the disbursements), that additional requisite being a suit by the master for his wages met by a plea of set-off or compensation. There was something too casual about this; and now it is gone. J. R.

COLONIAL APPEALS.

THE case of *Falle* v. *Godfray* (14 App. Ca. 70), an appeal from the Royal Court of Jersey, turned upon the following point. By the Roman law, a codicil followed the condition of the testament, and was void if the testament was annulled. The Roman law did not, however, originally prevail in the *Duchy of Normandy*, from which the law of Jersey was derived; and in the authorities, laid before the Judicial Committee in the case mentioned, there was nothing to show that by the law of Jersey itself a codicil was an inherent part of, and had no separate existence from, the will to which it was attached. The law of Jersey being silent upon the subject, the question was whether the rule of the Roman law on this head, which admittedly prevailed in *other provinces of France*, was not to be presumed to have formed part of the customary law of Normandy. The Privy Council followed, in preference, the general rule of English law, which makes the validity of a codicil, in the circumstances under consideration, depend on the intention of the testator. Sir Richard Couch, who delivered the judgment of the Court, observed that, in the absence of authority, they would rather adopt a rule of law which gave effect to the intention of the testator than one which defeated it. The Court declined to recognise as authorities for the

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law of Jersey writers in those provinces of France in which the Roman law had prevailed, though they admitted that such works might be referred to in order to test the interpretation put on a custom of Jersey, and also for the purpose of explaining the force and effect of particular expressions. The Court followed in this respect the judgment of Lord Westbury in the case of *La Cloche* v. *La Cloche*, L.R. 3, P.C. 125. It was then decided that the only absolute authority for the law of Jersey was the book known as "Le Grand Coustumier de Normandie." The *droit écrit* of France is not applicable to Jersey, nor the *droit du coutumier*, unless the custom is shown to have existed in Normandy in 1205, when the Duchy of Normandy was separated from the English Crown. The condition of the law in Jersey certainly seems not a little curious. A. W. R.

The decision—not yet officially reported—of the Privy Council in the case of *The Australasian Steam Navigation Company* (owners of the s.s. *Birksgate*) v. *Messrs. W. Howard Smith & Sons* (owners of the s.s. *Barrabool*), on appeal from the Supreme Court of New South Wales, turned upon a curious point of legal practice. The two vessels came into collision in Port Jackson, and were considerably damaged. Counter-actions were at once raised by the respective owners, were, by some unexplained coincidence, tried by separate juries, and resulted in contradictory verdicts, upon each occasion with the concurrence of the presiding judge. Both defendants appealed; the decision of the Supreme Court of New South Wales was adverse upon both issues to the *Birksgate*, whose owners appealed to the Privy Council. The position taken up by the appellants may be stated shortly thus. They admitted that the verdict in favour of the *Barrabool*, taken by itself, was one which a jury might honestly and reasonably return, and could not be impeached; but they contended that the same test must be applied to the verdict in their favour, and that it must not be judged in the light of evidence submitted, not to the jury which returned it, but to another tribunal. They urged the Privy Council, therefore, to send both cases back to New South Wales for trial, not separately, but before the same jury. In dismissing the appeal, Lord Watson, who delivered judgment, laid down the principles upon which the Judicial Committee will act in the exceptional case of contradictory verdicts coming before it—(1.) Where the evidence in each case is so fairly balanced that a jury might honestly return a verdict either way, the cases will be consolidated and remitted for trial before the same jury. (2.) Where one verdict is clearly "against the evidence" upon which it was returned, the Privy Council will set it aside and enter judgment for the proper party. Applying these principles, which, it will be observed, involve an admission of the appellants' contention in law, to the case before him, Lord Watson held that the verdict in favour of the *Birksgate* was not warranted by the evidence, and accordingly affirmed the decision of the Court below. A. W. R.

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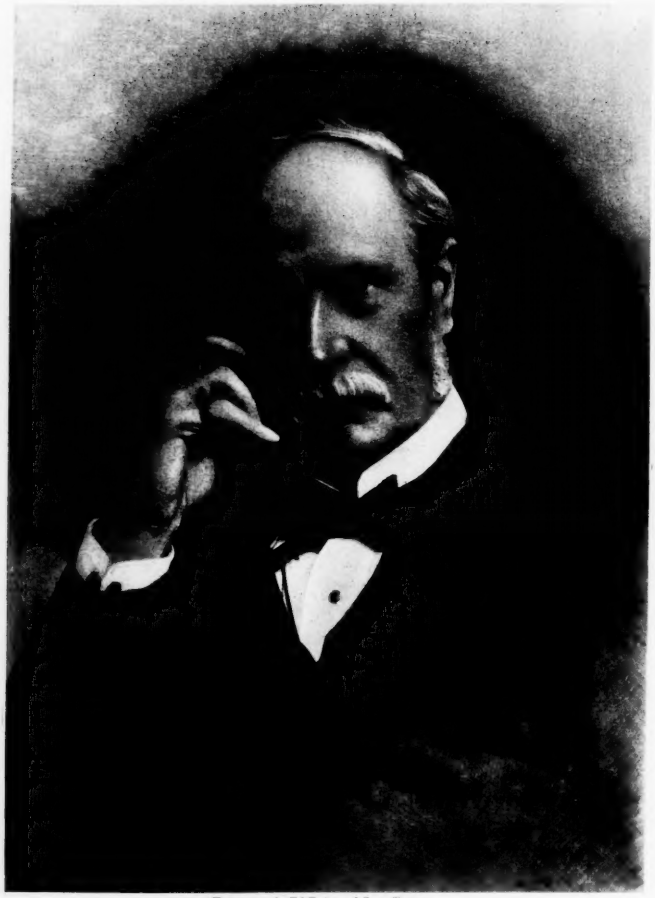

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The Hon. David Dudley Field.

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INSANITY IN ITS RELATION TO THE CRIMINAL LAW.

Part II.

IN the former part of this article it was shown that the question of guilt, in the shape in which it is usually put to a jury in a trial where insanity is alleged in defence, though occasionally simple, is (partly in consequence of judicial *dicta*), in the larger number of cases of extreme difficulty, and in some, it may almost be said, absolutely insoluble. When the Courts in Scotland were first compelled to direct their serious attention to criminal lunacy, their ideas were almost altogether derived from furiosity or congenital idiotcy, these being really the only two kinds of mental disease then familiar to the public, or even to the Bench. But it was soon perceived, in the course of accumulating experience, that such cases very rarely came before the Criminal Courts at all; but, in their stead, others of a highly complex nature, where weakness of intellect was so mixed up with shrewdness of character; dangerous passions and irresistible impulses with general quietness and docility; or mental delusions with visions which, to the mind of the accused, seemed to take material shape, and to step forth into an independent life—that it was almost impossible in such cases to decide whether the prisoner was in the eye of the law sane or insane; and it has even happened that the judicial stamp of sanity has been given to a prisoner who was in point of fact dangerous, and who, being convicted and imprisoned, almost immediately after his liberation has been again apprehended for crime,

and in the end, found to be so insane as to be unfit to plead. Numerous instances, indeed, could be given, besides those previously specified, where men, to all intents and purposes mentally diseased, have been convicted and punished on the footing of sanity. In mentioning such instances, as was already pointed out, it is not to be inferred that the panels should have escaped punishment, for, as will be afterwards seen, that involves other important considerations; but the evil has been that, in order to enable the law to inflict such punishment, it should be necessary to find convicts to be legally sane who, in point of fact, according to the evidence, are mentally insane. Thus, in the case of *Wilson*, tried for Fire-raising (High Court, February, 1877), the prisoner came of a family deeply tainted with madness. His father and his father's sister had been several times confined in asylums. He himself had been in Colney Hatch Asylum as a dangerous lunatic. Besides his hereditary taint, he had had sunstroke in India—a prolific cause of insanity—and had twice attempted suicide under maniacal excitement. Dr. Howden, the Medical Superintendent of the Haddington District Asylum, stated in evidence that he had little idea of the difference between right and wrong, and was more fitted for a lunatic asylum than a prison. This man was convicted and sentenced to twelve months' imprisonment, which, on the theory of the law, implied that he was sane. In pronouncing sentence, the presiding Judge, Lord Young, stated that, after the termination of his sentence, his further detention or release would depend on the observation of the prison officials, including the medical officer. It is clear, from this expression, that his Lordship was anxious to secure the main object of the law, prevention of crime by terror, and at the same time to guard society against the risk of a dangerous madman being set at large. The attempt, however, was not successful. In some way or other, the prisoner was liberated before the termination of his sentence; and on 3rd June, 1877, he was again before the Court for Fire-raising, and was found to be insane, and incapable of pleading to

the charge against him. One more illustration—the very singular and rare case of *Robertson* (6th January, 1836)—one of Rape, a crime not common among the insane, though not altogether unknown. The criminal's mother was insane, a matter generally more serious than the insanity of a father. His own condition of mind was unquestionably diseased. It commenced, as mental maladies often do, in a stroke of paralysis, and, under a suicidal impulse, he then attempted to hang himself. At last, in January, 1826, in a fit of "maniac irascibility," he was lodged in the Glasgow Lunatic Asylum, and detained there till June, when he was dismissed as "relieved," but was declared at the same time to be "incurably infirm in intellect." He was back again in October, in a furious condition, and detained till August, 1827, when he was dismissed as "free from paroxysms of fury," but still "slightly unsettled and infirm." He was twice afterwards in the Glasgow Poorhouse, where he was "sometimes insane, sometimes lucid," but when "lucid" he was "rather imbecile." On 22nd October, 1835, he committed the crime with which he was charged, and the attendant circumstances seem to show a man not in his right senses. When interrupted, instead of quitting his victim or attempting to escape, he complained loudly of being interfered with, clung to her with desperation, and was only compelled to quit his hold by blows from a stick. Robertson was convicted of rape, but with a recommendation to mercy "on account of his previous insanity and imbecility of mind;" and was sentenced to twenty years' transportation.

But the confusion upon this subject may be accounted for when it is remembered that the course of legal practice began from an entirely wrong starting-point—that of *à priori* conceptions, of which Nature knows nothing. Insanity is simply a name for numerous separate mental phenomena, all having some characteristic in common, which alone makes the general term possible. It is only after scientific inquirers have defined the general features, that lawyers, accepting their definitions, should apply the law to the fact, and adapt it to the

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necessities of social existence, of which they are the guardians. It is quite open to criminal jurists to determine, if such shall be found necessary, that one criminal shall be held insane, and therefore not responsible, and another insane, but yet responsible; but, instead of doing this, they have, as a rule, hitherto declared that they would not believe in the existence of this or the other kind of insanity, as defined by medical science, but would reject them altogether, either as not existing, or as not really being insanity at all. But unfortunately Nature had, *de facto*, produced all the kinds of insanity so rejected, and continued with the most obstinate perseverance to intrude them, again and again, into the forbidden precincts of the Court. "Moral insanity," "partial insanity," and "impulsive insanity," which had all in turn been ordered out of sight, kept continually rearing their hideous heads in the dock, and demanding to be effectually dealt with, in one way or another. Another necessary effect of this denial of Nature was that lawyers were compelled to confess that they could give no definition of insanity at all; and judges, some noted for the severe logical precision of their intellects, some for their clear and cultured perfection of language, some for extreme subtlety of discrimination, and some for rough and vigorous penetration, occasionally declared that no real definition could anywhere be found. And yet it is seemingly plain enough that a scientific definition must be possible; otherwise the term Insanity, the very existence of which implies some common quality, is entirely destitute of meaning. Very inconvenient consequences followed from this want of definition. Beginning with the Platonic conception of Mind, as an indivisible unity, without parts, destitute of length, breadth, and thickness, and occupying no space, they were led into treating the disease of such a being as also necessarily an indivisible unity, absolutely and totally destructive where it was present, and widely separated on all sides from other phenomena bordering upon it. It is true that such an idea was never formulated from the Bench in so many words; but traces of the supposed

absolute destructiveness of insanity, and its entire separation from purely ethical phenomena, appear in the expressed ideas of many judges. It may be worth while to illustrate this by quoting one or two passages from the charges of eminent criminal judges in recent cases. In the case of *James Macklin* (Glasgow, 9th May, 1876), Lord Moncreiff, lately Lord Justice Clerk, said, in charging the jury:—"If a man be of sound mind, if it be not proved that his mind is unsound, even though he be of feeble or excitable mind, or of variable temper, driven about by jealousy, or pride, or self-consequence, or anger, or temper, moved by trifles or indifference to grave consideration, he is responsible. While the human mind is liable to all the shades of such condition, none of them indicate insanity—*unsoundness of mind—unsoundness by reason of disease.*" In the case of *Brown* (High Court, 8th January, 1866) tried for Murder, the present eminent Lord Justice General said:—"A person being of ardent or passionate temper, or reduced to a state of weakness by the indulgence of bad habits, or in a state of deep moral depravity, either from the faults of original education, or from fault more personal to himself, these were things which had *nothing to do with insanity.* . . . Nothing but *mental disease*, which overpowered the reason, constituted insanity in the eye of the law." To a similar effect Lord Ardmillan said, in the trial of *Tierney* (Glasgow, 1875):—"Liability to sudden irritation, susceptibility to provocation, sullenness, ill-temper, silence, gloom, none of these would do. . . . But if there was a recurrence of *the disease*, depriving the man of the power of controlling his actions, that excluded responsibility."

These learned judges, in the cases cited, were laying down the law for practical purposes, and it was perfectly competent for them, in doing so, to attempt to fix some point in a continuous series of morbid phenomena at which the panel should be held irresponsible. They might demand for that purpose, that he should be, to use well-remembered language, "totally bereft of reason," or "ignorant of the difference

between right and wrong," or "wholly insane," or should answer to any other description which they, as expounders of the law, should require. But it would lead to mischievous confusion if it were not at the same time clearly understood that, after lawyers have made their artificial divisions between the sane and insane, the entire series continues to exist in nature itself, entirely unbroken and unaffected, and that sane and insane conditions melt into each other like the scenes of a diorama. There seemingly runs through the conceptions of the learned judges that it is "mental disease" or "unsoundness" which makes the difference, probably meaning that the morbid mental phenomena have an objective side in the nervous tissue, to which they respond. But such objective accompaniment exists also in what would be universally acknowledged as sanity. It is, indeed, not allowable to open the heads of living men and bring this to an absolute demonstration; but it is now generally admitted by scientific investigators and by enquirers into lesions and morbid states of the brain. Further, by *post-mortem* examinations, by experiments made upon the brains of the lower animals, and by the rise of the nervous system in the scale of animal life in general and in the individual embryo in particular, it is brought as near to demonstration as can be expected,—that all subjective thoughts and feelings, sane or insane, have objective sides in the nervous substance which answer to them. Sometimes some sudden event at once perverts the brain—as a stroke of the sun, a fit of epilepsy, or a shock of paralysis. Sometimes the madman inherits his madness from the accumulated disease of past generations. But usually, in actual fact, it is a case of gradual deterioration, and a matter of less or more. The well-known case of Nicolai, the Berlin bookseller, is a striking illustration. From some disorder of the bodily functions, Nicolai commenced to see phantom forms appearing in his chambers. At first they were faint and ill-defined; but gradually they took distinct shape, assumed colour and solidity, and seemed to differ nothing from real men and women. They did not, when they first

appeared, utter any sound, but by-and-by they began to speak and to maintain a continuous conversation. Nicolai, however, remained aware that they were mere shapes of his own making, and, therefore, he was not what is called "insane;" his senses were disordered, but his judgment was still unshaken. But in time he began to succumb to this ghostly company, and had he not been treated by skilful physicians, and copiously bled, he would have by-and-by believed his followers to be real beings and consorted with them as such; and then he would have been, in the strictest sense of the word, "insane." But in the gradual deterioration there would have been no gap between the first phenomena and their ultimate consequences; and each successive stage, whether subjective or objective, would have followed in steady, natural sequence. And so on in other cases. The sullenness and the silence which are said to have nothing to do with insanity are lighter phases of that savage melancholia which only rouses itself it may be to plunge a knife into the heart of a wife or a mother. Passionate irascibility is seen to be disease when it has reached the stage of a fit of mania, and nobody doubts that pride or vanity has become such when their victim imagines that he is possessed of countless millions or is Emperor of China or Ruler of the World. Thus there is but one truly scientific method of treating this question. The human race has a certain average amount of intellect, and a certain average condition of feeling, though in many cases it falls considerably below this average. So long, however, as his mental condition enables a man to consort in life with his fellow-men on a tolerably safe and practical, though not perhaps a wholly agreeable or comfortable footing, his mind may be accounted "*sana*" or "sound." When he falls below this standard, his mind, though still not in ordinary language "insane," because the term has acquired, by use, a certain intensity of meaning, is strictly "*non sana*," not sound, or "healthy," and by a continuous fall, it by and by reaches the admittedly "*insana*"—it being entirely impossible to distinguish the exact point where the "*non*

sanitas" passes into the "*insanitas;*" the two being not different in their essence, but only in the degree of comparative unsoundness or unhealthiness.

It is now necessary merely to notice one or two of the modes by which the law, for practical purposes, has endeavoured to find some fixed and definite line of separation between them. The earliest and most sweeping test of insanity judicially declared in Scotland was that it must be *total* —extending to the *whole* mind—and also *absolute*, that is, utterly destructive of reason. The Lord Justice Clerk (Hope) was the most fiery champion of this *à priori* conception. He refers to Lord Brougham's *dictum* as his authority—"That being or object called mind, *if unsound in one point, is unsound in every respect* so long as that which causes the unsoundness exists in the mind." Accordingly, in the trial of *James Gibson* for Wilful Fire-raising (High Court, 23rd December, 1844), his Lordship laid down that "the Insanity must be total, . . . the individual must be *bereft of reason.* There must be an *absolute destruction of reason.*" And again, in the case of *Lillie Smith*, also tried for Wilful Fire-raising (High Court, 11th January, 1855), after the lapse of eleven years, he laid down the same law even in more emphatic terms—"You will understand that there is no such thing admitted in law as partial insanity, give it whatever name you choose—*monomania or anything* else. . . . In all cases you must understand that there must be *absolute alienation of reason* —an *entire overthrow of reason*, as in the passage read from Baron Hume." The misconception of Baron Hume,(*a*) erected by the superstition of lawyers into law, is now ancient history, but science has kept on its steady course. It is pretty certain that no such being as Justice-Clerk Hope's lunatic has yet appeared before the Courts; and the conception of mind on which it rests is derived simply from the abstractions of Plato, and has no support either in the ghost-stories of the people, the books of the great religions, or the investigations

(*a*) Hume's "Criminal Law."

of science. The actual basis of mind can only be inferred either from its subjective or its objective phenomena. The subjective pass away almost with the swiftness of light, often make slight impression, and can only be recovered imperfectly and with difficulty. The chain is fragmentary and mutilated; often rises suddenly; and melts as suddenly away into the unconscious. The objective development does indeed, form a unity, but it is not a metaphysical unity, but one of closely connected parts—where the two almost homologous sides and the different ganglia are bound together by myriads of fibres, crossing and decussating, and passing in and out of myriad cells, and over bridges, transverse galleries and commissures leading to and from the different regions. Yet even here, in this closely compacted organ, there is reason to think that in certain morbid conditions, such as hysteria, the two sides of the cerebrum sometimes act as separate personalities, and it is quite certain that, where one is lesed or destroyed, the other can act independently. Nothing can show more clearly the limited character of the portions which are sometimes impaired, while others remain sound, than the diseases connected with speaking and reading—diseases which often arise from the same causes as insanity, are sometimes accompanied by it, and often end in it. The patient may sometimes totally forget the most familiar words—even his own name—though knowing them at once when he hears them. Or, singular to say, he may forget only substantives and adjectives, and sometimes though forgetting the words he may recollect the initial letters. He may in other cases read aloud, but though not deaf, cannot pronounce a single word spoken to him the instant the book or paper is withdrawn. He may perfectly hear, and know the meaning of, words spoken to him, but, though able to speak, cannot repeat them. Or he may be able to repeat the most difficult sentences after another person, but though seeing them distinctly cannot read them from a book. He may attempt to speak, knowing quite well what he intends to say, but

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only give utterance to perfectly meaningless sounds, without recognising his errors; or he may attempt to write, and only succeed in putting down words having not even the most remote connection, either in sound or sense, with what he intends. And so on, through a hundred other permutations and combinations, suggesting that the defects we may expect to find in the mind are generally not *total*, but merely *partial*. Another great test applied by lawyers to the question of insanity was the knowledge of right and wrong. The origin of this notion lay really in the same region. It belonged to the age of Kant's Categorical Imperative,—the mystic voice inside of man, issuing infallible moral commands. It certainly even then perplexed the moralist that this despotic monarch differed in his ethical ideas, not only from age to age, but from one region to another, even in the weightiest matters of the law; and it was not till Darwin broke up the fixity of things and demonstrated continuous growth where none had hitherto been imagined, that biologists suggested, at first timidly, that this knowledge of right and wrong was simply the approval of actions supposed to be beneficial to the tribe, nation, or species, becoming gradually more distinct, and improving and extending as the people grew better acquainted with the interests of mankind, and more clearly appreciated the consequences of their actions. But it is needless to "slay the slain." It fought hard for its existence, and often changed its shape. At first it appeared as the abstract knowledge of right and wrong—then as the abstract conception of the right or wrong of the particular crime—then as the knowledge that the particular crime was punishable by law—and at last Lord Deas gave it the *coup de grace* by declaring, *ex cathedra*, that a lunatic may quite well know that his act is punishable by law, and yet be unquestionably irresponsible. Indeed in this last shape of the doctrine, it contradicted the lawyer's most necessary and venerable maxim, "*Ignorantia juris neminem excusat.*" It must not, however, be forgotten that the two tests here discussed—the extent to which the faculties are impaired

and the knowledge of the crime being legally punishable—though not sufficient as tests, must always form very important elements in the question of responsibility, and were certainly relevant and important in the inquiries of the Court.(*a*)

We will, however, require to delay noticing those forms of insanity (impulsive, partial, &c.) which the Courts have until recently refused to recognise.

CHARLES SCOTT.

(*a*) It was pointed out in the first article that new light on this subject was not unlikely to come first from the psycho-physicists of Germany. In the newly-issued number of their organ, Wundt's "*Philosophische Studien*" (Band 5, Heft 4), Dr. Leumann has an article bearing somewhat on a novel aspect of this subject: "Die Seelenthätigkeit in ihrem Verhältnisse zu der Blutumlauf und zur Athmung."

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UNIVERSITIES (SCOTLAND) ACT, 1889.

WITH regard to the history of this important Act, which has recently received the Royal assent, it may suffice here to say that the reform of the Scottish Universities has been much discussed during the last fifteen years, and that this Statute, drafted by the late Liberal Government, and amended in many respects at the instance of all the parties chiefly interested, has been passed by the present Conservative Government in an improved form. An outline of the constitution of the Universities as established by the Universities (Scotland) Act, 1858, and subsequent legislation, will best enable readers beyond the limits of Scotland to understand the nature of the reforms effected or foreshadowed by the new Act. The Chancellor, who is the head of the University, and is elected by the General Council, presides over that Council, confers degrees, and is required to approve of alterations of ordinances before their transmission to Her Majesty in Council for final sanction. The Chancellor nominates the Vice-Chancellor, who may act as his substitute in the first two only of the above duties. The functions of the Rector, who is elected triennially by the students, are chiefly honorary. Next in the academic hierarchy comes the Principal, who is President of the Senatus, Chairman of the University Court in the absence of the Rector, and usually Vice-Chancellor also. The University Court, consisting of six or eight members—viz., the Rector, the Principal, and Assessors nominated by the Chancellor, the Senatus, and the General Council (and in Edinburgh the Lord Provost and a representative of the Town Council),

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forms a Court of Appeal against decisions of the Senatus, supervises the Professors, regulates fees, initiates or sanctions alterations of ordinances, and superintends finance. The Senatus Academicus, consisting of the professors in each University (38 in Edinburgh, 28 in Glasgow, 22 in Aberdeen, and 14 in St. Andrews), superintends the discipline and administers the property of the University. The professors derive no pecuniary benefit from the funds, except in a few cases for special services approved by the University Court. Lastly, the General Council, which consists of the whole of the graduates of the University, meets twice annually for deliberative and suggestive purposes, elects the Chancellor and an Assessor to the University Court, and together with one of the other Universities (Edinburgh with St. Andrews, and Glasgow with Aberdeen), returns a member to Parliament. The principals and professors are usually appointed by the Crown, but in Edinburgh the "Curators of Patronage," four nominated by the Town Council, and three by the University Court, elect (or assist in electing) the Principal and twenty-six of the professors. The teaching staff consists of the professors, with a number of assistants or tutors, and a few University Lecturers. In order to proceed to graduation, students must, as a rule, have attended the courses of the professors in their respective Faculties; but courses in other Universities are to a large extent accepted as equivalent. In the Faculty of Medicine and in the Science Department the lectures of extra-academical teachers approved by the University Court are also, with certain limitations, accepted as qualifying for the graduation examinations. The degree in Arts (M.A.) is conferred solely upon students who have attended seven specified subjects (Latin, Greek, English Literature, Mental and Moral Philosophy, Mathematics, Natural Philosophy, and in Aberdeen Natural History), and who pass the examinations in these subjects. Other highly important subjects, which are represented by chairs in some of the universities, such as History, Political Economy, Astronomy, Sanskrit, Geology,

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are not at present recognised as qualifying for a degree in Arts. As the emoluments of the professors (ranging from about £200 to £3000 per annum) in most cases consist chiefly of fees paid by the students, those of the chairs qualifying for graduation, especially in the Faculty of Medicine, greatly exceed those of the non-qualifying chairs. In Edinburgh, where the students number about 3500, of whom about 1800 are students of Medicine, the qualifying lectures in Arts are attended by from one to two hundred students, and those in Medicine by from two hundred to five hundred and fifty; while the non-qualifying attract audiences of from two or three to twenty or thirty only. Students in Arts are not required to pass any entrance or matriculation examination. Candidates for the degrees of Bachelor of Divinity and Bachelor of Laws must be graduates in Arts; those for degrees in Medicine and Science must either be graduates in Arts, or have passed a preliminary examination.

This constitution and these *curricula* have of late years been found deficient in elasticity and breadth. Various reformers, from different points of view, have urged—(1) That the University Court was too small and unrepresentative a body, and one in which the influence of the Senatus was likely to prejudice the interests of the public; (2) That the Senatus, although they had administered the university property economically and successfully, were unsuitable administrators, inasmuch as they were indirectly interested in the application of the funds; (3) That the teaching staff, particularly in the larger universities, was inadequate, and that some of its members were overpaid, others underpaid; (4) That the *curricula* for graduation required revision; in particular that there should be many avenues to the degree of M.A. instead of only one; (5) That all candidates for degrees should be required to pass an entrance or previous examination with a view to prevent the overcrowding of lecture-rooms by unprepared students; and (6) That attendance on extra-mural lectures should qualify to some extent for graduation in all the Faculties.

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Some of the reforms thus indicated have been effected by the Act, others may be effected by the commissioners it appoints. The University Court (§ 5) is to consist in future of from fourteen or fifteen to eighteen or nineteen members, the Senatus and the General Council being each entitled to elect several additional members, the civic element being more fully represented, and the interests of affiliated colleges being duly provided for. By § 6 (1), the whole of the University property is transferred to and vested in the University Court; (4) the University Court may appoint University lecturers and recognise extra-mural teaching for purposes of graduation, and (10) may found new chairs. By § 9 a Universities Committee of the Privy Council is constituted as a Court of highest resort. By §§ 10, 11, sixteen Commissioners, under the presidency of Lord Kinnear, one of the most learned judges of the Supreme Court of Scotland, are appointed to carry out the purposes of the Act. Of the extensive powers conferred on these Commissioners by §§ 14, 15, 16, some of the chief are:—§ 14 (1) To revise University endowments, bursaries, and scholarships; (2) To regulate the rights and duties of all University office-bearers; (3) To alter the composition of the Faculties, and to create new Faculties; (5) To regulate fees, *curricula*, and conditions of graduation, and to institute entrance-examinations; (6) To admit women to graduation; (7) To regulate the salaries of all University officials, and the appointment of assistants to professors; (8) To found new chairs and lectureships; (10 and 11) To administer the whole University property; (12) To recognise and regulate a Students' Representative Council; and (14) To establish a General University Court of the four Universities. Under § 15 the Commissioners may make regulations for the affiliation of Colleges to the Universities; and under § 16 they may affiliate University College, Dundee, to the University of St. Andrews, "with the object of establishing, *inter alia*, a fully equipped conjoint University School of Medicine." By § 17 the declaration hitherto signed by Principals and non-theological Professors, expressive of their

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benevolence towards the Westminster Confession and the Established Church, is abolished; and by § 18 the Commissioners are empowered to inquire and report as to the necessity or expediency of theological tests (*i.e.*, those which are exacted from the Professors of Divinity by their respective Presbyteries, and which at present render the divinity chairs the exclusive appanage of one Protestant Church). By § 25 a sum of £42,000 is to be paid annually by Parliament towards the support of the four Universities—*i.e.*, in round numbers, about £13,000 per annum more than they at present receive; but under § 26 (2) no theological chair, except that of Hebrew and Oriental Languages, shall receive an increased endowment.

Such, in barest outline, is what the Act does, and what the Commissioners may do. The Act is pregnant with promises; how far they will be performed, the next three or four years will show. Out of a possible volume of comments, present space admits of a few only. Foremost among reforms about which all are agreed, is the multiplication of avenues to graduation. It is therefore expected that the Commissioners will establish triposes or special *curricula* in mental and moral philosophy, in historical, political, and legal science, in ancient and modern languages and literature, and in the mathematical and physical sciences. They will hardly be able to found new Chairs with the slender means at their disposal, but they will doubtless insist that many existing Chairs, at present neglected, shall be duly utilised, and shall qualify for graduation; and it is hoped that they will at least be able to establish a number of supplementary junior professorships and lectureships. With regard to the degree of Bachelor of Laws, the Faculty of Advocates has proposed that the pre-requisite of a degree in Arts be dispensed with, provided the candidate pass a preliminary examination in general knowledge. But, as no ordinary preliminary examination is likely to afford so sufficient evidence of mental training as a degree in Arts, it is strongly urged by the most competent critics that candidates who are not graduates in

Arts should be required, not only to pass a preliminary examination, but to study and undergo examination in Logic and Ethics in addition to their legal subjects. The Doctorate in Law, hitherto honorary only, should, of course, be open to Bachelors of Laws who duly prove themselves worthy of the distinction. Scholars in the Faculty of Law in Edinburgh are at present, as a rule, required to deliver short courses of lectures during the tenure of their scholarships. A similar duty, it is thought, should be imposed upon all holders of substantial post-graduation prizes, which, often useless under present circumstances, might be thus rendered subservient to purposes of tuition and research. Among other matters, the Commissioners will also, in several instances, have to consider whether an audience of two or three students can be usefully increased, and whether a class of five or six hundred ought to be subdivided; they will also be expected to settle the not unimportant question as to how far professors and lecturers should be paid by fees or by fixed salaries; and they will be asked to frame regulations for the appointment and control of extra-mural lecturers in every department of learning.

In point of diction, the Act may fairly claim to be rather above the low average standard of Parliamentary English, but it is somewhat marred by several substantive blots. Thus, § 5 provides for the possibility of an indefinite increase of representatives of affiliated Colleges in the University Courts, but provides for no increase whatever of the representatives of the Universities themselves. Under the same section, the new University Courts are to be bodies corporate, with common seals of their own. Now, all Universities, in all countries, from the dawn of their history down to the present day, have invariably been regarded as corporations, as indeed their name imports. To erect the chief governing body, which is or ought to be one of the constituent parts of the *Universitas*, into a separate *Universitas* with a separate seal, is therefore not only unscientific and unnecessary, but is derogatory both to the University and its Court. Do the directors of a bank or a railway ever form a corpora-

tion distinct from the institution they manage, or do they ever possess a "common" seal of their own? Even the one word "common"—common, that is, to the whole corporation—might have put the Legislature on its guard against this solecism. Again, while § 9 institutes a Universities Committee of the Privy Council as a Court of last resort, § 14 (14) empowers the Commissioners to establish a General University Court of the four Universities. Surely this latter body might have been safely intrusted with final jurisdiction. If the great cities of Edinburgh and Glasgow can manage their internal affairs without being amenable to the jurisdiction of a higher court in London, surely the management of the Scottish Universities might well have been intrusted to a General University Court in Scotland as a court of final appeal from the different Senates and General Councils and Chancellors and University Courts, without further appeals to a Universities Committee, to Parliament, and to Her Majesty's Privy Council in London. This is red tape and circumlocution and centralisation with a vengeance. Under § 14 (12) the Commissioners are to frame regulations whereby a Students' Representative Council "shall be entitled to make representations to the University Court." If this means, as it seems to imply, that individual students, or groups of students, are not entitled to petition the University authorities whenever they see cause, it is clearly unconstitutional and objectionable. Every one knows that the present theological tests, which exclude from the theological chairs all Christian sects but one, are an anachronism; but the Commissioners are not supposed to know it. They are therefore empowered by § 18 to take evidence in order to "ascertain" whether such tests are necessary and expedient, "and to report." Balaam knew his duty, but instead of straightway doing it he "inquired of the Lord." To § 21 the objection above stated as to §§ 9 and 14 (14) also applies. This section requires changes of ordinance to be sanctioned by Her Majesty in Council, and to be laid before Parliament,

ignoring the "General University Court," and ignoring also the Chancellor, whose sanction has hitherto been required. On the other hand, the Chancellor's sanction may perhaps safely be dispensed with, as it ought not to be in the power of a single official to veto important measures passed by the Senates and the Courts. One other defect of the Act consists in the miserably inadequate pecuniary provision it makes for the four Scottish Universities. This injustice has been mitigated by a promise of the Chancellor of the Exchequer to supplement the grant, if absolutely necessary; but at best this treatment of Scotland, which annually contributes to the Imperial Exchequer about one and a quarter millions sterling more than her fair share of taxation, is shabby and discreditable. These are more or less serious blemishes; but common sense, if not common seals, will probably prevent them from doing much mischief. In other respects the Act is an excellent one, and will give a fresh impetus to that higher education, which is "the greatest of Scottish industries."

JOHN KIRKPATRICK.

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A MEDICO-LEGAL VIEW OF THE MAYBRICK CASE.

FEW facts are more noteworthy in the history of prohibitive legislation than the remarkable decrease that has taken place in the cases of poisoning with arsenic since the passing of the well-known Act, in 1851 (14 Vict. c. 13), which regulates the sale of that poison. So far as the criminal law of Scotland is concerned, this once popular poison has almost become forgotten, and the records of our Justiciary Court show that it has been supplanted by other and more insidious substances. Yet, strange to say, the *cause célèbre* of the century in Scotland was one in which this very poison was selected by the accused, although its purchase had been hedged round by what apparently were precautions of the most stringent kind. In 1857, Madeleine Smith was proved to have bought arsenic on two occasions, fulfilling to the letter all the requirements of the Act, and thus the purchase and possession of the poison were clearly brought home to her. In her case the chemical detection of the poison was not called in question, and the only points raised of scientific interest were the facility with which, by a little management, the colouring matters, directed by the Act to be mixed with the arsenic, could be removed by a non-professional person, and the neglect of the Crown chemical experts to look for either indigo or soot in the contents of the stomach of deceased. This was undoubtedly one of the weak points in the evidence for the prosecution, and its importance was not lost sight of by the skilful counsel

for the accused. No rebutting chemical evidence was submitted, and the case was ultimately decided on other issues. Indeed, at the date of Miss Smith's trial, it was generally admitted that the chemistry of arsenic had been thoroughly and satisfactorily investigated. This was principally due to the laborious and long-continued researches in this country of Christison in the first instance, and afterwards of Taylor. The varying solubility of arsenic in different substances, and the value of the liquid tests, had been carefully determined, while the reduction process had been minutely studied and its delicacy fully ascertained. More especially did it seem that science had fairly got abreast of the professional poisoner, and was able to meet him on something like equal terms, when it was announced that an obscure druggist in England and a chemist in Germany had separately discovered processes by which infinitesimal portions of arsenic could be detected with a certainty and a celerity that left nothing to be desired. It was generally allowed that these processes of Marsh and Reinsch made the detection of arsenic so easy and accurate as to render its successful criminal administration a matter of great difficulty, and there can be little doubt that their publication had much to do with diverting public attention from this popular poison. The criminal, however, enjoys this great advantage, that he can select his instrument, and he naturally leaves the beaten track, when no longer safe for him, and turns his attention to substances which have been little studied. The first to do so in this country—shortly, indeed, before Madeleine Smith's trial, but after the passing of the Sale of Arsenic Act—was the arch-poisoner Palmer. In 1856, Palmer, recognising the importance of the active principles of plants as poisons which prove rapidly fatal in small doses, which present few or no *post-mortem* appearances, and the detection of which after death is attended with great difficulty and uncertainty, boldly poisoned his victim Cook with Strychnia, the active principle of the Nux-vomica plant.

The substances, accordingly, which have of late years

specially engaged the attention of toxicologists, are those alkaloids which, in the hands of members (criminally inclined) of the medical profession, the persons who can most easily obtain them, can prove so fatal. It is satisfactory to reflect that, imperfect as are the means as yet provided by science for the discovery of these substances, three such notorious poisoners as Palmer in England, Pritchard in Scotland, and De Pommerais in France, were brought to justice by means of them,—the first using, as I have stated, strychnine; the second, aconitina; and the third, digitaline. Scientific research, however, has yet much to do to perfect methods for the more easy and precise detection of these very potent poisons.

In view of what I have said, it is certainly startling, in 1889, to have another trial for poisoning with arsenic, and a lady as the accused. I have nothing to do with the general evidence in this interesting case; my purpose is shortly to point out the facts connected with the chemical detection of the poison, and to direct attention to problems which must be solved, sooner or later, if this poison is to be kept in the background, and not again to be used as a ready tool by the poisoner. In Mrs. Maybrick's case no attempt was made to invalidate the processes for detecting the poison employed by the witnesses for the prosecution. The delicacy of the process of Reinsch was generally admitted, and the well-known statement of the late Professor Rainey, of Glasgow, was corroborated, that one-thousandth of a grain of white arsenic could be detected if dissolved in one million times its weight of fluid. One of the chief points of difference, however, between this case and that of Madeleine Smith, was the amount of the poison discovered by the chemists; for, while in the one, no tyro in chemistry could have failed to detect the arsenic, which was present in enormous quantity (nearly ninety grains having been obtained from the stomach of L'Angelier), in Mrs. Maybrick's case the amount spoken to by the chemists on both sides was not only exceedingly small, but most uncertain in its distribution throughout the body. John Davies, a chemist, spoke to a one-hundredth of

a grain being found in the kidney, one-eighth of a grain in the liver, while no arsenic was detected in the stomach and contents, none in the bile, or in the fluid escaping from the mouth, or in the lungs or heart; while Dr. Tidy, for the defence, estimated the quantity of arsenic in the whole body as three-tenths of a grain! The discovery of such small quantities, and the diffusion of the poison in the body, taken with the evidence of an arsenic habit in the deceased, at once raised questions, which so long ago as 1855, on the trial of Wooler for wife poisoning, came up for discussion—namely, as to the effects of small doses of arsenic on the system; as to the danger of stopping the taking of arsenic after the arsenic habit had been acquired; as to the organs in which arsenic, thus habitually taken, comes to be stored up; and, lastly, as to the rapidity with which the arsenic, thus accumulated, can be eliminated from the body. Most contradictory statements were made as to all these points. While Taylor, for example, with his great experience, modestly speaks of two to three weeks as the period for the elimination of the whole of the poison from the body, one witness referred to seven months as the period during which the process might be going on, and the poison might be detected in the liver! Now, all this uncertainty ought surely to be set at rest. There can be little doubt that persons bent on poisoning have carefully noted the difficulties in the evidence of this case, and it is possible that, in consequence of this trial, arsenic may again come into favour as a ready agent in committing murder. The poisoner must be met, and met successfully, on his own ground; and I cannot point out to any young scientific observer a more fruitful and important field of research than the questions as to the behaviour of arsenic in the human body, when taken in small doses, continuously, for a length of time.

With regard to one point in this Maybrick case, the defence was successful, I think, in impugning the conduct of the experts for the prosecution, and that was in the method employed for estimating the amount of arsenic in an organ of the body. The plan which had been followed was to select pieces from various

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parts of an organ—as, for example, the liver—and, having determined the quantity of the poison in one of these, to estimate approximately the total amount in the entire organ. For the defence it was argued, and I confess with some show of reason, that this method was faulty, inasmuch as it was highly probable that the poison was not equally diffused, and that the only correct method was to reduce the whole organ to a state of pulp and well mixed, and then from a given quantity of this pulp to estimate the entire amount. I cannot help remarking that it surely was not an edifying spectacle to observe, in this important case, the two selected Government experts appearing on opposite sides, and expressing different opinions, not merely as to quantities of the poison detected or the processes employed for its detection, but as to whether the case was one of arsenical poisoning at all. It may be asked, whether if it had so happened that it had been Dr. Tidy's turn to be consulted by the Crown when this case occurred, he would at once have advised that, as it was one which might be satisfactorily explained, as being due to natural causes, there should be no prosecution. Christison and Taylor have disappeared from the scene, and it is not an edifying spectacle to find two Government experts differing so widely on the subject of poisoning with a substance which was supposed to be so well-known in all its relations.

Already one of the leading English medical journals has paid Scotland the compliment of contrasting the criminal procedure of the two countries in such cases, and much to the credit of Scotland. No one can read the reports of the Maybrick case, and carefully weigh the strictly scientific evidence, without being painfully aware of the constant uncertainty produced by witnesses' references at the trial to notes they had made. Had the *post-mortem* appearances, and the various chemical results, been put into the shape of formal reports, as in Scotland, it would have been impossible for witnesses to forget important appearances, or to make varying and confusing statements as to chemical results.

HENRY D. LITTLEJOHN.

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IMPRISONMENT FOR DEBT IN THE UNITED STATES.

SINCE the passing of the Act abolishing imprisonment for debt in Scotland, it has been a frequent complaint that no adequate means were left at the disposal of the creditor by which he might enforce payment from his dishonest debtor. In view of this dissatisfaction, I have been induced to write this paper with the aim of showing how far imprisonment for debt has been abolished in the United States. I have, however, dealt only with the *constitutional provisions* which have been adopted in some of the States prohibiting or limiting such imprisonment. If I were to include an examination of the special statutes enacted in those States which have adopted no constitutional provision, I should exceed the limits proper to this article. Besides, although an examination of such statutes might be suggestive, an examination of the constitutional provisions, which are much more absolute in their terms, will fully indicate how far it has been thought advisable to take away the remedy by means of imprisonment which formerly existed.

I have not thought it well to examine the political or ethical aspect of the question; but have confined myself to a statement of the technical rules which have been adopted in applying the constitutional prohibitions. The members of the profession can, from these rules, draw their own inferences without any assistance on my part.

I. *Nature of Constitutional Provisions.*—In Alabama, Georgia, Missouri, Tennessee, and Texas, constitutional provisions have been adopted which, in absolute terms, prohibit

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imprisonment for debt.(*a*) In California, Florida, Indiana, Iowa, Kansas, Minnesota, Nebraska, Nevada, North Carolina, Ohio, and Oregon, the constitutional provision is that "no person shall be imprisoned for debt, except in cases of fraud," or is couched in terms equivalent thereto.(*b*) In Wisconsin, the Constitution declares that "No person shall be imprisoned for debt arising out of or founded on a contract express or implied"(*c*); in New Jersey, that "No person shall be imprisoned for debt in any action or on any judgment founded upon contract, unless in cases of fraud"(*d*); and in Michigan, that "No person shall be imprisoned for debt arising out of or founded on a contract, express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers or in any professional employment."(*e*) The constitutions of Kentucky, Mississippi, Pennsylvania, and Rhode Island simply declare that "The person of a debtor, when there is not a strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors in such manner as may be prescribed by law.(*f*)

In Ohio, it has been held that the effect of the adoption of the constitutional prohibition in that state was to abolish all right to imprison; that the Courts had thereafter no common law power to authorise arrests; and that the power to arrest, even in cases of fraud under the exception, must be conferred by express legislation.(*g*)

(*a*) Ala. Const., art. 1, sec. 21; Ga. Const., art. 1, sec. 21; Mo. Const., art. 2, sec. 16; Tenn. Const., art. 1, sec. 18; Tex. Const., art. 1, sec. 18.

(*b*) Cal. Const., art. 1, sec. 15; Fla. Const., Declaration of Rights, sec. 15; Ind. Const., art. 1, sec. 22; Iowa Const., art. 1, sec. 19; Kans. Const., Bill of Rights, sec. 16; Minn. Const., art. 1, sec. 12; Neb. Const., art. 1, sec. 20; Nev. Const., art. 1, sec. 14; No. Car. Const., art. 1, sec. 16; Ohio Const., art. 8, sec. 15; Oreg. Const., art. 1, sec. 19. Besides cases of fraud, the Oregon Constitution excepts "absconding debtors."

(*c*) Wis. Const., art. 1, sec. 16.

(*d*) N. J. Const., art. 1, sec. 17.

(*e*) Mich. Const., art. 6, sec. 33.

(*f*) Ky. Const., art. 13, sec. 19; Miss. Const., art. 1, sec. 11; Pa. Const., art. 1, sec. 16; R. I. Const., art. 1, sec. 11.

(*g*) *Spice* v. *Steinruck*, 14 Ohio St. 213, 218.

II. *Cases of Fraud.*—When cases of fraud are excepted from the operation of the constitutional prohibition, the exception includes not only fraud in contracting the debt, but also fraud in avoiding its payment.(*a*) Thus a refusal to apply money of which the defendant has the possession or control to the payment of a judgment-debt is a fraud within the meaning of the exception, for, as the Court said in one case, "Whatever is dishonest is fraudulent *in foro conscientiæ*, and is so treated in a Court of equity. Fraud and dishonesty are synonymous terms. The true spirit of the Constitution is this—and it speaks the enlightened and benevolent language of the age in which we live,—the honest debtor who is poor, and has nothing to pay with, shall not be imprisoned at the mercy of his creditor. But if the debtor, instead of putting himself upon his honest poverty, seek to elude the jurisdiction and process of the Courts; if he conceal or assign or remove his property, to keep it out of the reach of his creditors; or if he have the means in his pocket, or under his control, of paying his debt, and refuse to do so, he is a dishonest and fraudulent man. He is a man that the Constitution says may be, and that common sense and common honesty say ought to be, imprisoned until he disgorge his money, and deliver up his property to his confiding creditors."(*b*) In connection with this point it ought, however, to be noticed that under the Constitution of Oregon in which not only cases of fraud, but also "absconding debtors" are excepted from the prohibition against imprisonment, it has been held that the term "absconding debtor" involves the idea of secrecy, and that a removal from the State that will authorise an arrest, must be something more than a mere leaving the State in an open and public manner, or in the ordinary course of business.(*c*)

Where the fraud charged against the debtor has been

(*a*) *Baker* v. *State*, 109, Ind. 47; *Bromley* v. *People*, 7 Mich. 472; *ex parte* Bergman, 18 Nev. 331; *Hill* v. *Hunt*, 20 N. J. L. 476.

(*b*) *Hill* v. *Hunt*, 20 N. J. L. 476.

(*c*) *Norman* v. *Zieber*, 3 Or. 197, 205.

used in contracting the debt, fraudulent representations are sufficient,(*a*) and it has even been held that the sale of goods without payment of duty, in violation of the revenue laws, is a case of fraud on the United States, and comes within the purview of the exception.(*b*)

A breach of promise of marriage is simply a breach of contract, and cannot furnish a ground for arresting the defendant as for a fraud.(*c*) If, however, the plaintiff recovers not only on the ground of breach of promise, but also on the ground of seduction, the element of fraud is introduced, and the defendant may be imprisoned,(*d*) especially if he seeks to avoid performance by secretly leaving the jurisdiction.(*e*)

The simple failure of an agent to account for moneys received by him does not amount to a fraud for which a warrant of arrest may be issued.(*f*) Assault and battery do not involve any element of fraud.(*g*)

III. *Actions founded in Tort.*—Even when the Constitution declares in general terms that "there shall be no imprisonment for debt," the Courts have generally held that the word "debt," when so used, includes only pecuniary obligations, arising *ex contractu*, that it has no application to claims for damages arising *ex delicto*, and that, therefore, the person of a defendant may competently be imprisoned when the claim is founded in tort.(*h*)

The reasoning, upon which this doctrine is based, will

(*a*) *Parker* v. *Follensbee*, 45 Ill. 473.

(*b*) *U.S.* v. *Walsh*, 1 Abb. C. C. 66.

(*c*) Tyson's case, 32 Mich. 262; *Moore* v. *Mullen*, 77 N. Car. 327; *Perry* v. *Orr*, 35 N. J. L. 295.

(*d*) Sheahan's case, 25 Mich. 145.

(*e*) *Perry* v. *Orr*, 35 N. J. L. 295.

(*f*) *People* v. *M'Allister*, 19 Mich. 215; *in re* Stephenson, 32 Mich. 60; *in re* Holdforth, 1 Cal. 438.

(*g*) *Ex parte* Prader, 6 Cal. 239.

(*h*) *Ex parte* Hardy, 68 Ala. 303; *People* v. *Greer*, 43 Ill. 213; *M'Kindley* v. *Rising*, 28 Ill. 337; *People* v. *Cotton*, 14 Ill. 414; *ex parte* Bergman, 18 Nev. 331; *Kinney* v. *Langhenour*, 97 N. C. 325; *Long* v. *M'Lean*, 88 N. C. 3; *Hoover* v. *Palmer*, 80 N. C. 313; *Moore* v. *Mullen*, 77 N. C. 327; *Moore* v. *Green*, 73 N. C. 394; *U. S.* v. *Walsh*, 1 Abb. C. C. 66; *Hanson* v. *Fowle*, 1 Sawy. C. C. 497, 505.

appear from the language employed by the Supreme Court of North Carolina, in deciding a case before it. In *Moore* v. *Green*,(*a*) that Court said, "Chitty, in his standard work on Pleading, divides all actions into two great classes; those which arise *ex contractu*, and those which arise *ex delicto*. No doubt the framers of the Constitution had this familiar classification in mind, and, in forbidding imprisonment for debt, they referred rather to the cause of action as being *ex contractu*, than to the form it would assume upon a judgment. If they had meant to forbid imprisonment in every civil action, they would have said so. But by forbidding it for debt, they plainly imply that it may be allowed in actions which are not for debt. In forbidding imprisonment for debt, as popularly understood—viz., for a cause of action arising *ex contractu*, they responded to the general public sentiment; but I know of no writer on the reform of law who has recommended the abolition of punishment for trespassers and wrong-doers. Such a provision might be humane to the injuring, but it would not be so to the injured parties. It would withdraw from the State its power to impose a check on violence and wrong; and would tend to license disorders and law-breaking incompatible with the peace and welfare of Society." It has accordingly been held that the defendant is liable to imprisonment in actions for assault and battery; (*b*) for the wrongful conversion of personal property; (*c*) and for seduction.(*d*)

It has, however, been decided that the fact that a claim for damages has been reduced to judgment does not so alter its character as to make it a debt within the meaning of the constitutional prohibition. In the case in which it was so held, (*e*) an order of arrest was issued in an action for libel, and it was urged on the defendant's behalf that a judgment having been

(*a*) N. C. 394.
(*b*) *Hanson* v. *Fowle*, Sawry, C. C. 497.
(*c*) *Long* v. *M'Lean*, 88 N. C. 3.
(*d*) *Kinney* v. *Langhenour*, 97 N. C. 325; *Hoover* v. *Palmer*, 80 N. C. 313.
(*e*) *Moore* v. *Green*, 73 N. C. 394.

rendered in the action he was entitled to his discharge. The Court said, "The argument is this—the moment a judgment shall be obtained, the claim for damages is converted into a debt, the person of the defendant is thereupon liberated and his bail discharged. For what purpose then require bail of those who are to be discharged at the first moment when their liability can be of any value? It is an oppression to the defendant, and of no possible benefit to the plaintiff. *Dellinger* v. *Tweed* (66 N. C. 206) is cited as the authority for the proposition that the claim for damages is converted into a debt within the meaning of the Constitution, by the recovery of judgment. Undoubtedly for some purposes it is. An action of debt may be maintained on it; and a *fi. fa.* may issue on it. But to construe the above-cited clause of the Bill of Rights as forbidding imprisonment for any cause of action which, by judgment, would become a debt, would make its prohibition extend to all cases, as every action becomes a debt in one sense when a judgment is recovered on it. . . . *Dellinger* v. *Tweed* has no application to the present case. It is confined to a construction of the article of the Constitution respecting homesteads." The decision of the North Carolina Court in this case seems not only to be in conflict with the law as laid down in Blackstone,(*a*) but also to conflict with the decisions of the Supreme Courts of California and Georgia. The California Court held that a defendant in an action for libel could not be arrested, saying, "The judgment is a debt as much as though recovered in an action of assumpsit."(*b*) In a Georgia case,(*c*) it was held that the imprisonment of the defendant in an action of bail-trover became illegal whenever

(*a*) "It is a part of the original contract, entered into by all mankind who partake the benefits of society, to submit in all points to the municipal constitutions and local ordinances of that State, of which each individual is a member. Whatever, therefore, the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge."—3 Bl. Com. 158. But see 3 Bl. Com. 154.

(*b*) *Ex parte* Prader, 6 Cal. 239.

(*c*) *Southern Express Company* v. *Lynch*, 65 Ga. 240.

the plaintiff elected to accept a judgment for money damages. The plaintiff in that case had accepted such a verdict, and the defendant thereupon applied for a discharge. The Court granted it, saying, "It seems clear that this verdict authorised a judgment following its terms for a sum of money, and when entered the verdict became a judgment for money, or the highest form of debt known to the law."

In the States in which the prohibition against imprisonment is confined to the case of debts arising *ex contractu;* it has been held that execution against the person may issue upon judgments for damages and costs in replevin,(*a*) and in ejectment,(*b*) and for the conversion of property, even though the property originally came into the defendant's possession under a contract.(*c*)

IV. *Disobedience to Orders of Court.*—A constitutional prohibition against imprisonment for debt does not prevent the imprisonment of a defendant under an order of Court directing him to deliver to the plaintiff, or to any other person (*e.g.*, a receiver) certain property or money which is actually in his possession.(*d*)

In the case of proceedings supplementary to execution, it would accordingly appear that the defendant may be imprisoned as for a contempt if he fail to obey the order of Court. Thus, in Iowa it has been held that, notwithstanding the prohibition in the Constitution of that State, a statute which provides for the examination of debtors in proceedings supplementary to execution, and for imprisonment in the event of a refusal to obey any order therein, is constitutional and valid. In the case in which the point arose, the debtor had been imprisoned for refusal to obey an order requiring him to pay over money actually in his possession.(*e*) The

(*a*) *Fuller* v. *Bowker*, 11 Mich. 204.

(*b*) *Howland* v. *Needham*, 10 Wis. 495.

(*c*) *Cotton* v. *Sharpstein*, 14 Wis. 226.

(*d*) *Harris* v. *Bridges*, 57 Ga. 407; *Ex parte* Grace, 12 Iowa, 208; *State* v. *Becht*, 23 Minn. 411; *Roberts* v. *Stoner*, 18 Mo. 481. But see *ex parte* Hardy, 68 Ala. 303.

(*e*) *Ex parte* Grace, 12 Iowa, 208.

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Supreme Court of Minnesota have taken a similar view of the question. In a case in that State (*a*) the defendant had been imprisoned for contempt in failing to comply with an order requiring him to deliver certain property to a receiver appointed in supplementary proceedings, and it was held that such imprisonment was not a violation of the constitutional inhibition. The Court said—"In the case at bar the imprisonment is for contempt in refusing to obey an order of the Court. It is true that the order relates to the debt evidenced by the judgment against the relator, but this in no way alters the fact that the imprisonment is for the contempt and not for the debt. And the contempt does not consist in the relator's neglect or refusal to pay the debt, but in his disobedience of the order directing him to hand over certain property to the receiver. The fact that the property in question is to be handed over for the purpose of being applied to the payment of the judgment is in no way important. The commitment is, nevertheless, in no proper sense imprisonment for debt."

It ought, however, to be mentioned that the Alabama Supreme Court has adopted a view diametrically opposed to these decisions of the Courts of Iowa and Minnesota. The Alabama Code provides for the examination of judgment debtors in proceedings supplementary to execution, and confers upon the Court power, when it appears that the defendant has money, property, or other effects, to order him to pay or deliver the same to the Registrar of Court for the payment of the execution; and declares that "If any such defendant shall fail to comply with the terms of such decree, he shall be guilty of a contempt, and the Court . . . shall . . . have the power to imprison the defendant in the county jail until he shall obey the decree." This provision, it has been held, is unconstitutional and void, being a violation of the constitutional prohibition of imprisonment for debt, and it was also held that an order committing the

(*a*) *State* v. *Becht*, 23 Minn. 411.

defendant to prison for refusing to deliver up certain United States bonds as directed by the Court was illegal.(*a*)

In Georgia, on the other hand, the Court has sustained a statute which goes even further than the usual statutory provision applicable to supplementary proceedings. In the latter case, the contempt usually consists in a refusal to deliver property which the Court finds is in the defendant's possession; but in the case of the Georgian statute referred to no such element of actual possession seems to be necessarily involved. In that State a statute provides that in proceedings to recover the possession of personal property, the defendant may be imprisoned until he finds bail for its production. It has been held that this provision is not unconstitutional, and that a defendant in such proceedings may be imprisoned until he complies with the order to produce the property, or finds bail.(*b*) The Court said, "If one man obtains the possession of the personal property of another by fraud or violence, or, having possession of it, and there is reason to fear that it may be eloigned or moved away, or will not be forthcoming to answer the judgment that may be made in the case, there would seem to be no good reason why he should not be proceeded against, and required to comply with the terms of the statute made and provided for such cases; and if the defendant should be imprisoned in accordance with the terms of the statute, he cannot be said to have been imprisoned for debt. . . . In the case now before us, the defendant failed to enter into a recognisance, with security, for the forthcoming of the property, as required by the statute, and the property sued for was not to be found by the sheriff and delivered over to the plaintiff; and the sheriff, in obedience to the express mandate of the statute, committed the defendant to jail, where the statute declares that he shall be kept in safe and close custody until the personal property sued for shall be produced, or until he shall enter into bond, with good security, for the eventual condemnation money." But if the

(*a*) *Ex parte* Hardy, 68 Ala. 303.
(*b*) *Harris* v. *Bridges*, 57 Ga. 407.

plaintiff elects, under the statute, to take an alternative verdict—*i.e.*, a verdict for a sum of money in name of damages, which shall be discharged in the event of the property being delivered within a specified time, such verdict becomes an absolute verdict for damages by the failure of the defendant to deliver the property within the time specified, and the defendant can be no longer detained in prison.(*a*)

Where, however, no element of contempt enters into the failure or refusal of the defendant to obey the order, and the Court simply directs the payment of a sum of money, a commitment to prison is a violation of the constitutional prohibition.(*b*) Accordingly there can be no imprisonment for failure to obey an order of Court in divorce proceedings directing the payment of alimony.(*c*)

V. *Bastardy Proceedings.*—In the United States bastardy proceedings are usually of a summary nature. They are commenced by a complaint by the mother, upon which a warrant to arrest the defendant is granted. The defendant is detained in custody until he finds bail to appear at the trial of the complaint. The judgment rendered usually requires the payment of inlying expenses, and alimony until the child attains a certain age, and the execution of a bond to the State or county, conditioned to save the county harmless against claims for the support of the bastard. These proceedings, it has been held, are in the nature of proceedings to enforce a police regulation, and upon the failure of the defendant to comply with an order of Court, requiring the payment of a sum of money for the maintenance of the child, he may be committed to prison without violating any constitutional provision.(*d*) But in Iowa a contrary view has been adopted, and it has been held that a

(*a*) *Southern Express Company* v. *Lynch*, 65 Ga. 240.

(*b*) *Board of Education* v. *Scoville*, 13 Kans. 17; *Coughlin* v. *Ehlert*, 39 Mo. 285; *Roberts* v. *Stoner*, 18 Mo. 481.

(*c*) *Wightman* v. *Wightman*, 45 Ill. 167; *Steller* v. *Steller*, 25 Mich. 159.

(*d*) *Ex parte* Cottrell, 13 Feb. 193. See also *Musser* v. *Stewart*, 21 Ohio St. 353.

proceeding against the putative father for the support of his illegitimate child is not in the nature of a criminal action, and therefore under the constitutional provision, the defendant cannot be committed to prison.(*a*) The Court said, in the case referred to—"The complaint and proceedings are of a summary nature to secure to the woman (who is in such cases favoured by the law) a speedy remedy for the support of her infant child. She is permitted to use the name of the State to have compulsory process, and thus she can obtain a judgment without that delay attending civil suits in the usual form. In this way she is saved much trouble and inconvenience. Immediate means can be obtained for the support of the child, and the door of escape to some extent closed upon the defendant, whereby he is prevented from avoiding those legal and moral obligations which men under such circumstances are very reluctant to observe. For the purpose of affording a prompt remedy this statute was passed. But while the statute gives the right to a speedy action, and the woman is permitted to bring to her assistance the forms of criminal law, still the suit thus allowed to be instituted is a civil suit, to inure to the benefit of herself and child. The mother may dismiss the prosecution, settle the matter, and release the defendant if she chooses, or, if judgment is obtained, accept it in full, and the State cannot interfere or prevent it. The object and purpose of the complaint are to obtain from the putative father an amount sufficient to maintain the child, and not to punish him criminally for the carnal intercourse."

VI. *Costs in Criminal Proceedings.*—The costs of criminal proceedings imposed upon a defendant who has been found guilty, do not constitute a "debt" within the meaning of the term as used in the different constitutional provisions, and, in case of non-payment, no immunity from imprisonment exists.(*b*)

(*a*) *Holmes* v. *Satte*, 2 G. Greene (Iowa), 501.

(*b*) *Caldwell* v. *State*, 55 Ala. 133; *Morgan* v. *State*, 47 Ala. 34; *Ex parte* Bergman, 18 Nev. 331, 343; *M'Coal* v. *State*, 23 Ind. 127, overruling *Thompson* v. *State*, 16 Ind. 516.

By a Kansas statute it is provided, in effect, that when upon a trial before a justice of the peace for a misdemeanour, it shall be found that the prosecution was maliciously instituted without probable cause, the prosecuting witness shall be adjudged to pay the costs, and, unless a bond is given therefore, shall be committed to the county jail until he makes payment. This statute has been sustained as being constitutional, the Court being of the opinion that "These costs are cast upon him (the prosecuting witness) as a penalty—they do not constitute, strictly and simply a 'debt' in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery is a debt."(*a*)

In the case of fines, it has been held that the mere fact that a statute provides that certain fines may be collected by execution against the person, does not render such fines "debts" within the meaning of the constitutional prohibition.(*b*)

J. C. THOMSON.

(*a*) *In re* Ebenhack, 17 Kans. 618.
(*b*) *In re* Beall, 26 Ohio St. 195.

COUNTY GOVERNMENT IN IRELAND.

THE subject of Local Government in Ireland is likely to occupy a considerable share of public attention at an early date—probably in some respects a more concentrated attention than did the Local Government Acts of the past and the present year—and to the readers of this *Review* it will be of especial interest. In the short space at my disposal it would be obviously impossible to enter into a detailed exposition of the system; nor is it my intention to institute a comparison between the organisations as they exist in Ireland and in England and Scotland. I wish rather to give a brief statement of the present condition of Irish county administration, and I have avoided as much as possible all theoretical suggestions for reform. I may further explain that I use the term *County Government* as excluding both central and urban government, but as including the administration of poor law and sanitary matters at present exercised in the Unions. Any reform of county government must almost necessarily embrace the Unions.

There is a large section in Ireland which considers the present system of Local Government utterly bad, and that it should be completely revolutionised. There is another section, not so large, but considerable in influence, and representing important interests, which holds that although the system is in many ways anomalous and theoretically indefensible, the present social and political conditions of the country render any radical change in the direction of extended popular representation dangerous and undesirable. The Home Rule party, indeed, of which the first section is

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mainly composed, add a rider to their wholesale condemnations to the effect that no good or adequate system of Local Government can come out of a United Parliament; but no doubt, subject to this reservation, they would always favour legislation upon the lines of democratic extension. The advent of a Parliament to Dublin, however, is at least uncertain. And meantime, apparently, the tendency of modern political movement is to bring Ireland as far as may be into line with the rest of the kingdom as regards the form and principles of her Local Government. On the other hand, Conservatives and Unionist Liberals, in Ireland and elsewhere, do not as a rule theoretically defend the anomalies of the Irish system, and, according to the leading exponents of their views, are only deterred from joining in the demand for reform by the apprehension that the conditions of the country are not at present fitted for the practical recognition of a principle which in the abstract they approve.

There would be little interest, however, to the readers of a publication not distinctively and exclusively Irish, in considering the present conditions of Local Government in Ireland, were it to be taken for granted that the question cannot be dealt with except by some problematical Dublin Parliament; and it is because the question is likely to be brought forward as a separate problem for practical discussion in the near future that I have written this paper. The discussion and solution of the problem will probably devolve not exclusively upon Irishmen, but will be dealt with by the Imperial Parliament as at present constituted, with a due sense of the responsibility which attaches to a serious Imperial question.

Mr. Goschen, in a well-known speech upon the subject of Local Government Reform for England, made use of the expression, "chaos of areas," and though the phrase may have applied with greater force to the English than to the Irish system, yet the multiplicity and complexity of territorial areas in Ireland constitutes one of the chief difficulties in

forming a clear and comprehensive idea of its Local Government. The Census Report(*a*) divides these areas into six principal classes :—

1. *The Civil Division*, consisting of townlands, civil parishes, baronies, counties, and provinces, with cities or towns, and counties of cities and towns.
2. *The Poor Law Division*, consisting of townlands, electoral divisions, dispensary districts, and unions.
3. *The Registration Division*, consisting of townlands, electoral divisions, registrars' districts, registration counties, and provinces.
4. *The Police Division*, consisting of townlands, constabulary districts, and counties.
5. *The Judicial Division*, consisting of townlands, Petty Sessions Districts, Quarter Sessions districts, and counties.
6. *The Ecclesiastical Division*, consisting of ecclesiastical parishes and dioceses.

To these may be added the Revenue Division, comprising the customs, excise, income-tax, and post-office.

Such are the areas of local administration. But, besides, as every Government that wishes to secure regular and uniform administration of the powers which it delegates to local bodies must reserve to itself a measure of central controlling authority, there are also, in Ireland, various central boards, located in Dublin, for this purpose.(*b*)

Local Government areas in Ireland, however, may be broadly classified under four heads, the three principal of which are the County, the Town, and the Union. Under the fourth head, which may be termed Miscellaneous, may be grouped the management of harbours, inland navigation, arterial drainage, &c.

(*a*) General Report, 1882, pt. ii. p. 3.

(*b*) On this central administration, vaguely known as Dublin Castle, which is under the control of the Lord Lieutenant and Chief Secretary, and which includes the Local Government, the Prisons, the National Education Boards, the Police Force, &c., a separate paper may hereafter be contributed.

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Of these divisions, the Union is the most important as an administrative area, its responsibilities being increased by the Statutes passed in nearly every session of Parliament.(*a*) As Mr. Bailey points out in his excellent pamphlet upon Local Government in Ireland, during the last fifty years various burdens have been removed from the County and transferred to the Unions or the Imperial Exchequer. Thus in 1846 the entire cost of the Constabulary was so transferred to the latter, the annual cost of that force being now about £1,400,000, or considerably more than the present total County expenditure.(*b*) But though the Counties have of late years been relieved from many burdens, they are still the leading centres of administration, both in extent of area and amount of taxation. I therefore deal with them first, postponing what I have to say about the Unions.

It is not necessary to go into the history of the county division, which is believed to date back to the time of King John; suffice it to say, that the county was gradually introduced by the English settlers on the model of their own home counties or shires. There are now in Ireland thirty-two counties at large as distinguished from the counties of cities and towns; of these latter there are eight, each constituting a fiscal area distinct from the county in which it is situated. Speaking generally, the matters locally administered by the county include the erection, maintenance, and repair of buildings, roads, bridges, &c., and the cost is either borne by the county at large or by some portion of it.

With respect to fiscal administration, the county, as a whole, is the principal area. It is, however, sub-divided for several purposes, and the divisions, which are of varying importance, are as follow :—

1. *Baronies.*—At the date of the last census in Ireland (1881), there were 327 baronies and half-baronies, the latter being made separate fiscal

(*a*) O'Shaughnessy on Local Government, &c., in Ireland (Cobden Club Essays, 1882).

(*b*) Local and Centralised Government in Ireland, by W. F. Bailey, pt. i. p. 8.

areas for convenience' sake. These districts represent the territories or portions of the territories inhabited by the Irish aboriginal tribes. They are comprised of groups of townlands and resemble the English hundreds.

2. *Townlands.*—These are the smallest areas in Ireland: they vary much in size, and are the units of almost all local administrative divisions. They are not analogous to any English area, but are simply subordinate divisions of the county, forming, when grouped together, baronies, electoral divisions, civil parishes, &c.

3. *Parishes.* — In Ireland these areas do not hold at all the same position of importance that we find them occupying in England. Originally ecclesiastical divisions, they are now chiefly used for civil administration purposes, such as assessing damage for wilful and malicious injury to property and person, the formation of petty sessions districts, and the sub-division of baronies for the collection of county cess.(*a*)

So far as relates to fiscal administration, these three orders or classes exhaust the sub-divisions of the county; but connected with the local administration of justice we have ridings (only in three counties) quarter session divisions, petty session districts (610 in number), Coroners' districts (90 in number), and police divisions. The quarter sessions divisions are regulated by the Lord Lieutenant in Council,(*b*) while the petty sessions and Coroners' districts are regulated by the justices at quarter sessions.(*c*)

Having in view the above-mentioned areas of county administration, let me now briefly explain the constitution and functions of the county authorities. These are divided into two classes, namely,—(i) those who are charged with the

(*a*) 19 & 20 Vict. c. 63. (*b*) 14 & 15 Vict. c. 57.
(*c*) 14 & 15 Vict. c. 93.

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management of fiscal affairs, and (ii) those who are intrusted with the local administration of justice. Of the latter nothing need here be said.

The fiscal authorities are—(1) The Grand Juries, with their subordinate administrative officers, and (2) The Presentment Sessions.

(1.) The Grand Jury is the chief governing body of the county. It is the authority which in all counties at large (the Metropolitan county of Dublin excepted), imposes county rates in Ireland—including all the classes of cases where, prior to the Local Government Act, 1888, justices imposed county rates in England.(*a*) This body considers the indictments at assize; but it is in respect of the fiscal affairs of the county that they exercise their most important powers, and it is with reference to these matters, and not to their duties under the criminal law, that they have been appointed since the year 1836. The system is now regulated by the Act of that year,(*b*) as well as by subsequent amending statutes.

The Grand Jury first obtained a limited portion of fiscal authority in the reign of Charles I.(*c*); it being found impossible, owing to the disturbed condition of the country at that time, to maintain regular and permanent fiscal tribunals. It is now appointed by the Sheriff of the county for each successive assize. It must not exceed twenty-three members in all, and these are chosen from the £50 freeholders and the £100 leaseholders whose lands lie within the county boundaries. The only limitation to the Sheriff's discretion in the matter of election is the obligation to summon one resident representative from each barony. In none of the counties, however, with the exception of Cork, does the number of baronies amount to twenty-three, consequently the Sheriff has considerable discretion in making his choice.

But though technically nominated by the Sheriff, subject

(*a*) Hancock, Cobden Club Essays, edited by Probyn, 1875.
(*b*) 6 & 7 Will. IV. c. 116. (*c*) A.D. 1635.

to the restrictions mentioned, the Grand Jury is practically an assembly of the principal proprietors and the agents of peers.(*a*) Peers themselves are excluded from it, because a peer is not triable upon indictment by ordinary jury. It is, indeed, a strange anomaly in the system of Irish Local Government that peers, who are generally large proprietors and pay heavy rates, should be absolutely excluded from the most important assembly of county landowners for fiscal purposes, while under the Poor Law we find them members, and in numerous instances chairmen, of the representative Boards of Guardians.

The constitution of the Grand Juries has been generally condemned as not representative of the ratepayers, and the criticism, so far as it goes, is obviously true. It is also theoretically open to the charge of a want of executive force, consequent upon the fact that, although largely composed, year after year, of the same individuals, it has no corporate existence —a distinct jury being empannelled for each assizes. Practically it would not be likely to happen, but there is nothing in the constitution of the body to prevent any Grand Jury from completely annulling or reversing the policy of its predecessor, because directly the judge discharges the Grand Jury, it ceases to exist. And it is also a consequence of these bodies having no continuous corporate existence that they have no authority to maintain action against those who have failed in their obligations to the county. These apparent evils, however, are in a certain degree met by the fact that there are certain administrative officers, connected with the Grand Juries and the fiscal affairs of the county who, being permanent officials, can to some extent maintain its continuity and give effect to its decisions.(*b*)

(*a*) Hancock, *ut supra*.

(*b*) These are :—

(1.) Secretary, } both appointed by Grand Jury.
(2.) Treasurer, }

(3.) County Surveyor, appointed by Lord Lieutenant, but paid by Grand Jury.

(4.) The High Constables or Baronial Collectors, ordinarily appointed by the Grand Jury.

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(2.) Let me next consider shortly the nature and functions of the second county authority to which I have alluded—namely, the Presentment Sessions. Although the Grand Jury possess a well-nigh complete controlling power over upwards of two-thirds of the county presentments, they have no power to *initiate* any expenditure whatever; this power is exclusively reserved to the Presentment Sessions. The decisions of the latter are open to review. Thus, if an application for a presentment is twice refused by the Presentment Sessions, the applicant can memorialise the judge of Assize, who may refer the applicant to an ordinary jury, and should the decision be favourable to him, the judge can submit at his own hand the presentment for the consideration of the Grand Jury.

The Presentment Sessions are of two kinds—viz., Baronial and County at Large. The former deals with expenditure for the benefit of the barony, and the latter with that for works chargeable upon the entire county. The county justices may vote at both these Sessions. There is also a certain amount of indirect representation of the ratepayers, though of a very shadowy and worthless kind. The "Baronial Sessions" are composed of the county justices and a certain number of the cess-payers of the barony, not being less than five, or more than twelve in number. The latter are chosen in this wise:—A list of the hundred highest cess-payers is struck; then those who have acted at the previous Sessions are excluded, and the Grand Jury choose at their own discretion twice as many names as there are seats to be allotted, leaving the final selection to ballot. The "County at Large Sessions," on the other hand, is composed of one cess-payer selected by each Baronial Sessions of the county, together with any county justices who may choose to attend, irrespective of property or residence.(*a*)

Passing now to the subject of fiscal administration by the county authorities, the principal matters administered by

(*a*) 6 & 7 Will. IV. c. 116, §§ 4 and 9.

the Grand Juries are public works, such as the construction and repair of roads and bridges, the erection and repair of court houses and the like. Contributions (the amount of which is discretionary) are also made, under a variety of statutes, to district lunatic asylums, industrial schools, reformatories, extra police, and (not unimportant in the present condition of the country), compensation for malicious injury to person and property. Payments are also made for coroners' fees, and instalments of Government and other debts. Projects under the Tramways (Ireland) Acts, and baronial guarantees for railway extensions, also require the sanction of the Grand Juries. About one-fourth of the money presented consists of the "imperative presentments," that is, those which are made obligatory, as above mentioned, by Acts of Parliament. The other presentments are imposed and rated at the option of the Grand Jury, who can either reject or ratify any presentment of the Sessions.(*a*)

The local taxes raised for Grand Jury purposes are termed *County and Grand Jury Cess*, and the incidence and payment of these taxes become important when considering any proposal for County Government Reform. All tenancies created prior to the Land Act of 1870 were subject to County Cess; it was a charge upon the land, and was exclusively payable by the occupying tenant. Since the passing of that Act, however, the tenant of an agricultural and pastoral holding is entitled—supposing he has not contracted himself out of the Act, and where the valuation of his holding is over £4—to deduct half of the County Cess paid by him from the rent payable to his landlord; and in the case of a similar holding under £4 valuation, the payment of the County Cess is thrown *entirely* upon the landlord. By the Grand Jury Act, 1836, the proportion of cess to be raised off each barony under the treasurer's warrant (*b*) becomes a charge on the premises mentioned therein, and may be levied

(*a*) For constitution, &c., of Presentment Sessions, see 6 & 7 Will. IV. c. 116, §§ 4-9.

(*b*) One of the permanent Grand Jury officials already alluded to.

by Distress or Civil Bill Process. Now when we find it to be a fact that upwards of one-third of the agricultural holdings in Ireland are rated under £4, the importance of these considerations comes into view. One-third of the present occupiers are clearly relieved from all county taxation, while, at the same time, they take full advantage of all the benefits of Local Administration. Bearing these facts in mind, the claim of the owner to a considerable, if not preponderating, share in the management of Local Government seems not altogether unreasonable, that is, so long as the present incidence of taxation remains.

Although from their constitution the Grand Juries cannot be reasonably considered as representative of the ratepayers, it must not be overlooked that there are powers given to every payer of Grand Jury or county cess which prevents this non-representative character from working with any considerable degree of injustice or hardship. All traversers of presentments (*i.e.*, every person objecting to pay the assessment imposed), can have their traverses tried by petty juries, so that any cess-payer can have the question ultimately decided by a petty jury of the county; and even if there be a verdict against him, the costs of the traverse will be paid by the county, should the judge consider that there were "reasonable and probable" grounds for objecting to the presentment. Any cess-payer, for example, may traverse a presentment on the ground that the sum presented is exorbitant, or that the work for which the assessment is imposed (*e.g.*, the charge for repairing a road), has not been performed in conformity with the contract. These are questions which the judge of assize always sends before the petty jury.

I have now explained generally the constitution, function, and procedure of the Irish Grand Jury system upon which the county government of Ireland at present rests. I am not here concerned to condemn it or to defend it, but having given prominence to most, if not all, of the objections which can fairly be brought against it, I feel bound to say that, from my own observation, and from all

that I have heard from impartial observers whose experience is much longer and more extensive than mine, the system has worked, comparatively speaking, well; and that is quite as much as can be said for most local government organisations. It is very seldom charged against Grand Juries, as Mr. Bailey observes, that they act from corrupt motives in deciding cases or in making presentments. Doubtless, the fatal objections which can be used against them are the non-representative manner in which they are constituted, their temporary existence, and the consequent fluctuating nature of their membership. Threatened institutions, in common with threatened individuals, enjoy a proverbially long life; but no one, I imagine, who intelligently observes the political tendency of the times in the direction of democratic representation, will be inclined to predict for the Irish Grand Jury system, as at present constituted, a prolonged term of existence.

I now come to what I have already called the most important area of local administration in Ireland, namely, the Union. Although the English Poor Law dates back so far as the year 1601, the first effort at its introduction into Ireland was made by the Irish Parliament in 1771.(*a*) The creation of the Union proper, however, dates from 1838.(*b*) It was modelled upon the lines of the English Act of Reorganisation of 1834, and its operation was actually controlled by the English Commissioners until 1847, at which date the "Irish Poor Law Commission" came into existence.(*c*) In the year 1872, this body became merged in the Local Government Board, whose establishment dates from the previous year(*d*), and of which the Chief Secretary was made President.

When settling the limits of the Union, the principle laid down by Sir George Nichols, in his report to the Govern-

(*a*) Cobden Club Essays on Local Government, 1875, p. 174.
(*b*) 11 & 12 Geo. III. c. 30.
(*c*) 10 Vict. c. 31.
(*d*) 34 & 35 Vict. c. 70.

ment, 1836, was to take as a centre the chief market town in each county, and attach to it, as far as conditions would allow, a rural district within a certain convenient radius. This, as Sir George remarks, was the principle which governed the formation of the English Unions, wherever the Commissioners were not driven from it by exceptional circumstances. But the only limit imposed by the Irish Statute was, *that no townland should be divided.* The Townland, then (the nature of which I have already explained), being made the unit for Ireland, just as the parish was for England, it is easy to see how many of those objectionable inequalities in the construction of Union areas, which were so apparent in the English, were avoided in the Irish system.(*a*)

In order to render simple the election of guardians, groups of townlands, crystallising, as it were, round the several central points, were formed into Electoral Divisions. And it is the Electoral Division which is chargeable with the maintenance of paupers who have obtained a residential qualification, in other words, of all paupers who have resided therein for four out of the five years previous to receiving relief. In the case of paupers not having so qualified, the Union, as a whole, becomes chargeable. It is the Union at large, also, which pays for the maintenance of paupers who are lunatics, idiots, blind, or deaf and dumb. The Union is also, to a great extent, chargeable with out-door relief.

The other Poor Law areas are the dispensary districts and the registration divisions.

The principal Local Authority of the Union is the Board of Guardians, which holds a weekly meeting, and is composed partly of elected, and partly of *ex officio* members, the number and qualifications of elected guardians being fixed by the Local Government Board. The qualification is on the average of a £20 valuation. The Union constituencies are composed of both owners and occupiers of property, and the

(*a*) The number of Unions in Ireland is 162; of electoral divisions, 3444 (averaging 21 per Union); of townlands, 60,644.

following are the principles upon which the system of voting is conducted :—Where the valuation (in respect of occupiers), or the net amount of rent received (in respect of owners), is under £20, one vote; £20 and under £50, two; £50 and under £100, three; £100 and under £150, four; £150 and under £200, five; £200 and over, six. Six votes is (save in certain cases, where double the number of votes on this scale may be given) the maximum. It is also competent for the electors to vote by proxy.

The *ex officio* guardians are justices resident in the Union. If their number should fall short of that of the Elected Board of Guardians, justices non-resident in the Union but having property therein, may be added; should their number exceed it, a selection of the highest-rated justices is made; but in no case must the number of the *ex officio* exceed that of the elected guardians.

Committees, consisting in part of guardians and in part of co-optated ratepayers, may be constituted under statutory authority, and are formed from time to time to assist in discharging the different duties thrown upon the Boards of Guardians. The most important of these committees are constituted under the Medical Charities Act of 1851 (*a*) for the management of the affairs of the district dispensaries established by that Act. Similar committees are constituted under the various Sanitary Acts. Every Union has a staff of paid officers elected by the guardians, and subject to removal by the Local Government Board; and, I may here observe, as illustrating the controlling power of the central authority, that the Local Government Board may, in case of default, dismiss an Elected Board, and appoint vice or paid guardians in their place.(*b*) The Unions are also made the means of administering various important Statutes—*e.g.*, the Medical

(*a*) 10 Vict. c. 31, and 12 & 13 Vict. c. 104.

(*b*) 10 Vict. c. 31, § 18. This power was largely exercised by the Poor Law Commissioners during the famine time, affecting the case of one-fourth of the existing Boards of Guardians.

Charities Act previously alluded to, the Vagrant Act of 1857, &c.(*a*)

Sir George Nicholls estimated the annual outlay of the Unions previous to the Act of 1838 at £295,000, and in 1842 the expenditure was £281,238. The appalling distress consequent upon the famine in 1846-48, and the introduction of outdoor relief by the Act of 1847, raised the outlay in 1849 to the vast sum of £2,177,649. In 1859 it fell to £413,000, while the total expenditure for minor purposes, for the year ending September, 1886, was £1,300,597.

In conclusion, let me very briefly glance at a few other organisations which may fairly be ranged under the head of County Local Government. First of all, with reference to the care of the insane, there are twenty-two lunatic asylum districts in Ireland, each possessing an asylum. The management and control of these is intrusted to a Board of Governors, whose members are nominated directly by the Lord Lieutenant.(*b*) He also appoints the medical officers. Two Inspectors give effect to the regulations made by the Lord Lieutenant in Council, and the reception of patients is determined (as regards number and treatment) by the Lord Lieutenant himself, the Board of Governors, the inspectors, the resident medical superintendents, and the justices of the several counties comprised in the respective districts.(*c*) The expenditure is met in a dual method, by a grant from the Imperial Exchequer, and by "presentments imperative" upon the Grand Jury. Next, there are Harbour Districts in Ireland, mostly under the control of Local Boards, whose members are (with certain exceptions), elected by the inhabitants of different localities possessing the harbours. The election takes place under the enabling powers conferred upon the inhabitants by the respective Acts under which such districts are constituted. There are also Arterial Drain-

(*a*) See Bailey on "Local Government," p. 30.
(*b*) 1 & 2 Geo. IV. c. 33.
(*c*) 30 & 31 Vict. c. 113.

age and Inland Navigation Districts. The execution of the works of the former is intrusted to Local Trustees, subject to the approval of the Board of Works, which fixes the charges upon the respective districts, and makes the awards. The Board of Works recommends loans for arterial drainage and navigation purposes out of the Imperial Exchequer, while part of the cost is assessed on the counties benefited by means of obligatory presentments.

In this brief sketch I have endeavoured to set forth the salient features of Irish County Local Government as it exists. The very vague indication of the lines of future reform, which has so far been given to the public, tends to make that long-suffering body incline to wait for further confidence before seriously exercising their minds in the matter. If, however, the Local Government system in Ireland is to be assimilated to that of England and Scotland, the possible consequences in every detail should be carefully weighed. Take, for instance, the fact (an unhappy one, in my opinion), that the clergy of all denominations are eligible for election as members for the Local Boards in the sister island. Apply that principle to Ireland. Assume that the Roman Catholic clergy are allowed and avail themselves of the privilege; it will follow that throughout the greater part of Ireland the parish priest will be practically the President of the Local Board, however constituted. I do not at all discuss the question as to whether the parish priest would or would not make the best possible chairman. I merely point out, for the sake of illustration, that which every one acquainted with the social and political condition of Ireland knows, namely, that a clause enabling the clergy to sit upon Boards in Ireland would be quite a different thing, as applied to that country, from the clause now in operation in England. It is to be hoped that our legislators will bear in mind when they come to reform the Irish system, that there should be a conformity in principle and end, as well as in ink and paper.

J. T. C. Humphreys.

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Current Topics.

Société de Législation Comparée.—This powerful and energetic Society was founded in France in 1869 for the study of the laws of different countries, and the investigation of the best methods for the practical improvement of different branches of legislation. It has recently been celebrating its twentieth anniversary by a Congress and Dinner at Paris on the 30th and 31st July, 1889. The most important business was the consideration of a Report on the Functions of Second Chambers or Senates in the enactment of Financial Laws. This Report, so far as regards Great Britain, was the work of M. Georges Louis, of the French Home Office. The Society is governed by a Council, consisting of a President, elected for two years, four Vice-Presidents and sixteen members, elected for four years, a General Secretary and four subordinate Secretaries, named each year by the Council. The Council decides on the line of work of the Society and authorises its publications. There are four general meetings in the year, at which discussion takes place, but not voting. The more active members of the Society are distributed into sections, according to the different countries dealt with. These are—the section of the French language; section of the English language (including the United States, India, and the British Colonies and Possessions); section of the Northern languages; and section of the Southern and Eastern languages. There is published a valuable *Annuaire* of domestic and colonial legislation. The Society possesses an extensive political, economical, and legal library at Paris, 44 Rue de Rennes. The annual subscription is only twenty francs, or 250 francs for life membership. New members are admitted by the Council on the nomination of a member. The Society has at present more than 1200 members, including foreign correspondents. These belong to every part of the world, but only three or four to England, and only two members of the Scottish Bar. The Presidents have included such distinguished men as Laboulaye, Dufaure, Larombière, Ribot, and Barboux. It is most desirable that Scotland should be more largely represented on this Society; for there can be no doubt as to the solid advantages to be reaped from membership.

The proceedings of the Society for the present year are both interesting and important. Among the papers read and discussed at the general meet-

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ings were these:—The Origin of the Project of the New Civil Code for the German Empire; Analysis of the General Part of the same Code; General Theory of Obligations and Law of Real Property in the same Code; Penal System under the New Dutch Criminal Code; The Administrative System in Algiers; Austrian Legislation upon the Execution of Notarial Acts; The Deduction of Debts and Succession Duty under the Chief Foreign Systems of Law. It will be seen from this that French lawyers have been, *inter alia*, attentively studying the legislative reforms of their great political rival. In the sectional work, we notice that M. Guérin and M. Raffalowich jointly undertook the translation of Mr. Ritchie's Local Government Act. Notices of the new Italian Criminal Code, the recent Austrian Liquor Laws, the French Law on Destructive Insects, and many other special matters, were undertaken by other members. The plan adopted is, that at the sectional meetings books are given out to review, and the members present undertake to contribute notices of foreign legislation. The Monthly Bulletin of the Society contains the papers read and a brief report of the discussions, reviews of books, and valuable notices of legislation, and also an abstract of the proceedings of the French Legislature. The general results are contained in the *Annuaire*. It may be noticed that, in the volume for 1888, it is stated that political struggles have prevented legislation in France. The more important laws referred to in this volume are those prohibiting fishing by foreigners in the territorial waters of France; an amendment of the liability of common carriers, according to which the consignee has three days after receipt of the goods to make his claim; and an increase of the power of Prefects to deal with noxious parasites which have recently affected French agriculture. A large number of books were added during the year to the library of the Society. All this indicates sustained and systematic intellectual activity on the part of our French brethren, and it becomes us to consider whether, if we cannot go and do likewise, we should not go and help them.

W. C. S.

Courts of Criminal Review.—The agitation raised by the Maybrick Case may do good service, if it result in fixing public attention on the defects of our criminal procedure, and hastening the institution of Courts of Review in all criminal causes, such as have been long ago established in almost every foreign State professing to be civilised. Little can be said for the appeal to the clemency of the Crown, except when seeking mitigation of sentence only. It is absurd and arbitrary. To pardon a convict for the crime which he did not commit, because he did not commit it, is neither reason nor redress. A political partisan, overburdened with his proper official work, is the judge. He conducts his examination by methods exactly opposite to those regulating the normal administration of justice. No publicity, no evidence on oath, no argument, but petitions, letters, untested theories of experts, perhaps electioneer-

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ing considerations, out of which somehow emerges the haphazard decision to pardon. Yet it is some slight corrective of the anomalous and unjust finality which our law attributes to verdicts in serious criminal cases. One would suppose that the consequences of error are heavier, and the chances of error not less in criminal prosecutions than in civil suits. Nothing of the kind! Take this issue of fact—Did A forge B's signature to a £30 Bill? when the legal consequence of an affirmative is to make A liable in payment of that sum, judge and jury are fallible and reversible on law or fact, but if it be to make A suffer ten years' penal servitude, then the same judge and jury became infallible and final. Is this good sense? But in the case of trivial offences involving slight penalties, the law does provide means of ample and effective review. When A is tried by a Sheriff for dealing in lottery tickets, or selling whisky in a glass some drops too small, or obstructing a public meeting by questioning a candidate, happy is A, for on all matters of law he can appeal by case stated, or he can suspend the whole proceedings on various grounds, and the Supreme Court, if in the humour of reversal, will, by the aid of newspapers and statements at the bar, pick up sufficient information to quiz and reverse the decision complained of. Every year witnesses many sentences of inferior judges annulled on the grounds of illegality or oppression. But when the charge is serious, and the scene shifts to the Supreme Court, then our Scottish procedure may claim a bad pre-eminence even over that of England. For in England there are at least writs of error for defect of law appearing on the record, and means of having reserved questions of law decided by a Court of Appeal, and there perhaps exists a power in certain cases to grant a new trial. In Scotland a single judge of the Supreme Court, sitting with a jury, may compel trial on an indictment which charges no crime, deny the adjournment necessary to obtain witnesses, admit incompetent, exclude competent evidence, proceed in the absence of the accused or of his counsel, misdirect the jury as to the law, mislead them as to the facts, dictate the verdict, or order to be entered a verdict which the jury did not intend to give, or pass an outrageous sentence on a null verdict, or do any of the things which, when done by an inferior judge, void the whole proceedings: and you have no kind of redress or appeal. The conviction may be next day proved to have proceeded on mistaken identity or on suborned testimony: our law sees no wrong, and affords no remedy. If judicial absolutism be desirable, and if the absence of all usual securities against misdecision, arbitrariness, or any other shape of error or oppression, be conducive to justice, then our system is the bright consummate flower of legal perfection.

The remedy consists in following out the modern tendency to assimilate prosecutions to actions, in points not affecting the presence of the accused at the trial. Let the Court of Review consist of not less than five judges. Let either prosecutor or accused be entitled to appeal on relevancy and against sentences, and to apply for a new trial on any ground of justice.

Such as—(1) verdict against evidence; (2), (3) rejection of competent, admission of incompetent, material evidence; (4) surprise; (5) discovery of new evidence affecting the result, the right of the prosecutor in all cases, and of the accused, except on the last ground, being limited within a short period. Perhaps, as suggested by the Criminal Code Commission of 1878-79, the Secretary of State might also be empowered to direct a new trial on cause shown. This subject has now been ten years before Parliament, but it seems easier for that august body to work itself into an hysterical passion, threatening overthrow to the whole imperial administration, over a policeman's possible mistake as to a milliner's identity, than to devote a few hours to accomplish any solid and durable reform in criminal law.

N. J. D. K.

British Honduras. — On 1st April, 1889, the acting Chief-Justice Hoffmeister opened the sessions of the Supreme Courts for criminal business at Corozal in the Northern District. On this occasion, Attorney-General Parker (an Edinburgh law-student and the son of a well-known Edinburgh advocate) addressed to the Bench a very interesting speech on the history of the Administration of Justice in this small British colony. After a tribute to the ability of the late governor, Sir William Stevenson, and to the admirable judgments and charges of Chief-Justice Temple, Mr. Parker stated that all the Chief-Justices (of whom the last was Mr. Goodman) of British Honduras, had not contented themselves with the administration of justice, but had given their spare time "to work for the public good of the colony, its law, its courts, and its people." The old baymen and woodcutters of Honduras detested lawyers so much that, like the Spanish edicts further north, they forbade their settlement. But, when the British trade in logwood and mahogany was started by the buccaneers described by Dampier and Benbow, it gradually led to a commercial state of society which made lawyers inevitable. For long, justice was administered on the occasional visit of one of the British ships whose captain was a J.P. This condition still exists in some parts of Newfoundland. The first collection of Honduras Laws was made by Admiral Sir Wm. Burnaby, assisted by the (afterwards) famous Captain Cook. Mr. Parker referred to the vicissitudes through which the colony had come; the Godolphin Treaty of 1670; the later treaties of Paris and Versailles; and, alluding to the necessity of an Extradition Treaty with Mexico, especially for the district of Yucatan, he proudly described Honduras as "an oasis in Central America, where British law and order prevails, and will still prevail." There was a very large attendance in Court of Spanish-speaking people and foreigners enjoying British protection. At the close of an eloquent speech, Mr. Parker said that, although they had not the pomp and circumstance of Courts as they were known in Europe, yet they recognised in the

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judge, as in every judge in the Courts of the colonies and dependencies of the British Empire, the fountain of justice and the representative of its sovereign, and they heard repeated the everlasting words of the Great Charter: "To no one will we sell, to none will we deny, to no one will we delay justice and right."

The Local Government (Scotland) Act, 1889.—This Statute is an important chapter in public law. It establishes the democratic principle for the transaction of County business, and imposes on the County a new responsibility for the administration of public health. It also introduces the idea of the District, (formerly known under special Statutes), as a normal area for administration, under the superintendence of the County Council. The Statute has been much lauded as a result of Parliamentary management, and we have no desire to detract from the high credit due to the learned Lord Advocate in this connection. But it is necessary to say that, viewed as a piece of constructive legislation, there are serious defects in it. The rule in building is to begin at the foundation, and the Act should have begun by reforming parish authorities and by consolidating their various jurisdictions. Only in that way was it possible to build up a coherent and permanent system of County government. Such an Act would have been more difficult to pass, but the present Act leaves a much greater difficulty in the future. It is a pity to set new machinery in motion if you are going to alter it very soon. Then, also the Statute errs in delegating too much to the Privy Council. Up to a certain point legislation by Order in Council is very proper and convenient. But, after the discussion which the subject has received, and with the complete knowledge of the subject they possess, the Government might have introduced a little more decentralisation once for all, and not left the future so absolutely vague.

The Chair of Conveyancing in Glasgow University.—The appointment which has just been made to this Chair by the Council of the Glasgow Faculty of Procurators, is, we believe, a surprise to the public, and a disappointment to the body by whose liberality the Chair is endowed. The candidate designated as Professor Roberton's successor by the general voice of the profession, and whose election would have been honourable to the Society to which he belongs, as well as acceptable and beneficial to the University, has been rejected, and a candidate comparatively unknown elected. One would like to know the reasons which prompted the gentlemen possessed of the patronage to take this step. It has been already pointed out in this *Review* that the so-called Faculty of Law in Glasgow University, which for years has been in a state of almost hopeless decadence, is now about to undergo a dangerous rivalry from St. Mungo's

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College. It is not a good omen for it that the claims of a candidate like Dr. David Murray, possessed of academic tastes and learning, and of qualifications publicly proved, should be ignored by the patrons of the Conveyancing Chair. The recent Universities Act empower the Commissioners to transfer the private patronage of Professorships to the New University Court, and to prepare a scheme by which a detailed and reasoned report on the qualifications of candidates for chairs, may be submitted to patrons, so as to assist them in the exchange of their patronage. This is not the least important nor the least necessary of the functions of the Commission. But experience shows that it will still fail to effect what the Act intends, unless "patrons" of all kinds can be taught, that they are not truly "patrons," but "trustees." This will not be until the public begins to require them, in cases where the trust has obviously been violated, to give an account of their stewardship.

The Maybrick Case.—The recent painful Maybrick Case illustrates in one or two minor points what may without ostentation be called the superiority of Scots to English criminal procedure. Since the trial, it has been made matter of complaint that the prisoner could not obtain a copy of the indictment, as she could and indeed must under the Scots Law. It would seem that by the law of England, in cases of felony, the prisoner is not entitled to a copy of the charge or indictment against him, except for the purpose of the special defence of *autrefois acquit*, which corresponds to the Scottish "tholed an assize." It is very remarkable that the distinction between felonies and misdemeanours should be maintained in a matter of this kind, which is one of simple justice to the accused. It was proposed to put the law on a proper footing by sec. 507 of the Draft Code prepared by the Royal Commissioners in 1879, and there ought not to be any further delay in remedying the evil. There is more difficulty in comparing the two laws with respect to attempts to commit crime. Every attempt to murder is in England an offence against 24 & 25 Vict. c. 100, sec. 15. The Scots Act, 10 Geo. IV. c. 38, is confined to special modes of attempt, of which administering poison is one. But attempt to murder (otherwise than in any one of the modes mentioned in the Statute) has always been a relevant charge of common law in Scotland. In England it is by Statute enacted that the jury may convict of attempt on an indictment charging the commission of any crime (14 & 15 Vict. c. 100, sec. 9). In Scotland it would appear formerly to have been the practice to take the verdict where the jury found the accused guilty of an offence of the same kind as that charged, but of a lower degree (Hume, ii. 450-51). But, as is stated by Macdonald (2nd edition, page 5, note 6), in modern practice this is not done in any case, except that of murder, and then only a verdict of culpable homicide is taken.

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St. Mungo's College—Faculty of Law.—Glasgow has had the credit of producing the most thorough of those Academical Reformers, whose untiring efforts have resulted in the University Act of last session. Is it possible that this is because the University of Adam Smith has since his day lagged behind, and become a conspicuous example of almost all that a university should avoid? Certainly if the spectacle of a public institution of the higher education turned to the private uses of the teaching staff; if the contemplation of University Education cramped within the narrow limits of the most vulgar traditionalism, merely to secure the incomes of the compulsory chairs; if all this and much more of crying defect and abuse, can amuse the cynical or distress the serious observer, there is no place more worthy of attention than the Academy at Gilmorehill. To the existing or rather non-existing Faculty of Law in the University of Glasgow, a topic which formed the subject of some cursory remarks in the second number of this *Review* (*ante*, p. 194), it is pleasing to find that Glasgow Reformers have turned with their usual effective energy. St. Mungo's College is a corporation registered by license of the Board of Trade under the Companies Acts, and intended to rank as a College of Glasgow University. It has not yet a local habitation except as regards its Medical School, for which a home is being found by the Royal Infirmary. The names of distinguished Glasgow citizens to be found on its list of Governors are sufficient assurance that it is not as regards its material wants that any difficulty will arise. It is part of the St. Mungo's scheme that a Faculty of Law shall be established with not less than ten chairs, nay more, these chairs have all been already filled, except one; and seven professors are to begin next month. There are promptitude and largeness in this; and it will evidently not be the fault of the St. Mungo Governors if Glasgow has not a fairly equipped School of Law, which may stir up even the most modern of the Scottish Universities to healthy rivalry. The ten subjects of the St. Mungo Legal Faculty are Roman Law (Professor Douglas); Scots Civil and Criminal Law (Professor Herkless); Land Rights and Conveyancing (Professor Lindsay); General Commercial Law (Professor Brown); Banking, Sale and Shipping Law (Professor Watt); Evidence and Law Procedure (Professor Borland); Constitutional Law and History (Professor Orr); Public Law—the chair still vacant; Political Economy and Statistics (Professor Mavor); Medical Jurisprudence (Professor Glaister). The full curriculum is to last over three years, though the classes necessary to cover the work prescribed for the Law Agents' Examination may be taken in two sessions. The division of subjects may not be altogether modern or scientific, because the new college has plainly in view the established requirements of professional training, as well as those of university degrees in law, when it secures affiliation to the University of Glasgow. It would be wrong in those days of renascence to write one word of adverse criticism on this laudable attempt to fill up in the West the deficiencies of the present College of the University at Gilmorehill. A Chair of nominally Roman Law, whose professor has to

struggle with the whole law of Scotland, and a Chair called of Conveyancing, where excursions, more or less vague, are made from the forms of deeds into the Scottish system of Feus, or the law of immoveables, with a couple of unendowed and fugitive Lectureships, are all that Gilmorehill offers for the science of Jurisprudence. Like some other old institutions, it has fallen asleep among its privileges and monopolies, and this vigorous young college is needed. It is a hopeful sign that the St. Mungo scheme should be even tried, and it depends on the spirit in which the Universities Act is administered whether or not this new Faculty shall be added to the ancient University. The refusal of affiliation will place the new teachers and their possible pupils under the usual ban which guards the existing professorial monopoly. If they teach or study their best at the shrine of St. Mungo, there is for them no degree to be got in Scotland, so as to satisfy the public, and no university certificate such as may be required for some professional purposes. A venture such as this of St. Mungo is not, however, merely a question of rousing a slumbering and somewhat selfish university into healthy life and activity. There never was a time in which the careful study of law, its true nature and limitations, what it can and what it cannot do, was more necessary. The public, which has seen political power committed to new hands, is interested directly that knowledge of the law, public and private, and above all, that knowledge of how this sharp instrument may be efficiently and wisely handled in its proper sphere, should be widely spread. Moreover, as a branch of general education, the study of jurisprudence has not lost the value which our wiser forefathers assigned to it. Forgotten under the dull provincial puritanism which has sat like a nightmare on Scotland now for many a year, the intellectual training to be found in legal studies is sufficient to recommend them as part of an academic course for all educated men, and particularly for all who aim at public life, local or imperial. The intending Scottish practitioner has always been able to find extensive legal studies abroad, if the range of his native universities was too narrow; and the German, as formerly the Dutch or French universities, have, every year, contingents of Scottish students for at least the higher branch of the Scottish legal profession. It is well that an attempt should be made to supply such wants at home. It is still more important that possible Justices, Magistrates, Journalists, or Members of Parliament should have presented to them an opportunity of learning the legal point of view on its main subjects and of studying the history of law as, after all, the department of intellectual labour of which Western Europe has most reason to be proud. It can hardly be news, even to the guileless Glasgow merchants who contributed so generously to the buildings on Gilmorehill, that the college there falls far short of what a university should be. In the institution of St. Mungo's College there is evidence of a determination that the intellectual equipment of the University of Glasgow shall no longer remain unworthy of the great city of the West. The St. Mungo scheme

may be subject to modification in some directions or extension in others as experience may direct, but that it should be tried at all speaks well for the breadth of view of its promoters, and entitles them to the hearty approval of all who would fain see a revival of legal learning in Scotland.

Summary of Legislation, 1889. — Apart from the larger Statutes affecting Scotland which have been separately noticed, there has been during the session 1889 what, looking to the standard of recent years, may be described as an unusual amount of legislation, mainly beneficial. We omit all reference to the measures for the strengthening of the Naval Defences, and for the completion of Mr. Goschen's policy of redemption of the National Debt, and also to mere incidental enlargements or corrections of previous Statutes. What remains is taken in chronological order. 1. The jurisdiction of the English County Council under the Adulteration Acts has been extended to the sale of horseflesh; and it is now a statutory offence to sell horseflesh except in a place publicly described to be so used. 2. In England, the justices, who commit, or admit to bail, for an offence triable at Quarter Sessions, are directed in the general case to direct the trial to proceed at the next practicable Court of Quarter Sessions, unless the High Court direct the case to be tried at Assizes. This is another step in the decentralisation of justice. 3. The Irish Land Acts are again liberally extended, to the effect of authorising the advance of public money for the purchase by a tenant (who is already purchasing under the Ashbourne Acts) of such additional land (not exceeding ten acres) as the Commissioners think is reasonably required for the convenient use of the holding. There is no compulsory power here, but the provision resembles (in its purpose, at least) that for the extension of crofts in the Scottish Act of 1886. 4. The powers of Town Police Commissioners in England for the regulation of traffic are definitely extended to omnibuses. 5. The Secretary of Scotland is declared to have no authority with reference to the business of the War Department. This was necessary from the very general words used in the Secretary for Scotland Act, 1887. 6. A stringent Act has been passed against indecent advertising, which is to be punishable by a fine of £2, or one month's imprisonment. The Act applies to the affixing, inscription, delivery, or exhibition of any picture or printed or written matter of an indecent or obscene nature. This ought to lead to a cleansing of common stairs. Special reference is made to advertisements relating to syphilis, gonorrhœa, and nervous debility; a well-known and lucrative class of advertisements. The odd thing is, that the Act is not so framed as to interfere with such advertisements in newspapers, which the existing law has certainly not been strong enough to restrain. 7. Some amendments have been made on the somewhat expensive procedure under the Agricultural Holdings (Scotland) Act, 1883. 8. There is to be a rigid verification of weighing instruments

used in trade, and new denominations of standards for the measurement of electricity, temperature, pressure, and gravities required in trade are to be made, and the Board of Trade takes power to inquire into the local administration of the Weights and Measures Act by the County Councils. The same Act absolutely prohibits the sale of coal, except by weight, unless where, with the written consent of the purchaser, it is sold by boat load or by waggons or tubs delivered from the colliery into the purchaser's works. 9. The Herring Fishery (Scotland) Act introduces some quite new and sweeping prohibitions. Daylight fishing and Sunday fishing (*i.e.*, the setting or shooting of herring nets) is prohibited between 1st June and 1st October between Ardnamurchan and the Mull of Galloway. Beam and other trawling is prohibited within three miles of low-water mark all round the coast and in certain scheduled waters, except in the Solway and Pentland Firth, and except in cases permitted by the bye-laws of the Fishery Board. The whole and quarter cran, in branded boxes or baskets, are made the only legal measure for the sale of herring. 10. The Small-Debt Amendment Act for Scotland introduces some wholesome reforms into the procedure of the Small-Debt Courts. 11. The Ontario Boundary Act is an interesting illustration of the golden link which binds our colonies to us. It recites the fact that the Senate and Commons of Canada have presented an address to the Queen, and that the Government of the Province of Ontario have assented to this address, that the boundaries of Quebec were declared by proclamation of the Governor-General in 1791, and those with Manitoba were reported to be correct by the Judicial Committee, and this report was ordered by the Queen, in 1884, to be carried into execution. It further states that it is expedient (but apparently not necessary) that the boundaries should be declared by the Imperial Parliament. 12. The new Board of Agriculture takes over the duties of the Privy Council under the Destructive Insects Acts and the Cattle Plague Acts, and also the duties of the Land Commissioners under the Tithe Rent Charge Acts, the Copyhold Acts, and the Inclosure of Commons and Allotment Acts, and also the duties of the Board of Works under the Survey Act, 1870. It also undertakes the preparation of statistics relating to agriculture and forestry, and the inspection and aid of schools (not public elementary schools) where instruction in such subjects is given. It may also direct experiments and researches to be made. Power is taken to transfer, by order in Council, to the Board the administrative duties of other departments which relate to agriculture and forestry. 13. The important Trust Investment Act (which does not extend to Scotland) gives increased powers of investment to trustees. This is substantially the portion of the proposed legislation of 1888 which was dropped. (See *Juridical Review*, i. p. 85.) 14. The unique individuality of the Isle of Man has rendered necessary a troublesome Statute applying the Telegraph and Post Office Acts to that island. 15. A new Court of Appeal is to be established for the Windward Islands, but the details are left to the Legislatures of Barbadoes, Grenada, St. Vincent, and St. Lucia. 16. The Judi-

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cial Factors (Scotland) Act puts on a business footing the official supervision of estates under judicial management, and enables testamentary trustees to institute what seems very like an administration suit in Chancery. It also abolishes the office of the Accountant in Bankruptcy as a separate department. 17. The Welsh Intermediate Education Act is one of the most admirable and promising pieces of constructive legislation that has been seen for a long time. It creates a joint Education Committee for each county in Wales, consisting of three members of the County Council, and two persons appointed by the Privy Council, who must be well acquainted with the wants of the Welsh people. This Committee is to arrange for the application of Welsh endowments to intermediate and technical education, subject to the approval of the Charity Commissioners. The County Council may also agree to assess for these purposes; and the Treasury will contribute to the new schools so long as these are efficiently conducted. 18. The Prevention of Cruelty to, and Protection of, Children Act has already been commented on in its first stage. (See *Juridical Review*, p. 200.) The maximum fine of £25 in cases of neglect and ill-treatment is increased to £200, where the offender has an interest in the death of the child. This seems to trench on a very different department of crime. The Local Authority (*i.e.*, Town and County Councils) is to have a discretionary power over certain of the restrictions on child labour. The Parochial Board may pay the expenses of any prosecution. The accused persons are competent but not compellable witnesses. Children of tender years allowed to depone (without either swearing or affirming) may, if they give false evidence, be punished under the Summary Jurisdiction Act, 1879. 19. The Factors Act gives a neat and clear summary of the law relating to dispositions of goods by mercantile agents, and by sellers and buyers respectively, in the frequently occurring circumstances mentioned in the Act. 20. A useful reform in procedure has been effected by the County Court Appeals (Ireland) Act. 21. The Arbitration Act (confined to England) is designed to improve, simplify, and render more efficient both references by consent out of Court and references under order of Court. One interesting feature of this Act is that it applies to arbitrations the "implied clause" principle, which has so much shortened conveyances. The provisions to be implied in a submission occupy a considerable schedule to the Act. 22. The Official Secrets Act was passed to prevent the disclosure of official documents and information. It is an illustration of laws passed by the British Parliament directly applicable to the whole of the British Possessions. Where, however, a local Legislature makes a similar law, the Queen may, by order in Council, suspend the operation of this Act in that particular Possession. 23. The Clerks of Session (Scotland) Regulation Act is a long-waited-for measure of economy. We have no Sir Walter Scotts now to provide for! 24. The Regulation of Railways Act, at last, gives the Board of Trade absolute power to require the block system, the interlocking of points and signals, and continuous brakes. 25. The Coinage Act will withdraw from circulation light pre-Victorian gold

coins, where the lightness is due to tear and wear, and not to illegal dealing. 26. The London Council (Money) Act is as good a practical proof as can be given of the far-reaching character of the reforms inaugurated by the Local Government Acts of the last two sessions. 27. It has been found necessary in the Cotton Cloth Factories Act to add to factory legislation a new code of rules as to the temperature and humidity of the atmosphere in places used for weaving cotton cloth. 28. Another instance of wise economy is the Act authorising the Indian Secretary to abstain from filling vacancies in the Indian Legislative Council, provided the number does not fall below ten. 29. The Light Railways (Ireland) Act authorises large expenditure by the Treasury for the purpose of assisting the local promoters in the construction of light railways in Ireland. The Act is put in motion by an order of the Lord Lieutenant declaring that such a light railway is desirable for the development of fisheries or other industries, and that, in the special circumstances of the district, State aid is required. It is expected that the Railway Companies will promote these schemes, and the Barony may guarantee dividends. 30. The Salford and other municipal scandals have resulted in the Public Bodies Corrupt Practices Act. 31. It is to be hoped that the District Committees under the new Local Government Act in Scotland will adopt the provisions of the Infectious Disease (Notification) Act, which are, unfortunately, permissive. The obligation to notify is laid on the head of the family, the near relatives, the attendant, the occupier of the house, and the medical practitioner. The Local Authority has the remarkable power of extending the definition (already liberal enough) of "infectious disease" given in the Act. 32. Among the numerous Acts passed this session on the affairs of the Mercantile Marine, one of them (chapter 73) deals with the use of flags, and makes the interesting statement of law that the red ensign usually worn by merchant-ships, without any defacement or modification, is the proper national colours for all ships and boats belonging to a subject of the Queen, though not in the case of Her Majesty's ships and boats. 33. Further power is given to the Inspectors of Irish Fisheries to protect these industries by the prohibition of steam trawling within the three-miles limit. 34. The Technical Instruction Act, which applies to England and Ireland, but not to Scotland, enables Town and County Councils to apply rates for the purpose of assisting instruction in the principles of science and art applicable to industries, and in the application of special branches of science and art to specific branches of industry, and also in manual instruction in the use of tools, processes of agriculture, and modelling in clay, wood, or other material. This does not include the teaching of the practice of any trade or industry, nor is the instruction to be given to elementary scholars. 35. The Lunacy Acts Amendment Act, which is confined to England, is an elaborate and important Statute. It proceeds on the recommendations of the Select Committee of 1878, and is in substance the same as the earlier Bills promoted by Lord Selborne and Lord Herschell. The general objects in view were—(1) to furnish safe-

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guards against the improper confinement of persons as lunatics, very much on the lines of Scottish procedure; (2) to amend the law as to single patients; (3) to give more power of administering the property of lunatics; (4) to check the licensing of new houses; (5) to enable the public asylums to receive private patients on terms agreed upon. 36. The Interpretation Act consolidates the Statutes relating to the construction of Acts of Parliament, and further shortens the language used in these Acts. A great number of official and judicial names are shortened, and new general rules are laid down. Thus, in every future Act, unless the contrary appears, the expression "person" shall include any body of persons corporate or unincorporate. Such useful practical matters as the measuring of distances and the citation of Acts are dealt with. Altogether, Parliament, though working under difficulties, makes progress in the right direction.

The Universities Act, 1889.—We refer to the article by Professor Kirkpatrick in the present Number of the *Review* as giving a clear statement of the aim and provisions of this Statute. It must, however, be added that the value of the Act depends almost wholly upon the Executive Commission, and that the constitution of that Commission has not been such as to inspire complete public confidence. It does not contain names which it should have included, and does contain names which will be more ornamental than useful. But, although the prospect is not altogether reassuring, let us hope that the influence of public opinion may be sufficient to animate the Commission with the true spirit of reform, and that our Universities may at length be brought into harmony with the requirements of the time.

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Reviews of Books.

Lectures Delivered on Various Occasions by Adam Gifford, one of the Senators of the College of Justice, Scotland. Privately Printed, 1889.

THE name of Adam Gifford is not likely to sink into oblivion for a century or two. It will probably survive a few reformations or at least revolutions in religion—it will certainly survive the extinction of a few bundles of incoherent unmeasured dogmas ostensibly held by knots of bigots and pretenders, who appropriate to themselves the name of Churches and of Kirks. Eighty thousand pounds devoted by him to the exposition and the dissemination of the science of Theism will be for him the "foundation of a monument more perennial than brass"—a monument sure to excite the interested curiosity of the vast hordes of the worshippers of Mammon, who, if somewhat sordid in their devotions, are never hypocrites or despisers of any sacrifices that can be measured in pounds sterling or almighty dollars; a monument stirring the sceptic to ask whether at the end of eighteen Christian centuries there has been any final answer to Pilate's question, What is Truth? a monument rising as a pillar of gold and of hope to the pious soul unwilling to abandon its birthright as a child of the Supreme Parent of all, but struggling as if about to drown in gulfs of despair, amid epicurean treacle, surging materialism, and ancient pieties expiring and falling down into putrid cant. Great is faith in all the ages of the past; nothing valuable and persistent was ever done without it. Great is faith even in this age of materialism and mammon, especially when it can be measured by tens of thousands of pounds sterling. So Adam Gifford manifestly thought while as manifestly realising the want of it among the shadows that passed before him in his way through the world. He knew the value of money. He knew how to make it. His £80,000 devoted by him to the advancement of the highest of all thought and learning, was earned by him, not in the big lotteries of commerce, but in the exercise of the most laborious profession of the law, in which the famous and successful practitioner often pockets more than he truly works for, but in which no practitioner can ever be successful without a great deal of enormously hard work. Did this most industrious and successful advocate,

this eminent judge of the Supreme Court of Scotland, understand how he acquired his multitudinous fees, and the use to which he was to destine them? He was not a terror-stricken child of superstition, afraid of tedious purification by the fires of purgatory or of the "other place." That this generation has been duly grateful for his munificence is not yet apparent. Have not the talking and scribbling weaklings of it been anointing him after their fashion with such epithets as vanity, heresy, atheism, pantheism? And have not the babes and sucklings of Darwin and other dry materialistic nurses settled with themselves that this Gifford Bequest for the study of theological science can never be of any use? Are they not already proposing that there should be a Royal Commission to subvert the will of the lawyer and judge, and apply his money to illuminate the evolution of mammoths, monkeys, and midges, contrary to public good faith and common honesty, however generated or evolved? Perhaps the Gifford Bequest may save some men of intellect from the fate which Swift predicted for himself, under the emblematic blasted tree,—the fate of withering at the top,—which fate certainly befell Darwin, and is bound to befall every one who can make a creed of his crawling doctrines. But whatever the possible results in the future may be, an actual result in the present is a good deal of not unnatural curiosity regarding the author of this munificent, unselfish bequest. To gratify this curiosity there are, in Edinburgh, the scene of his birth and life, many floating traditions and living memories, which show what manner of man he was, there are his printed opinions as a judge, forming an important contribution to the literary jurisprudence of his country, and there has been recently edited and printed by his niece and son a volume of lectures, or notes for lectures, which, though not prepared or finished for publication, give an insight into his place and capacity as a thinker not otherwise attainable, and not likely to be credible or even intelligible to many of the shrewd, non-speculative, or anti-speculative lawyers who sent him fees, and among whom he moved and spent the most bustling, if not busy, hours of his life.

The story of Adam Gifford's life is not long to tell. It was a life of labour, and not of incident or adventure. The open and public, but ephemeral, side of it was that of a son of no aristocratic or influential class performing the feat—a feat impossible in non-democratic days—of climbing to the proud position of being a judge of the Supreme Court of Scotland. The hidden or private side of it, the most interesting side whenever it can be revealed, was that of a lover of truth for its own sake, a daring speculator and perhaps half-conscious heretic under the ecclesiastical garments and phylacteries with which local fashions had adorned him. Outwardly, he was a slave to his profession, to ambition, to money-making; inwardly, he was one of the freest of the free, caring much less for money than he did for the spiritual emancipation of man from all material fetters and bonds. Born in Edinburgh in the year 1820, the son of a merchant, who was able to educate him well but not expensively, he died at Granton House (once, and for

long, the residence of Lord President Hope), on 20th January, 1887, after six years' bodily prostration from paralysis. His temperament as a boy must have been more than sufficiently mercurial, but of his boyish pastimes and passions the one result that kept its place in manhood and after he had reached the bench was his fondness for and skill in skating, in which his movements were marked by that graceful but impatient velocity which he exhibited on higher planes and more slippery surfaces than ice. School boy, he was at the High School, more bright and diligent than most. Next, clerk in office of a relative, mounted on a three-legged stool, copying papers, writing neatly, and with uncommon rapidity, 'comparing' documents to test accuracy, and, it may be, practising the swift humdrum recitation of the office, carrying processes with letters of instructions more or less empty, attending consultations, and all the other routine of that monotonous kind of intellectual tread-mill, a busy lawyer's office. By-and-by the profession of advocate begins to seem to him to become not beyond the reach of his ambition, for has he not had occasion to observe what lazy, ignorant, perfunctory gentlemen many advocates are? He knows for a certainty that he never could be either indolent or perfunctory, and that he has friends of the order of the three-legged stool upon whom he can rely for support, so in due time he attends the law classes, passes his formal examinations (formal enough in his day!), makes payment of his entrance fees (by no means a mere form!), and, in 1849, puts on an advocate's wig and gown. He did not need to wait long for success. And certainly he never ate the bread of idleness, or sucked the cloying sweets of corrupt patronage. His early friends were narrow enough in their notions, but not dishonest. Their religion was not a cloak or a sham. Whatever some of their views concerning faith might be, they knew that in matters of legal practice "faith without works is dead." Their experience of Gifford was that he was a man of untiring workfulness, and of no more faith professionally than was required to make him reasonably zealous in his work. Plenty of work he now found, and he did it as well as any intelligent, honest worker could do. He had every faculty essential to a great lawyer, except, perhaps, patience. He had a quick apprehension, strong ready memory, broad wary common sense, a natural inclination to look fairly at both sides of a question, and to make the most of his own without perversion of the other side, swift skill in setting forth a plausible argument, and in skating over thin ice round awkward corners and deep, dangerous holes. Even the natural impatience and intuitive quickness of his mind, which savoured of the feminine rather than the masculine in its quality, was of great value, especially money value, to him as a pleader. It saved time for himself and others, for he knew at an instinctive glance what he could plead, and often, too, whether he was likely to convince the torpid or the vigilant tribunal that might require to understand or misunderstand him. His career at the Bar was one long career of success. With unexampled rapidity for a son of the people, he leaped into a practice large and lucrative.

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After about twelve years of it, the dispensers of public patronage, always cautious when the claims of a son of the people fall to be considered, came to think that he might be trusted with the appointment of Advocate-Depute, and that appointment he obtained in 1861. Next year, at Glasgow Autumn Circuit, he acted as prosecutor in the trial of Jessie Maclachlan for murder, and, with the help of Lord Deas, he procured a verdict of guilty, followed by sentence of death, against which the public opinion of the country revolted, with the result of bringing about a commutation of the sentence. That was Gifford's most celebrated criminal cause. Except him, hardly any one connected with it escaped a great deal of public opprobrium. He acted his part quite fairly, and it was no fault of his if Glasgow juries are capable of being encouraged to convict wherever there are reasonable doubts of innocence. Four years' experience of the duties of a prosecutor, in supplement to as large a practice as any at the Bar, was supposed to qualify Gifford for the office of Sheriff of Orkney and Shetland, an office which, apart from sea-sickness, involves the easiest of duties. His immediate predecessor was the distinguished Professor Aytoun, a successor of another son of sarcasm and song, who had become Lord Neaves; and no doubt Gifford's not unknown devotion to literature would be an effective cause for his appointment to the far North, so that the children of twilight there might come to understand how much they were obliged to literary Edinburgh and the *aurora borealis*. Another five years brought him to 1870 and the Bench of the Court of Session, just as considerations of health had been prompting him to a retirement from the Bar, either permanent or temporary. Such a post of leisure and of honour could hardly be rejected because of a doubt as to the sorely tried health of an overworked man. He assumed the judicial *toga*, and wore it for eleven years, till he was stricken in it at his post. Looked at from the point of conscience, he was the true ideal of a Judge, somewhat too partial to "first" impressions, because of an incapacity to surrender an idea of which his mind had once clearly approved as conformable to right, but superior to all partiality, conscious and unconscious, devoted to truth and right, and to those alone, and fearing no power save the One Power in the universe, through Whom kings rule and judges decree either justice or their own just condemnation.

In the competition at the Bar the race is not always to the swift and the battle to the strong. Adam Gifford was both swift and strong, fleet as a greyhound, and more than sufficiently strong for the duties of a lawyer and of a judge, which are rather in their nature the arriving at an eclectic, common-sense estimate of the suffrages of the many (most of whom are weak), than the discovery and promulgation of ideals in the fields of understanding and pure reason. Whether from pure love of work, or incapacity to be at rest (most valuable but eventually deadly incapacity!), or a sense of duty, Gifford did not flinch from exploring details, though he did it at greyhound speed, generally with his game in full sight. His velocity was tremendous, his accuracy very great, indeed surprising, considering the big

tasks that he accomplished. His success was never grudged him, except by the envious and the base. He duly worked for it. He did the climbing of ambition openly, in the eye of day, never creeping or begging, or lying or tuft-hunting, or forgetting what a true man of heaven-born intellect and insight into the highest truths owes to himself and the God that made him.

His distinguishing speciality among able, learned, experienced lawyers and skilful pleaders, which made him be run after for celebrated Church causes and jury trials, was his rare power of eloquence. Most of the arguments that are delivered in the Parliament-House are delivered and received like shot fired into a Serbonian bog. But whatever Gifford had to say was said as if he believed it and was almost ready to lay violent hands upon whomsoever ventured to doubt it. His fluency was great, his style generally correct, and always effective (at least with juries), and his gesticulations, which suggested Paris rather than Edinburgh in their variety and vehemence, were such as may have sometimes illustrated the oratory of the conventicle, but never within human memory in Scotland were permitted to disturb the icy serenity of forensic oratory. Juries and the members of Church courts admired it. The wags of the Parliament House laughed at it, according to their merry, wicked way, and characterised these out-bursts of eloquence as "Gifford letting down his back hair," the joke deriving an extra point from his abnormal superabundance of long, streaming, dark-brown locks. They laughed not without cause, for his animation over an annuity tax deforcer of sheriff-officers or the like could hardly fail to appear excessive to those sober or cynical persons who think that every citizen is bound to obey the law, so long as it is law. But the jury did not laugh, nor the judge, except in indignant derision when he heard the verdict. Some of his eloquent speeches were justifiable and admirable, others were such that a man with a keen sense of humour could not have made them. But the secret of their delivery with gravity and success was that by fixing his attention only on the strong points of his cause he convinced himself, and so, contagiously, affected the conviction of others. Whatever they were, they were certainly not the work of a mere play-actor, laughing in his sleeve at his audience.

The volume now before us, which has been printed privately, "only for his friends," might have been published, and indeed we think ought to have been published, to all the world, for it is impossible to conjecture where the "friend" and appreciative admirer of a man like Adam Gifford may not be found; we feel sure he or she will be found wherever there is sufficient intellectual and moral altitude, and cannot possibly be found where ignorance and pure selfishness prevail. The subjects of these seven printed lectures, according to the table of contents, are—(1) Ralph Waldo Emerson; (2) Attention as an Instrument of Self-Culture; (3) Saint Bernard of Clairvaux; (4) Substance, a Metaphysical Thought; (5) Law a Schoolmaster: or the Educational Function of Jurisprudence; (6) The Ten Avatars of Vishnu; and (7) The Two

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Fountains of Jurisprudence. They are all interfused with a metaphysical tincture, which gives a colour to the law, the biography, the learning, the philosophy, the religion, which are more or less didactically and dogmatically unfolded in them. They are all thoroughly good, not negligently and hastily got up for some popular occasion, but manifestly the result of long, reiterated meditation and sincere conviction, thought out with cool, leisurely deliberation, but written as fast as pen and ink would go, without intentional finish or ornamentation of style, without intent of any kind except to make clear the outcome of long, brooding, and busy thought; convictions that had been attained by a true seeker after truth, and were fit to be written in his heart's blood. Tastes may differ as to which is best. We think the best is that entitled "Substance," which is a clear, terse, logical, and yet fiery piece of demonstration of the existence of the unseen essence upon which the whole visible universe depends; of that totality of force, wisdom, and power, out of which all things proceed, to which all things return; which cannot be dead, unintelligent matter; which must be the living, working cause of all causes, the fountain of all life, the source of all thought, the eternal, immortal, invisible, incomprehensible, named of old and in many languages, but named inadequately, not to be compassed by the finite, but denied in the heart and soul (if he have a soul) only of the fool. The man who wrote that lecture did not require to bequeath £80,000 to attest the strength and vehement sincerity of his conviction; but he was a friend of free discussion, a believer in the ultimate principle of truth, and he had no fear of the effects of collecting, collating, and annotating the opinions of fools and the lisping aspirations of savages and children; he knew that the chief adversary of the belief in the Divine was not lively, unhappy, critical scepticism, but comfortable brutal indifference. The next best lecture, in our opinion, is that on Emerson. There is really more in it of variety, though less of force, than in the demonstration of Substance being identical with God and embracing all possible and thinkable existence; and it reveals an appreciation and knowledge of poetry, of ideal philosophy, not common among busy lawyers, or even among men of letters. Indeed, it is a discourse full of beauty, of suggestiveness, of keen, fond glimpses into transcendental regions, manifestly inspired in great part by Emerson, and, though not so void of logic, is nearly as void of method as if Emerson had been its author. Plainly the two great effective teachers of the author of these lectures were Emerson and Spinoza, and it is curious to trace how his speculations and utterances have been affected by the iron inornate arguments of the one, and the flashing zigzag intuitions of the other.

As the speculative philosophy taught by the author is transcendental, so also is the morality. In his pages there is the clearest evidences that he believed in the actual distinction between right and wrong, not as a matter of convenience or of corrupt favouritism, but as a matter of absolute and irreconcilable contrast. In his Parliament-house days and years he must

have heard hundreds of sneers at "eternal justice," but he believed in it nevertheless. The sincere believer in an Eternal God in all and over all could not well do otherwise, whatever the small practical atheist may do. The atheist, unspeculative and unconscious, but not impossible or unknown among empirical lawyers and other empirics, may think that justice is a fantastic nullity apart from positive law, and that law is too often a mere irregular uncertain product of tact, confident polite talk and ingenious clap-trap operating upon judicial ignorance, indolence, and unprincipled aversion to apply intellect and conscience to the solution of new problems on their own merits, instead of ranking them under obsolete or inapplicable categories. Manifestly in his soul and conscience, Adam Gifford never agreed with the atheistic legal quack or with any other atheistic quack. His writings teem with protests against unreason and disregard of conscience and its lights from heaven, in all their numberless manifestations. There is also, however, it must be admitted, a suspicious tendency to toleration disclosed here and there for those frail empirics who postpone in matters of law conscience to convenience. These lectures, however, it is not to be lost sight of, are not a philosophical treatise. They are mere fragments of philosophy torn apart from system and swiftly prepared for the instruction of a mixed audience for an idle hour. Any reader who knows how difficult it is to teach profound thought in a popular lecture, will not soon cease to wonder at the amount of genuine, subtle, deep thinking, clothed in fit language, lighted up with sparing but appropriate illustrations, that is to be found in these lectures, and set forth with an energy of rhetoric and of style that we believe did not fail to arrest the attention of every audience that was fortunate enough to hear them. They are not so carefully and elegantly written as some of his judicial opinions—admirable expositions of law, that are buried in that great mummy pit of precise logic and dignified stately literature over which Shaw, Dunlop, M'Pherson, and Rettie have presided as sextons and embalmers. But it is doubtful if any labour of the file, any elaboration of ornament, any "purple patches" could have improved them. One of their chief merits is that by sheer force of earnestness, and cogent connected reasoning, they have been able to dispense with all arts of ornamentation, and to fascinate and electrify readers without them.

When there is so much to praise in compositions never prepared or revised for print and permanence, it would be unfair and ungenerous to deal in fault-finding. But we cannot refrain from saying that, in our opinion, the most faulty of these lectures are the two that were delivered to audiences of lawyers. On these two occasions Lord Gifford must have felt constrained to stoop to the non-transcendental level and infirmities of his hearers. He certainly does not hesitate to tell them—and he must have astonished some of them by the information if they quite comprehended it—"that law must teach nothing that is not eternally true," and that "it shall conform, down to its minutest jot and tittle, to the law that is written in heaven." But he also tells them that there are two sources of jurisprudence—*Morality* and

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Policy. In this, we think, he is inconsistent with himself, erroneous in logic, and at variance with every principle that can wear the semblance of soundness. What does "policy" know about the law that is written in heaven—or propositions that are eternally true? No doubt, in one sense, the highest policy and justice are eventually one, but in that aspect the sources of jurisprudence are not diverse and dual, but one and the same. Lord Gifford expounds the two as contrasted, and in contrast with justice. Policy is not justice at all, but an obstacle to justice. Broadly and briefly, policy or convenience is no more a *source* of justice, or of its theory, than is the rock that obstructs a stream or the artificial bank of a canal, one of the sources of the water. Gifford, of course, knew that well enough, but he, taught by long experience, thought it expedient or courteous to descend to the level and the prejudices of his audience. When he is guided by the spirit of Emerson or Spinoza, he keeps to regions more secure from criticism and less fertile in vulgar error. Easy enough it would be to multiply criticisms of this kind. But we doubt if they would edify any reader. We recommend all, who have a chance, to read the book for enjoyment and instruction, in the first instance. They may, when they have a great deal of leisure, dissect it critically. We believe that whoever finds in it much to condemn had better begin to examine and distrust himself.

It is greatly to Lord Gifford's credit and honour, as a man of mind and of conscience, that he emancipated himself from the swaddling-bands trammels and disturbing influences, both of his early ecclesiastical and of all stages of his legal education, from the three-legged stool onwards to the judicial chair. Without much help, often with more hindrance than help, from countless sermons both in Gospel and in law, he required to find out the right and true for himself, as real men require to do everywhere, more especially in the midst of a selfish, self-conceited, and infidel environment. That the teaching of clergymen and lawyers had no bad effect upon Adam Gifford, we will not undertake to assert. We incline to think that they—both classes of them—infected his mind with a tendency to compromise, to accept of principles provisionally and not to follow them fearlessly to the end, to falter in his logic or to accept of bad logic as sufficient for some purposes and for the hour or the day, to be too charitable and tolerant, to have been sometimes more disposed to appropriate and utilise the plausible than to unmask and condemn the untrue. No doubt, as a lawyer he felt bound to recognise dogma sufficiently set up by authority, even though it could not bear the tests of logic or of reason. No doubt, he let the irrational nonsense of bigots pass without contradiction, because he had come to be satisfied of their sincerity and moral goodness, as also that the book of pure reason was a sealed book to them. But, though he let alone the convictions of others, real or pretended, he held fast by, and eventually acted on, his own. Let those artists who pursue law as a trade find out, if they can, how much they and the like of them managed to teach him in the region of fixed conviction. Let those other artists, who deal in

cant, hypocrisy, slander, and persecution, find out if they have taught him anything at all; if they have not failed to awaken in him even disgust and hatred. What an amount of no-popery howling and cursing of the scarlet woman's petticoat, he must have listened to, and perhaps in his infant years believed in. But notwithstanding, he does justice to the Roman Catholic Church as "all through the Dark Ages, the home of learning and the guardian of letters," . . . the "last landmark of humanity;" and hints a doubt if some other Churches have seen as faithfully to the fulfilment of their duties. Not much imagination, and reading between the lines is required in what he says to see that if a contemporary of St. Bernard of Clairvaux, he could have been a follower, perhaps a rival, in taking captive the minds of men, and still more of women, and as great a preacher as his multitudinous admirers in the General Assembly of the Church of Scotland—that most capable and catholic tribunal for hearing and appreciating oratory — thought he had been equipped by nature to be. How often in his juvenile orthodox and unemancipated days had he heard pulpit asseveration of the sentence of damnation pronounced upon the heathen from before the beginning of time! And yet he manages to rise above the brimstone smoke, into the clear cold region of comparative religion, to recognise adumbrations of the Divine in the avatars of Vishnu, to find reason to believe that the Maker of man never, and nowhere leaves Himself without a witness in souls which however purblind and imperfect, must emanate from Him. Did he ever hear the name of Spinoza uttered in a pulpit? If so, it would likely be by some one who never read a line of his speculations, but who nevertheless could venture to declare with the unfaltering ferocity of ignorance that he confounded substance with God, and was therefore an atheist whose erroneous strivings after the light was fore-ordained darkness and despair for himself for ever and ever. But notwithstanding the perdition-dispensing raving of dogmatists in pulpits and in print, he came in due time to the conclusion that few of the sons of man have sought for truth with a more earnest single eye, and a more pure, unselfish heart than this poor spectacle-grinder of Amsterdam, who sought for no endowment but the labour of his hands—hands guided by unsurpassed skill in his art as well as strict conscience in the practice of it—and that still fewer of the apostles and prophets of the race have come so near as he did, not to vision, but to demonstration of the Eternal, the Invisible, the Divine. And so he magnanimously devoted a great part of his fortune to the cause of the highest, broadest, deepest Truth—that truth which is disclosed or foreshadowed in the pages of the much-enduring, much-reviled Spinoza, an immortal citizen of the world of pure reason, an unknown citizen of the world of human fashion, who would have been scorned from his birth till now by the proud hollow gentility of Edinburgh, and burned at the stake, if they had the power, by every succeeding generation of its clamorous fanatics and profound hypocrites. Happy is Adam Gifford to have gone

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beyond the reach of all bitter censure and insincere praise! His story will always be an encouragement to the industrious, the faithful, the honest, and the brave; and one of its morals will point to the provinciality, the futility, the perishable nature of narrow and intolerant dogma, as contrasted with the patient immortality of truth.

J. Campbell Smith.

A Treatise on the Law of Companies considered as a Branch of the Law of Partnership (5th Edit.), by Rt. Hon. Sir Nathaniel Lindley, Kt., LL.D. (Edin.). London: Sweet & Maxwell, 1889.

The profession and the public are under renewed obligations to Lord Justice Lindley for his treatise on the Law of Public Companies. Though Company Law is a branch of the Law of Partnership, and as such was incorporated with it in the four previous editions of his work, it assumes, in the volume before us, a separate form; the material with which he explained and illustrated the principles of partnership applied to such companies being now brought together and woven into a separate treatise. This will tend to clearness in the study of both branches, though of course it must always be kept in view that the principles of the common law of partnership underlie the Company Acts and the decisions thereon, and are properly invoked where statutory provisions are silent or obscure. The present work is not a series of annotations on the Companies Acts. It will not trench upon the field so well occupied by Mr. Buckley. It is a systematic treatise, for practical purposes appropriately enough divided into four books—(1) the formation of companies and the allotment of shares; (2) the rights and obligations of companies towards non-members; (3) the rights and obligations of members *inter se;* and (4) the winding-up of companies.

In the first book we encounter the subject which brings companies so unpleasantly in contact with the public, and taxes the resources of the profession to free the unwary from their perilous baits. The alternative remedy to the defrauded of—(1) rescission and restitution against the company, and (2) damages against the individuals defrauding, are expounded; and it is pointed out that *both* remedies may in some cases be obtained. The author also expresses the opinion (pp. 74 and 217) that the current of authority and sound principle are in favour of an action of damages based on fraud against a company, provided it be not in liquidation, in which case the winding-up provisions of the Companies Acts exclude that remedy, as in *Houldsworth's* case (City of Glasgow Bank Liquidation); and he observes that the liability of the bank, but for the winding-up, was not denied by the House of Lords in that case. He also observes that claims for frauds, on other persons than defrauded members, are not affected by *Houldsworth's* decision. The latest case of a claim for damages against Directors, *Peek v.*

Derry (commented on by us in the present number of the *Review*), is referred to as the one "which goes furthest in imposing liability for misrepresentations." Probably his Lordship's mind is now relieved by the reversal which this case has since suffered in the House of Lords.

The second book deals with the relations of companies to non-members, and the application thereto of the law of agency, with the necessary limitation of the doctrine of *ultra vires*, bringing out the distinction between *ultra vires* of the company which cannot, and *ultra vires* of the directors which may be afterwards ratified. If there be any outcome from Lord Herschell's Select Committee on the alteration of Memoranda of Association, this subject will undergo important change; and *Riche* v. *Ashbury Co.* will cease to be a legal land-mark. The third book concerns the multifarious relations arising among directors, promoters, and shareholders, including, under the last head, much of the internal arrangements of the company as regards capital, preference or ordinary—its creation, increase, or reduction; also as to calls, dividends, accounts, and transfers and sales of shares, including the subject, ever increasing in importance, of sales on the Stock Exchange. One of the most recent decisions on this last head is that if a buyer pays the price of shares to the seller or his broker, on receipt of a proper transfer, and the company declines to accept the buyer, the latter cannot recover from the seller the amount paid for the shares. The buyer wished to buy shares, but only succeeded in buying the chance of being accepted as a shareholder. The seller is still shareholder, with all accompanying liabilities, but, we presume, with right of indemnity against the buyer. Some solution must surely be sought for this anomalous position. It is in this book, too, that we meet with the question of companies buying their own shares, and the kindred one of issuing shares at a discount, which have recently occupied the attention of the Courts, both in England and Scotland. In this connection we may observe that it is a pity that the author does not, on this and many other subjects in his treatise, draw illustrations from the concurrent decisions in the Scotch Courts. We appreciate the reluctance which an English lawyer feels to plunge into the mysteries of Scots Law, but there is much common ground in the law of partnership, and the Companies' Acts are imperial statutes applicable to both countries.

The last book deals with the dreaded winding-up in its different forms. On the most recent decision in a winding-up, involving the distribution of a surplus of upwards of half-a-million sterling, we comment elsewhere, and shall only observe here that the case of the *Bridgewater Navigation Company*, since reversed in the House of Lords, is, unfortunately chronicled at its erroneous stage (Court of Appeal in Chancery Division), and we are surprised to observe that Lord Justice Lindley, though not responsible for that judgment, appears to approve of its principle (pp. 455 and 869).

The volume is a worthy monument of the erudition and labour of an able and accomplished judge. With characteristic modesty, beautiful in one of his advanced age and attainments, he says that he cannot venture to hope

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"that his work is free from serious faults; and, although it has engaged his unremitting attention for more than thirty years, he is painfully aware that it is even now but an imperfect production." We do not believe the profession will endorse this estimate, though they will admire its graceful humility.

J. CAMPBELL LORIMER.

The Law of France relating to Industrial Property:—Patents, Trade Marks, Merchandise Marks, Trade Names, Models, Patterns, Designs, Wrappers, Prospectuses, Exhibition Rewards and Medals, Unpatented Industrial Secrets, and Colonial, Algerian, and Tunisian Regulations. With a Commentary on the Industrial Property Convention, 1883, and the Provisions concerning British Inventions and Designs at French Exhibitions. By THOMAS BARCLAY, LL.B., of Lincoln's Inn, Barrister-at-Law, Knight of the Legion of Honour. London: SWEET & MAXWELL, LIMITED, 1889.

This is a small book on a wide range of subjects; it contains much riches in a little room; and it bears distinctly the stamp of practical experience. It is needless to point out the position which Mr. Barclay's acknowledged competence as an authority on French law has secured for him, and consequently that any work from his pen must deserve careful attention. This work presents two aspects: from the one point of view it is a clear and carefully commentated statement of the present state of the French law of Industrial Property, as it is called for want of a better, and, at the same time, a sufficiently comprehensive name; from the other, it is a contribution of importance to the study of comparative legislation, in so far as it takes up the comparison of British and French law, a comparison drawn with sufficient fulness to make the work one of practical utility to the British inventor and exhibitor. The plan of the work is to give the text of the French law in a careful English version, and to accompany it by comments, remarks, and illustrations: to show in detail how the French law has been modified by the International Industrial Property Convention of 1883, and how the various clauses of that Convention were developed in the course of negotiation; and to supplement all this with a collection of apparently all that it might be useful for the Briton to know in respect of treaty arrangements and past diplomatic correspondence between Great Britain and France on the subject of industrial property, and also with a collection of useful French forms of style. The book is one to be recommended, and even to those who work amid a different and, as we think, decidedly a not inferior system of patent law, it cannot fail to prove interesting and suggestive.

A. D.

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The County Council Guide for Scotland, a Handbook of the Local Government (Scotland) Act, 1889, with Introduction, Explanatory Notes, and Index. By J. Badenach Nicolson, Advocate, Counsel to the Scotch Education Department; and W. J. Mure, Advocate, Legal Secretary to the Lord Advocate for Scotland. Edinburgh and London: William Blackwood & Sons, 1889.

Manual of the Local Government (Scotland) Act, 1889. By John Chisholm, Advocate, and of the Middle Temple, Barrister-at-Law; and Hay Shennan, Advocate. Edinburgh: T. & T. Clark, 1889.

The Law relating to Scottish County Councils, being the Local Government (Scotland) Act, 1889, with Introduction and Notes, and a copious Index. By William George Black, Author of "The Parochial Ecclesiastical Law of Scotland." Edinburgh: Bell & Bradfute, 1889.

These are all useful books, but the first place for good workmanship must certainly be given to the book of Messrs. Chisholm and Shennan. They give a clearer and fuller statement of the business transferred to the County Councils than the other commentators, and they have thought out some difficulties of administration, which are not elsewhere noticed. It would be impossible to discover from Mr. Nicolson and Mr. Mure or from Mr. Black that the powers of the Local Authorities of Health under the Housing of the Working Classes Act, the Alkali Acts, and the Rivers Pollution Act, have been transferred to the County Councils or their District Committees. An argument may, no doubt, be raised on sections 11, 77, and 105 of the Act, to the effect that this has not been done. If it has not been done, it is a very unfortunate omission, because it would leave a number of important sanitary duties in the hands of the Parochial Board, from which general jurisdiction in sanitary matters has been removed. Again, Messrs. Chisholm and Shennan discuss the position of the county councillors elected to the Standing Joint Committee in the third year of the Council's existence. It would appear to be the case that, as these gentlemen cease to be county councillors in December of that year, they cannot by force of section 18 continue to act on the Joint Committee until the following May, in which month only the County Council is authorised to elect their quota of representatives on the Joint Committee. The statutory quorum of this Committee may be obtained in the absence of these gentlemen, but *quid juris* as to the power of the mutilated Committee? Mr. Nicolson deals with the subject of registration and election with the skill of an old Parliamentary hand. Indeed, for these purposes, his "Guide" is perhaps better than the "Manual." We gladly note, from the Introduction to the work of Messrs. Nicolson and Mure (p. 22), that they apparently contemplate in the near future a consolidation of poor-law and educational administration in parishes and burghs. Mr. Black has recorded one or two facts which do not appear

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in the other books; such as the Order in Council under the Wild Birds Protection Act. He has, however, been once or twice unfortunate in his citation of Statutes. Thus, on p. 42, the chapter of the Weights and Measures Act is not 17, but 49; and on p. 40, the Cattle Plague Acts of 1884 are 47 and 48 of the Queen, not 45 and 46. Mr. Black has made, under section 15 (the "future transfer" section), an interesting list of the Statutes under which the Secretary for Scotland now has powers which may possibly be transferred to the County Councils. This is of great political interest; but, as Mr. Nicolson observes, it is not of much use, in a book of law, to speculate about the future. Mr. Black prints a note on p. 49, which is not intelligible. It apparently refers to the Salmon and Freshwater Fisheries Act, 1876. Although this Act is printed in Blackwood's Statutes, it does not extend to Scotland, and the transfer of power which Mr. Mundella accomplished by that Act was generally understood to be confined to England. Messrs. Nicolson and Mure raise the question (p. 20) whether, under section 15, sub-section (1 *b*), the licensing powers of the justices could be transferred by the Queen in Council to the County Councils? They say that this is not clear. It might rather be said that, unless the justices of the peace can properly be described as a "public body, corporate or incorporate," it is clear that no such transfer can be made. On the whole, no one will make a mistake in buying any one of these books. The subject might have been treated in a more interesting way, but perhaps future editions will develop editorial power.

Bell's Principles of the Law of Scotland.—The Ninth Edition, revised and enlarged. By WILLIAM GUTHRIE, Advocate, LL.D. Edinburgh: T. & T. CLARK, 1889.

Bell's Principles has long been the *vade mecum* of Scottish lawyers. No one who is engaged in professional practice can afford to do without it. Unsystematic in arrangement, and inferior in logical statement to more than one legal treatise upon our law, it meets the wants of the practising lawyer in a way that no other book can attempt to rival. For nearly half-a-century it has been recognised as a standard work, cited daily in the Courts, and accepted by the judges as possessing the highest authority. There never was a greater municipal lawyer than George Joseph Bell.

The first four editions of the Principles were published during the author's life, the last in 1839, shortly before his death, and now we have the ninth. Fortunately for the profession, the task of editing the later editions (the sixth to the ninth), has been entrusted to most competent hands. No better editor than Sheriff Guthrie could be found anywhere. he has brought to his task not only thorough knowledge of the law, but great care and most conscientious industry. It goes without saying that

it has been a work of no ordinary magnitude. To digest and arrange nearly the whole mass of the case and statute law, which each year accumulates, and to incorporate this into the existing text so as to enable the student and practising lawyer to understand the exact extent of the changes and modifications which have taken place, must have required the most strenuous labour. As an illustration, we may mention that the table of cases in the present edition occupies no less than 130 closely printed pages. The editorial work has indeed been a positive boon to the profession, for which no professional reward could be too great.

As the present edition (in the preparation of which the editor has been assisted by his son), differs in no way from the previous one, beyond incorporating the changes in the law down to date, there is really nothing for a reviewer to do but to call attention to the book. Criticism is not called for in regard to a work so well known and so thoroughly approved by the public. The best proof of its value and utility will be found in the fact that in three years the last edition—large and expensive as it was—has been exhausted.

H. G.

The Small-Debt Amendment (Scotland) Act, 1889, with Notes and Forms. By J. M. Lees, M.A., LL.B., Advocate, Sheriff-Substitute of Lanarkshire. Glasgow: William Hodge & Co., 1889.

Since the passing of the "Act for the more effectual Recovery of Small Debts in the Sheriff Courts, and for regulating the establishment of Circuit Courts for the Trial of Small-Debt causes by the Sheriffs in Scotland," in 1837, the Sheriff Small-Debt Courts have from year to year increased in usefulness and popularity. They have truly become the Courts of the people. Lynx-eyed legal reformers, on the outlook for some field whereon they might earn cheap glory, have shrunk from laying their hands on the Act of 1837. It has, in the course of fifty-two years, received but little amendment. By the Sheriff-Court Act of 1853 (16 & 17 Vict. c. 80), the jurisdiction of the Small-Debt Courts was extended to causes not exceeding £12 in value—the former limit being £8, 6s. 8d. At the same time, causes above the value of £12 were allowed, by consent of both parties, to be tried summarily in the Small-Debt Court. This latter provision has been but rarely taken advantage of, while the former amendment is universally admitted to have increased the usefulness of the Court. This fact points to the conclusion that most legal practitioners, in causes above the value of £12, preferred to have them disposed of, after a record had been carefully made up, by the more thorough methods of the Sheriff's ordinary Court. Of late years, a movement has been made in certain quarters to have the jurisdiction of the Small-Debt Courts still further extended to all causes not exceeding £25 in value, and at the same time to allow an appeal to the Court of Session of questions of law on a case stated by the judge, under provisions similar to those in the "Summary Prosecutions Appeal Act, 1875." This is not the place to dis-

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cuss the arguments *pro* and *con*. But a recommendation may be made to those advocating extension of appeals, to attend the discussion of some case involving £30 or £40 in one of the Divisions of the Appeal Court, where there has been the usual expenditure on printing and counsels' fees, and where the expense incurred is as large, or larger, than the sum originally at stake.

For some years past a Bill for the amendment of the Small-Debt Act has annually made its appearance, been reported on by the various legal bodies of the country, and been, at the end of each parliamentary session, ruthlessly massacred with other innocents. At last this little bill has grown into an Act of Parliament, and while its more ambitious features of extension of jurisdiction and appeal have been cut off, there still remains a good practical *residuum* passed into law. The able and industrious author of the "Small-Debt Handbook," published in 1884, has edited this new Act and appended to it notes and forms which will make it indispensable to all those "duly qualified agents" who now, by section 8 of the Act, are permitted to appear for parties in the Small-Debt Courts. He points out in the short but business-like preface the changes introduced by the new Act. These are, as he says:—"Agents are allowed to appear, delivery may be got by direct action, defenders may be convened from adjacent counties, remedy may be got against a party carrying on business within the jurisdiction, though domiciled without it, edictal citation may be used, the representatives of a party may be sisted, amendments may be made on the summons, warrant of ejection may be obtained, decerniture for future aliment is authoritatively sanctioned, avizandum may be made, partial extract may be got, and lockfast places may be opened without the expenses and delay of obtaining a special warrant." The notes are full and to the point. The captious critic may take exception to such a passage as this:—"Sometimes two parties get so heated with conducting their own cases, especially in claims of reparation for slander or assault between political or religious parties, that, in the public interest, it will be well to avoid letting one party and his witnesses and sympathisers depart in a state of jubilation alongside of the other and his in an opposite mood." But in other respects there is little room for adverse comment. A carefully prepared appendix of forms and a good index form a suitable conclusion to a small but useful publication.

J. R. B.

Analysis of the Conveyancing (Scotland) Act, 1874, and Amending Acts of 1879 and 1887, and Notes on the Cases which have been decided relative thereto. By JAMES S. STURROCK, Writer to the Signet. Edinburgh: BELL & BRADFUTE, 1889.

Mr. Sturrock, according to the preface of this work, seems at first to have thought of preparing a new edition of Dr. Mowbray's well-known "Analysis" of the Conveyancing (Scotland) Act, 1874, which is now

out of print. Instead, however, of a new edition of Dr. Mowbray's "Analysis," Mr. Sturrock has given the legal profession a new and valuable "Analysis" of the Conveyancing Acts of 1874, 1879, and 1887. The plan adopted by him is this. In an introductory chapter, he points out the changes which have been made, especially by the Conveyancing Act, 1874, on the law prior to its date, and then he gives the text of three Acts with which he deals, appending notes to each section of the Acts. These notes are exceedingly well done. They very often show what the law was prior to the commencement of the Acts, and how far the recent enactments have superseded or modified it. In the notes, Mr. Sturrock takes occasion to discuss the cases bearing on the Conveyancing Act, 1874, which have been decided since it came into operation, and to give practical suggestions with regard to several difficulties which occur to practitioners in the working of the Act. These suggestions of the author are not the least valuable part of his "Analysis."

Under section 4 of the Conveyancing Act, 1874, Mr. Sturrock has a long note, in which he deals with the exaction of casualties. He then discusses the question, which year's rent, under the statute, is to be taken in fixing the amount of a casualty? Notwithstanding the decisions in the cases of *Stewart* v. *Murdoch & Rodger*, 19 Sc. L.R. 649, and *Campbell* v. *Stewarts*, 22 Sc. L.R. 292, neither of which went to the Inner House, he thinks — and he gives reasons for his opinions — that the rent of the year of demand ought to regulate the amount of the casualty. Under section 9 of the Conveyancing Act of 1874, he notices the case of *M'Adam* v. *M'Adam and his Executors*, 6 R. 1256, which settled that an heir of entail, although he had made up no title to the estate, could competently grant a bond of annuity under the Aberdeen Act (5 Geo. IV. c. 87), to his widow. The Lord President, in *M'Adam*, observed that the enactment contained in section 9, is obviously intended to apply to every estate descendible to heirs. Looking at the enactment and the decision in this case of *M'Adam*, one must hold that the doubt, sometimes suggested, that section 9 does not apply to heirs of provision, is not well founded. The Conveyancing Act has already given rise to a large number of decisions, the most of which Mr. Sturrock has cited and discussed, but, as is apparent from Mr. Sturrock's notes, there are a number of points under it, which must yet come up, sooner or later, for judicial determination.

From some of the conclusions to which Mr. Sturrock comes in his "Analysis," one may be induced to dissent. There can be, however, no doubt that his "Analysis" is a valuable one, and he may well be congratulated on the care and ability which mark its pages.

J. C.

A Manual of Equity Jurisprudence. By JOSIAH W. SMITH. Fourteenth Edition. By J. TRUSTRAM, LL.M. (Cantab.). London: STEVENS & SON, Limited, 1889.

The fact that Mr. Smith's "Manual of Equity" has reached the 14th edition is probably sufficient proof of its excellence. It is a book too well known, at any rate, to require a reviewer to point out its many good qualities, its conciseness, its preciseness, and its lucidity. Though written mainly for the use of students of English law, it may be recommended to all who desire to have a clear apprehension of the rules of Equity Jurisprudence as recognised by our Southern kinsmen. Especially to Scottish students of law do we recommend it; for, as year by year the English and Scotch laws approach nearer to one another, a book of this kind, which, without any pretension, gives a fair compendium of the branch of law with which it deals, becomes more and more serviceable. It is always desirable that such a book should be kept up to date: the last edition appeared in 1880, and since then, as the Editor points out in his Preface, several important Statutes have been passed, affecting to a considerable extent the matter dealt with. Amongst these Statutes are the Married Women's Property Act, the Guardianship of Infants Act, 1886, and the Trustee (England) Act, 1888. The chapters on Trustees and Married Women have been to a large extent rewritten, while many additions and changes have been made in other parts of the book. As regards the form of these changes, the Editor deserves commendation. The process of incorporating new matter in old paragraphs, unless done with very great circumspection, reminds one of the Scriptural injunction against putting new wine into old bottles; both are apt to be spoilt. To avoid this difficulty, Mr. Trustram has nearly always inserted new paragraphs, except, of course, where he has rewritten the whole subject; he has thus both saved trouble to himself and annoyance to his readers. In dealing with cases illustrating his points, however, the Editor has hardly shown the same acumen. It troubles the eye to find references inserted within the subject-matter. In all law-books it is better to cite the cases in the footnotes with reference letters; more especially does this rule hold in the case of books written, as this one is, for students rather than for practitioners.

In his chapter on Infants, Mr. Trustram might perhaps have gone a little more fully into the Act of 1886: he certainly gives the main clauses of the Act, but he fails to mention any of the cases decided under it. It is, as every one knows, a revolutionary Act, in so far as the rights of the mother are concerned; and it would have been better, had the more prominent cases decided under it been brought before the notice of the student. It is true that in England not many points of importance have been decided up to this date; but in our own Courts several very important judgments have been given. For instance, in *Brand* v. *Shaw and Others* (16 R. 315), it was decided that the Act does not apply to bastards; again, in *Campbell* v.

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Macquay (15 R. 784), it was held that a second marriage did not affect the mother's position as regards the Act. Cases of this kind, decided under an Act applying both to England and Scotland, might very profitably be inserted in a treatise of this kind. The "Manual," as we have indicated, is not intended for practitioners, but for students, and for that purpose it can be recommended as a useful compendium of the law of Equity.

R. E. M. S.

Notes on Decided Cases.

Trust—Liability of Trustees for Imprudent Investment.—The divergent views expressed by the judges who took part in the recent decision of *Rae* v. *Meek* (15 Ret. 1033, reversed on appeal, 8th August, 1889), point to a radical difference of opinion regarding the nature of a trustee's position under a gratuitous private testamentary trust. In one view, such a trust is the truster's own affair exclusively. If he chooses to appoint stupid, ignorant, or careless persons to be his trustees, and they in consequence of their stupidity, ignorance, or carelessness, bring the trust into confusion, and cause loss, no one has any title to complain, for it is the truster's business only, and he, it is said, must have had his eyes open to the possible consequences of his trustee's ignorance and incapacity. If a person choose to appoint, say, a lady, absolutely ignorant of business affairs, to be his trustee, can she be expected to act as a prudent man of business? The office of trustee may be (usually is), accepted on grounds of kinship or friendship with the deceased; it is an office gratuitously imposed, and destitute of any contractual obligation. Why, then, should not the truster's estate bear the consequences of his own imprudence in making the appointment, should mismanagement take place, instead of the unfortunate trustee, who acted according to his lights? The Courts—both of England and Scotland—have, however, on the whole, shown a steady tendency to discountenance this notion, that a trust is the truster's own exclusive affair, and to hold that if a man wishes to have his succession managed by trustees, it must be, (apart from his express directions), on such conditions only as the law considers to be in accordance with sound policy—the main object being the reasonable protection of the beneficial interests. One such condition plainly is, that the persons appointed trustees should be qualified for the performance of the duties of the office. The case of *Rae* v. *Meek* appears really to decide no more than this—that persons who are appointed to an office, cannot plead their own incapacity as a reason for not performing the duties of the office; a very elementary proposition, once it is assumed that a trust is not a mere private affair, but an office with recognised duties, which a Court of law, if appealed to, will enforce. To some extent the

truster may, by express declaration, relieve his trustees from the performance of these duties; but in so far as the duties are inherent in the nature of the office, even the express declaration of the truster may prove nugatory. *Rae* v. *Meek* very clearly illustrates this last proposition. The marriage-contract there contained a clause of immunity in the following very wide terms:—"The said trustees shall not be answerable for errors, omissions, neglect of diligence, nor for the insufficiency of securities, insolvency of debtors, or depreciation in the value of purchases, nor *singuli in solidum*, or for the intromissions of each other or of their factor, but each for his or her actual intromissions only." The Lord President was of opinion that this clause, apart from other considerations, was sufficient to free the trustees from liability, and Lord Young appeared inclined to take the same view in principle, but held the matter as concluded the other way by authority. In the House of Lords the question was regarded as settled by the case of *Seton* v. *Dawson*, 18th December, 1841, 4 D. 310, where it was held that a similar clause of immunity did not protect the trustees from the consequences of *culpa lata* on their part. To have given the clause its widest and more natural reading would practically have left the trustees responsible for nothing except the consequences of their own personal dishonesty; and trustees who are not answerable, except for criminal misconduct, can hardly be regarded as trustees at all.

The ultimate decision in *Rae* v. *Meek* was to some extent based on a consideration of the inconvenience of allowing a separate inquiry into the capacity—or rather, the incapacity—of each trustee. But this argument is a double-edged weapon, for if it levels all trustees up to a certain average standard, it has also the effect of levelling down to that standard such trustees as may be possessed of exceptional qualifications. The ideal trustee figured by the rule is supposed to have no special qualifications for the office; he is merely a person of average general intelligence and prudence, and of no occupation. But as a matter of fact, trustees may be frequently lawyers or stockbrokers, or, generally, persons conversant with some business, the knowledge of which is likely to prove of advantage to a trust, and they are selected by the truster, it cannot be doubted, mainly because they are so qualified. Is a court of law in determining the responsibility of such persons for matters of trust management to throw their special qualifications out of account? We venture to think not. A trustee, who happens to be a stockbroker, and who makes, or rather permits his co-trustees to make, an investment of trust-funds, which the slightest attention on his part, with his special means of knowledge, would have shown to be unsound, can hardly be said to have acted with due diligence in the conduct of the trust, merely because his co-trustees having (let it be assumed) done all that prudent men of no special knowledge could reasonably be expected to do, are exonered from liability. No prudent man in the conduct of his own affairs throws such special knowledge as he

possesses to the winds. Why should he be permitted, or rather encouraged, to do so as a trustee? In short, it appears that the fiction of an ideal trustee is merely a figurative and somewhat misleading way of saying that all trustees must at least come up to a certain average standard of capacity. If any trustee does not, the law, in judging of his liability, will nevertheless assume that he does; it has not, so far as we know, yet been determined that the converse presumption holds good, of regarding specially qualified trustees as being destitute of their special qualifications, for the purposes of trust-management.

H. J. E. F.

Reparation—Liability of Lessor of Dangerous Machine to Servant of Lessee.—The case of *Edwards* v. *Hutcheon*, 16 R. 694, raised a point which, though not directly determined, seems to be involved in the decision, and which, from its novelty in the law of Scotland, seems worthy of special notice. A threshing machine, with two men to work it, was supplied, under contract of hire, by the defender to the pursuer's master (who was also her father), to do certain threshing at his farm. The farmer provided his own servants to feed it, and the pursuer, while so employed, met with an accident, having one of her feet taken off by the drum. The machine was defective in not having a guard on the drum, and for the consequences of this defect the defender was held liable in damages to the pursuer. The defect was not one of condition, but of construction, and of such a kind as to be patent to any one acquainted with these machines. Now, the question that suggests itself is, whether the defender, having no contract with the pursuer, was liable to her upon his contract for damage suffered while she was working in her master's employment at a machine which her master had accepted to do the work, or otherwise whether her master, having accepted a machine of a certain obviously dangerous construction, had not taken on himself the risk to the workmen he employed to work at it. The action was apparently treated by all the Judges as one on contract. It was certainly so treated by the pursuers, because, although the girl was of full age, the action was laid at her instance with the consent and concurrence of her father. The effect of that instance may be doubtful, looking to the principles laid down in *Hislop* v. *McRitchie's Trs.* (L.R. 6 App. Cas. 560, and 8 Ret. H.L. 95), but its purpose is not doubtful. Lord Young, who took part in the decision, stated that the defender had committed a breach of contract, and that the action might be viewed as one at the instance of joint pursuers. This, however, is inconsistent with the actual decision, because the decree finds the daughter alone entitled to damages, and decerns in her favour only. Assuming that the father was a necessary party to the action (as Lord Young considered), it is difficult to see, if this decision be sound, why a mere servant, whether living in

family with the lessee or not, should not be equally entitled to recover in similar circumstances. If the breach of contract gives a right to recover to a third party in the one case, there seems to be no reason for withholding it in the other. But, suppose the farmer hired the machine, knowing the defect and its danger, there would have been no breach of contract, and then every action on the contract must necessarily have failed, although the culpability of the lessor, as regards the injured person, would have remained the same. It is submitted, with deference, that, if the decision can be justified, it should have proceeded, not on the principle of breach of contract, but on the lines laid down in the English case of *Heaven* v. *Pender* (11 Q.B. 502). In that case, it was held that a person supplying goods, machinery, or the like, for the purpose of their being immediately used by a particular class of persons before there was any probable opportunity of discovering defects dangerous to those using the material, is under a duty (irrespective of contract altogether) to those persons to take every reasonable precaution that no such defects exist. We are more familiar with such an obligation in the case of immoveable property, but it is not limited to such property. The thing supplied in *Heaven* v. *Pender* was staging for the painting of a ship in dock, and the dock-owner who supplied it was held liable to the painters employed by the shipowner in respect of a defect in the construction of the staging which caused damage. It may, however, be disputed whether such liability could attach in the case of a seen and obvious danger, accepted by the shipowner, or where there arose on the part of the shipowner a duty to inspect upon delivery. The well-known opinion of Lord Esher in *Heaven* v. *Pender*, seeking largely to extend and generalise the ground of liability in such cases, although not concurred in by his colleagues, seems to have been adopted by Justice Hawkins in *Thrussell* v. *Handyside*, 20 Q.B. 359; and in America, see *Wabash Railroad Company* v. *Loche*, 2 Am. St. 193. The matter is discussed by Shearman and Redfield, "Law of Negligence," § 116; and by Beven, "Principles of the Law of Negligence," p. 63.

A. T. G.

Public Company—Damages for Loss by Misrepresentation in Prospectus.—*Peek* v. *Derry and Others*, L.R. 37 Ch. Div. 541, reversed, H.L., June 4, 1889, *Times* Law Reports, v. 625. This is an important decision, but only in the sense of being a re-affirmance of a doctrine which was generally supposed to have been well settled, both in English and Scots Law, that if a person make a misrepresentation *bonâ fide* believing it to be true, it is not enough, with a view to obtain damages under the head of fraud, to prove to the satisfaction of a Court or jury that there were not reasonable grounds for the belief.

The action was brought by Sir Henry Peek to recover from the Directors

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of the Plymouth, Devonport and District Tramways Company (Limited), individually, damages for misrepresentations contained in a prospectus issued by them, by which he was induced to take shares in the Company. The misrepresentation was that the Company, by its Act of Parliament, had "the right to use steam or mechanical motive power instead of horses," which it was expected would effect a considerable saving in working expenses. But, in fact, the right conferred by the Act was dependent on the consent of the Board of Trade and the Corporations of Plymouth and Devonport being obtained. The Board of Trade subsequently refused consent as to the greater part of the line; and the Company was wound up. It is provided by the General Tramways Act, 1870, that all carriages used on any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only. In order, therefore, to enable the Company to use steam authority had to be obtained in their Act. The Bill was promoted, and in the course of the proceedings the plans were submitted to the Board of Trade, and no opposition made. The Act passed; but the authority to use steam was clogged with the condition that it should only be used with the consent of the Board of Trade. The evidence of the defendants was to the effect that the Act authorising the use of steam having, after notice to, and without objection on the part of, the Board of Trade, been obtained, they thought that practically the consent was given, and that no objection would afterwards be raised, provided the works were properly carried out.

The Court of Appeal (Chancery Division), consisting of Lords Justices Cotton and Lopes, and Sir James Hannen (reversing the judgment of Mr. Justice Stirling), held that the Directors were liable for the misstatement, because it was made without reasonable ground for believing it. All three judges lay down the law in similar terms; but a passage from Lord Justice Lopes' opinion may be taken as illustrative. He states, as the result of the authorities and as settled and well-understood law, that "If a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely on it, and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made—(1), If it is false to the knowledge of the person making it; (2), If it is untrue in fact, and not believed to be true by the person making it; (3), If it is untrue in fact, and is made recklessly, for instance, without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false; and (4), If it is untrue in fact, but believed to be true, but without any reasonable grounds for such belief."

This doctrine received very trenchant criticism in the House of Lords from Lords Bramwell and Herschell, because, obviously, it would make that a fraudulent statement which the person who made it *bonâ fide* believed to be true. What are reasonable grounds is a matter of opinion and judgment. Thus, in a question of fraud and deceit, such a rule as the Chancery Division formulated would put in issue, not merely the honesty, but the intelli-

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gence of the person charged; and might brand a man as dishonest who was merely stupid. Lord Herschell's judgment is specially valuable for his examination and criticism of the prior cases from the time of Lord Kenyon downwards. He points out that the first suggestion, that want of reasonable grounds for believing a statement, would support an action of damages for deceit, appears in the case of *Addie* v. *Western Bank* in 1867 (L.R. 1 Sc. App. 162), when Lord President Colonsay told the jury that "if a case should occur of directors taking upon themselves to put forth in their reports statements of importance in regard to the affairs of the bank, false in themselves, and which they did not believe, or had no reasonable ground to believe, to be true, that would be misrepresentation or deceit." This view was challenged in the House of Lords by Lord Cranworth as going "beyond what principle warrants;" though Lord Chelmsford appears to have approved of it. The decision of *Addie's* case, however, did not turn upon that point; and the only other authority in support of it is what fell from Lord Justice Cotton himself, in dissenting from the judgment in *Weir* v. *Bell* (3 Ex. Div. 238), and a *dictum* of the late M.R. Jessel, which are inconsistent with the current of prior authorities. Lord Herschell concludes that nothing short of proof of fraud will suffice, 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. Although I have treated the (2) and (3) as distinct cases, I think the (3) is but an instance of the (2); for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth." Applying this clear test to the facts of the case, Lord Herschell says: "I cannot hold it proved, as to any one of the directors, that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I think that the charge of fraud made against them has not been established."

The test so formulated is, as we have said, not new, and it is remarkable that Lord Herschell did not in his researches, himself or by the aid of Lord Watson, come upon a very clear enunciation of the same doctrine by Lord President Inglis, seven years ago, in *Lees* v. *Tod*, 9 R. 807 (853, 854). If obscurity was introduced into the law by one Lord President, it had been effectually dispelled by another. The passage is too long for full citation, but it contains these sentences:—"If they (Directors) make the statements in the *bonâ fide* belief that they are true, they are not guilty of fraudulent misrepresentation, merely because in the judgment of the Court, or of a jury, they had not reasonable, which I understand to mean sufficient grounds, for believing the statements to be true; for this would be to make them answerable for the erroneous inferences which they drew from the facts within their knowledge, which is only an error of judgment. . . . The

legal proposition which I desire to state will apply to no man who has not a *bonâ fide* belief in the truth of the statement. But if there be such belief, then in my opinion there is no occasion to refer to the sufficiency or insufficiency of the grounds of that belief, unless they be so slender or flimsy as to destroy the idea of *bonâ fides*." Lord Shand also, in the prior case of *Brownlie* v. *Miller*, 5 R. 1076 (1091), said, in reference to one making a representation, "If he have refrained from making inquiries which would have disclosed the truth, it may often be a legitimate inference that he did not believe in the truth of his assertion. But if he refrained from inquiry, not from any unwillingness to know the truth, but because he was really satisfied he had reasonable grounds of belief, and his belief be thus honestly entertained, I do not think his statement, though false, can be held to be fraudulent in law, as it certainly is not in fact."

These observations are in conformity with what Lord Cranworth says in *Addie's* case:—"If a little more care and caution must have led the Directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud." There was on this point in all the judgments under appeal, as Lord Bramwell observed in his opinion, "a confusion of unreasonableness of belief as evidence of dishonesty, and unreasonableness of belief as of itself a ground of action," or, as Lord Herschell expresses it, "between that which is evidence of fraud, and that which constitutes it." This makes very clear both that reasonableness of belief has a legitimate but limited place in this controversy, and what exactly that place is.

It is to be noticed that Lord Herschell points out that this form of remedy (an action of damages based on deceit), differs materially in principle from the other remedy for misrepresentation—viz., rescission of the contract and restitution. In the latter case, he observes, "it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract having been obtained by misrepresentation cannot stand." But, as is well known, if restitution be impossible this remedy is lost. Into this part of the subject, we are not, however, called to enter.

J. C. L.

How to Divide a Surplus in Liquidation of a Public Company—(*Birch* v. *Cropper*, 39 Ch. Div. 1, W.N. 1889, p. 167).—We called attention, in the Notes on Decided Cases in last January number of the *Juridical Review* (i. 107), to what appeared to be the erroneous principle on which the English Court of Appeal (Chancery Division) distributed the £550,000 of surplus assets of the Bridgewater Canal Company. This surplus remained after discharging debts, and paying

back to shareholders—(1) £300,000, the amount of fully paid up preference shares; and (2) £350,000, the amount of partly paid ordinary shares. The amount of subscribed, but uncalled, ordinary shares, was £650,000; and the question was, how should the £550,000 be distributed between the preference and ordinary shareholders. The Court of Appeal, Lords Justices Cotton, Fry, and Lopes, affirming Mr. Justice North's judgment, held that the distribution should be in proportion to the amount paid up on the shares, disregarding the £650,000 of subscribed, but uncalled capital—that is to say, in the nearly equal proportion of six-thirteenths to preference, and seven-thirteenths to ordinary shareholders. It was common ground that the surplus was to be distributed among the shareholders, "according to their rights and interests in the Company" (Companies Act, 1862, § 133); and that the preference shares had no preference over the ordinary shares in the distribution of capital. The House of Lords, on 9th August, 1889 (*Weekly Notes*, p. 167), reversed the decision of the Courts below, and held that the distribution must be in proportion to the number of shares held by preference and ordinary shareholders respectively—that is to say, in the proportion of three-thirteenths to preference, and ten-thirteenths to ordinary. The ground of judgment is, as indicated in our notes, that the rights and interests of shareholders cannot be determined without taking into account the £650,000 of subscribed, but uncalled capital, for the Company trades upon the credit so raised.

Lord Justice Fry said that distribution must be proportionate to contribution; but his Lordship discarded the contribution in credit, and attributed the entire value of the concern to the contribution in cash. The House of Lords held that thus a consideration of essential importance to an equitable distribution had been entirely lost sight of. It was also shown that in the converse case of a deficit, losses have to be borne, not in proportion to the amount of capital paid up, but to the amount subscribed, —*Anglesea Colliery Company*, L.R. 1 Ch. 555; *Maude*, L.R. 6 Ch. 53.

Lord Herschell, on the whole question, observed that it was one to which, in the absence of any provision in the constitution of the Company, a general rule must be applied, and that a rule, which recognised all the elements in the problem, was to be preferred to one which entirely ignored one of them. At the same time, it was impossible to affirm that the principle adopted would secure absolutely equitable treatment, the reason being that, it is impossible to say how much, in individual cases, the prosperity of a Company is due to its capital paid up and employed in the undertaking, and how much to the credit reposed in the proprietary behind.

J. C. L.

Reparation—Volenti non fit injuria.—There are few spectacles more touching than that of a "practical" lawyer struggling with a problem of abstract metaphysics. By a sort of Nemesis, his previous contempt for

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speculation makes him all the more helpless in the discussion. Such problems as free-will, the relation of will and motive, the nature of knowledge, and the relation of will and knowledge, seem to be matter of daily discussion in the English County Courts as well as in our own Sheriff Courts, particularly in connection with section 2, sub-section (3) of the Employers' Liability Act. The same questions have recently been more than once presented to the English Court of Appeal, and have at last reached the House of Lords, in *Membury* v. *The Great Western Railway Company*, May 14, 1889, L.R. 14 App. Cas. 179. The facts were simple and of a very common type. Membury was in the employment of Younghusband, who was under a contract with the Company to shunt their trucks on their line near Paddington. The work was properly done by a man with a horse, and a boy, whose duty it was to unhook the drawing-chain. Down to 1887, the Company had supplied boys, but after that year a new arrangement was made, whereby the Company was to supply boys if they had them, but if not, the work was to be done without boys. Membury worked for seven years under this new arrangement, though with constant grumbling. On the night when the accident happened, he applied to the Company's foreman for a boy, and was answered, "When I have got one, you shall have one." He then proceeded to do the work alone, but in unhooking the chain on one occasion, he fell, and the truck passed over his foot. The jury found for the plaintiff, or rather they sympathetically voted a subscription to the injured man out of the Company's pocket. The Divisional Court (Mathew and A. L. Smith, JJ.), refused to set aside the verdict, holding, on the authority of *Thomas* v. *Quartermaine*, 18 Q.B.D. 685, and *Yarmouth* v. *France*, 19 Q.B.D. 647, that it was a question for the jury, whether the plaintiff was *volens* within the meaning of the maxim, *volenti non fit injuria*. The Court of Appeal, however (Lord Esher, M.R., Lindley and Bowen, 4, JJ.), reversed that decision, on the ground that the plaintiff had acted voluntarily and with full knowledge of the danger, and that the two authorities above quoted were not applicable. In the House of Lords, this reversal was sustained on two grounds—first, it was held unanimously that the Company had broken no contract with the plaintiff, since they had not undertaken to supply boys; and secondly, the Lord Chancellor (Halsbury), Lord Bramwell, and Lord Herschell, held that he had full knowledge of the danger, and the doctrine *volenti non fit injuria* applied. The result is unsatisfactory, because the other Law Lords left the question open as to the application of the maxim, preferring to decide the case on the former ground alone, and all, except Lord Bramwell, left the question open as to the limits of the application of the maxim. Lord Bramwell's opinion is, however, most emphatic, and he expressly declares that his words are not *obiter*. "I hold," he says, "that where a man is not physically constrained, where he can at his option do a thing or not, and he does it, the maxim applies." In the concluding paragraph, he throws discredit on the two cases above referred to, the former of which was decided by the Court of Appeal. The case of *Membury* will,

therefore, probably furnish a new starting point for litigation, until the question is set at rest by the House of Lords or the Legislature.

One advantage of adopting Lord Bramwell's view is that it furnishes a clear, definite rule with reference to which individuals may contract and act. No judge, no jury, can estimate the motives of men; and if they attempt such a task, they will perpetrate more injustice than the wrongs they will remedy. The proper judges are the parties themselves, for they alone know if it is prudent to run the risk of dangerous employments; and their judgment will be materially assisted if they know that they have no redress in the case of injury. Any other rule leads to practical gambling, with life and limbs as the stakes. It is thus satisfactory to note that our own Courts have a distinct tendency to make *mere* knowledge of the danger a sufficient bar to an action for reparation. (See *Crichton* v. *Keir*, 1863, 1 Macph. 407; *M'Gee* v. *The Eglinton Iron Co.*, 1883, 10 R. 955; *Fraser* v. *Hood*, 1887, 15 R. 178, all in the First Division; and *M'Ghie* v. *The North British Railway Co.*, 1887, 14 R. 499, in the Second Division.) But when we speak of knowledge, we, of course, attribute it to a rational person capable of taking care of himself, and exclude children and idiots. Beyond these cases, the dulness of a man's intellect does not entitle him to special privilege (*Forbes* v. *Aberdeen Harbour Commissioners*, 1888, 15 R. 323), unless there is a special duty expressly or impliedly undertaken by the person who is alleged to have done the injury. Knowledge by itself has no effect, but it is knowledge which issues in, or is directly connected with, overt acts, of which the law takes cognisance. And, as a general rule, the person who is capable of having knowledge is also capable of exercising volition. (Compare the doctrine as to mere knowledge in bailment, loan, &c., Smith's L.C., 9th edition, i. 266.)

But mere knowledge of a defect, of which the master or his representative is unaware, seems expressly to bar a workman from claiming damages under section 2, sub-section (3) of the Employers' Liability Act. In like manner, mere knowledge on the part of a master of a defect, of which the workman is unaware, will make the master liable in damages to the workman if he is injured in consequence of this defect. But though we speak of *mere* knowledge, it must be borne in mind that the knowledge here is connected, in the one case, with the carrying on of the work, and, in the other, with permitting the work to be done.

The difficulty arises when *both* the master and the servant know of the defect. We have then another element added to knowledge on either side, and the question is, Who takes the risk of accident? In the case put by Lord Esher (19 Q.B.D. 653), where a master says to a workman, "There is a rotten ladder: it is ten to one it will break under you; but if you choose to run that risk, I will give you higher wages," there can be no doubt, as his Lordship points out, that the workman will be precluded from claiming damages. But, suppose the workman discovers a defect, and communicates the information to his employer, and the

employer says, "I see the defect, but I am not disposed to incur the expense of repairing it: if you are not pleased, you must leave," why should the decision be less clear? If the workman leaves, the employer may hire another, and, according to Lord Esher, escape liability by pointing out the defect. If the employer fails to point it out, he will be liable to the new workman, for he knew the defect, and did not disclose it. But, suppose again, the master, when the defect is pointed out, says, "I cannot afford to have this work brought to a standstill at present; but if you continue working, and exercise the most vigilant caution, there is little danger of accident, and certainly less with you than with a fresh workman, and I will get the defect repaired as soon as possible." Here there is really a contract for the benefit of the master, and it may fairly be argued that the master took the risk. This has practically been so decided in the case of *M'Monagle* v. *Baird & Co.*, 1881, 9 R. 364.

Yet, once more, if to the element of knowledge we add that of the lapse of time, the case presents a new phase. When the defect is discovered, it is alike the duty of the master to remove the servant, and of the servant to cease working. If the servant intimate to the master the discovery of a defect, it is *prima facie* evidence that he does not intend to take the risk; but if he continue working long after the master has had an opportunity of remedying the fault, then the presumption is surely changed. If the defect could be put right in an hour, then working for a single day should bar the workman. But each case must be decided on its own circumstances, and so we find cases such as *Henderson* v. *The Carron Company*, 1889, 16 R. 633, where to save the expense of a complete remedy, the masters tried other expedients to remove a defect, and although the servants worked for many months, with the known possible danger hanging over their heads, the Court (Second Division) held the masters liable, in other words, they decided that they and not the servants took the risk. That is regarding the relation from the point of view of contract. But the decision may also be explained on the principle, to which reference will be made presently, that the employers neglected a duty imposed on them by law to provide for the safety of their workmen.

In other contracts than that of service, a party who has not objected to certain conditions of the contract when his attention has been called to them, is held to be bound by such conditions. The contracts which carriers formerly attempted to make by notice are familiar examples. In all the reported cases it is assumed that if the conditions are legal, and are brought to the knowledge of the other contracting party, and he does not dissent, then he is bound. (See *Henderson* v. *Stevenson*, L.R. 2 H.L. Sc. 470; and especially *Watkins* v. *Rymill*, 1883, 10 Q.B.D. 178, where all the previous cases are reviewed by Stephen, J., who delivered the judgment of the Court.) But while the presumption is so strong against an ordinary person that if he knows of the existence of conditions, but chooses not to read them, he will be bound; in the case of a workman

there is a distinct tendency to hold him free, unless he has distinctly bound himself. A workman may contract himself out of the Act (*Griffiths* v. *Earl of Dudley*, 1882, 9 Q.B.D. 357), but the Court will not presume such a contract from the mere fact of his working in the face of a known danger. There are other circumstances which converge to the same result; for example, that the Act is to benefit workmen, and must be favourably construed for them; and also the general idea that the Act has made more stringent the common law duties of a master to see to the safety of his employés. Is this last not the true ground of the judgment in *Cairns* v. *The Caledonian Railway Company*, 1889, 16 R. 618? There is also a prejudice against persons being allowed to escape from a stringent law by a loose and slipshod agreement. (*Cf. dicta* of Lord Chelmsford in *Henderson* v. *Stevenson*, with *Griffiths* v. *Earl of Dudley*.)

That the application of the maxim belongs to the general law of consent is evident from the exceptions recognised by the English Courts. They really fall under the head of fraud, and force and fear (Broom's "Legal Maxims," 6th edition, pp. 267, 268), proving that Lord Bramwell's *dictum* would be received without question, with regard to any class of relations, other than that of master and servant. And, therefore, if workmen are incapable of volition, or if it is expedient that they should not be permitted to exercise volition, the broad general rule should, after full discussion, be laid down by the Legislature. No doubt employers would learn to adapt their conduct to such a fiction; but its effect on workmen would be at once disastrous and degrading.

W. G. M.

Income-Tax on Profits of Colonial or Foreign Trade.—The case of *Colquhoun* v. *Brooks* in the House of Lords, on 9th August, 1889, decides that a person residing in the United Kingdom, but engaged in a trade carried on entirely abroad (*i.e.*, in a colony, dependency, or foreign country), is only liable to income-tax on such of the profits as are remitted to this country. The justice and policy of the judgment will be appreciated by every one, but the varying fortune in the litigation, as well as the grounds on which the judgment has ultimately been based, will leave many lawyers unconvinced. It would have been preferable had the result, in itself desirable, been attained by legislation.

The policy and distinct language of the amended Income-Tax Act of 1853 (which re-defines the various schedules under which profits are ranged), is, in regard to Schedule D (trades and professions)—(1) to make every person resident in the United Kingdom liable to the tax on the profits "accruing from any kind of property whatever, whether situate in the United Kingdom or elsewhere," and also on the profits accruing from any trade, whether it be "carried on in the United Kingdom or elsewhere;" and (2) to make the profits of any property situate, or any trade carried on

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in the United Kingdom, liable to the tax, whether or not the owner or trader be resident in the United Kingdom, and whether or not he be a subject of Her Majesty. It is under the former head that the present case falls, as well as the precisely similar case of *Lloyd* (March 12, 1884, 4 Ret. 687), decided in the Court of Session, in favour of the Crown.

The judgment of the House of Lords, exempting Mr. Brooks from income-tax on his colonial trade profits, except so far as remitted home, was delivered by Lord Herschell. He gives at the outset the very candid admissions "that the words of the statute [of 1853] do, *prima facie*, support" the Crown's contention that "the case is within the very terms of the Act;" and that "giving to the language of the enactment its natural meaning, the facts stated do apparently bring this case within it." Further, he negatives the view, which was the basis of the judgment of Lord Esher and Lord Justice Lopes in the Court below, that to tax one in Mr. Brooks' position "would be opposed to international comity," or "would involve a violation of international law."

Thus Lord Herschell finds no countenance for his judgment in the more recent Act of 1853, but proceeds to examine the rules or machinery of the Act of 1842, which by the later Act are continued in force, and directed to be employed, but only "so far as they are not superseded by, and are consistent with, the express provisions" of the later Act. It was apparently thought that they might not be entirely harmonious; but the ruling statute, so far as substance is concerned, is that of 1853. The machinery of 1842 must yield to the direct enactment of 1853.

In examining the rules of 1842 Lord Herschell points out an anomaly —viz., that in dealing with interest on foreign and colonial securities, and profits on foreign and colonial possessions, only the sums received in this country are charged, whereas there is no similar limitation in regard to the profits of foreign or colonial trade, the subject now in question. The anomaly or distinction referred to exists, and is recognised in both Acts, and in the rules of 1842. This is shown in one of the rules (first case, second rule), which provides that the tax shall extend to every person, company, or society, and to every concern "carried on by them respectively in Great Britain [now the United Kingdom] *or elsewhere, as aforesaid;*" and also in the directions given in section 190 as to the mode of making returns. The reason of the distinction is not obvious, but Lord Herschell admits that however glaring the anomaly may be, it will not avail the respondent (Mr. Brooks) if the language of the statute imposing the tax be clear, as undoubtedly it is.

Accordingly he proceeds to deal with the general objection that none of the "machinery is applicable to the assessment of the profits of a trade carried on entirely outside the United Kingdom, and no part of which is received here," and he adds, "if this be correct it certainly goes far to show that the Legislature cannot have intended to tax such profits." He then points out that one of the classes of persons to be charged is *traders*,

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but that the rules describe the trade as carried on "wholly or partly in the" United Kingdom, which is inapplicable to a trade carried on entirely abroad. No doubt, but there are three other classes under one or other of which the foreign or colonial trader living in the United Kingdom might be classed—viz., householder, resident, or "other person." Lord Herschell further shows that, in the case of partnership trade, the rules direct one of the partners to make a single return of the whole profits of the concern, a mode which, in this case, is inapplicable, seeing that the other partners are clearly not chargeable.

But his Lordship's reasoning on these points seems to prove too much; for if the want of prescribed machinery to deal with trade entirely foreign or colonial be sufficient to exclude it from taxation, on what principle can the part of these profits remitted home be charged at all? To obviate this difficulty, which indeed would create a greater anomaly, Lord Herschell invokes an entirely different rule, which deals with "duties to be charged in respect of possessions" in the colonies or foreign countries. For this purpose he expands the natural meaning of the word "possessions," and makes it include a partner's interest in a partnership concern carried on entirely abroad, on the ground that such interest is something "possessed" outside the United Kingdom. This is obviously a novel and forced construction of the statute, and his Lordship almost apologises for the violence it does to the language.

We cannot help thinking that Lord Herschell's opening admissions have much more weight in them than the difficulties to which he has succumbed in the problem of working out the Act of 1853 by the machinery of the Act of 1842. If the Acts be found too wide and sweeping, as probably they have been, let the Legislature repair the error, not the Law Courts. This was the view taken by distinguished judges both in England and Scotland.

J. C. L.

Interpretation of Statute—Coal Mines Regulation Act, 1872.—In the case of the *Netherseal Colliery Company, Limited* v. *Bourne and Others*, June 3, 1889, L.R. 14 App. Cas. 228, the House of Lords finally settled a question which has given rise to much bitter discussion between mine-owners and miners. Their Lordships, in affirming the judgment of the Court of Appeal (consisting of Lord Esher, M.R., and Lopes, L.J., Fry, L.J., dissenting), 20 Q.B.D. 606, affirming the judgment of the Queen's Bench Division (Stephen and Wills, JJ.), 19 Q.B.D. 357, reversing the judgment of the County Court Judge, and thereby indirectly overruling a judgment of Lord M'Laren, in *Hynd* v. *Spowart*, 1884, 22 S.L.R. 702, in which the parties had apparently acquiesced, held that the miner was entitled, notwithstanding the terms of a special agreement he had made, to be paid for all coal brought to the surface, including "slack" or dross. The

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question resolved itself into the very narrow one of the construction of a statutory agreement. The majority of the Law Lords held that freedom of contract had been taken from the miner, and he could not renounce his statutory rights. A private agreement to that effect would be contrary to public policy. In short, the penalty in the 17th section of the Coal Mines Regulation Act, 1872, made any attempt to defeat it void (see Maxwell "On Statutes," 2nd edition, p. 483). Lords Bramwell and Fitzgerald, however, held that the deductions claimed by the mine-owners were not in themselves illegal, but that they could not be made, as they had not been ascertained in the manner set forth by the 18th section of the Act.

Experience seems, however, to have convinced the miners and their advisers that freedom of contract can be too much curtailed, and accordingly the 12th section of the Coal Mines Regulation Act, 1887, allows the parties themselves to determine the special mode of ascertaining deductions. But in the circumstances of such a case as that of the *Netherseal Co.* v. *Bourne*, the question might still be raised, would a course of dealing and acquiescence be sufficient to constitute an agreement?

From the decision in the House of Lords in the above-mentioned case, and also from the terms of the new Act, it seems abundantly clear that it is the mineral contracted to be gotten which alone ought to be weighed, and that, therefore, the practice which prevails in some quarters of weighing trucks and all, and making an average deduction for tare, is illegal.

W. G. M.

COLONIAL APPEALS.

Right of Appeal to Privy Council.—How far is the right of appeal to the Queen in Council a right inherent in every subject of the British Crown, and independent of any permissive provisions contained in Royal Instructions, Orders in Council, Charters of Justice, Letters Patent, and colonial or imperial statutes?

The case law, in which the answer to this question is embodied—already a long and tolerably consistent series of decisions—has received several noteworthy additions to its volume in the recent sittings of the Judicial Committee of the Privy Council.

It is thought that the following propositions accurately state the existing law:—

1. It is the inherent prerogative right, and on proper occasions the duty, of the Queen in Council to exercise an appellate jurisdiction in all colonial cases, criminal as well as civil. See *Attorney-General of New South Wales* v. *Bertrand* (L.R. 1 P.C. 520) and Knapp's Reports (1829-36, ii. Appx. p. iv.).

2. The Queen in Council may, in the exercise of her general jurisdiction, and in the absence of any charter or statutory right, grant special leave to

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appeal in *civil* cases, of substantial, general, or constitutional importance [where the judgment appealed against was plainly wrong, or attended with sufficient doubt to justify the Judicial Committee in recommending that it should be reviewed].

Illustration.—A judgment of the Supreme Court of Canada exempted the Seminary of St. Sulpice from the payment of $361—being the proportion charged upon it, by the Corporation of the City of Montreal, of a special assessment made by them for the cost of constructing a main drain which runs in front of its premises. Special leave to appeal was asked on the ground that the effect of the judgment would be to determine the future liability of all charitable institutions for local improvements carried out in their interest. The Judicial Committee held that the decision of the Court below (that no such general question was raised) was plainly right, and dismissed the petition. The judgment in this case, while it supports the general statement, contains expressions which seem to render necessary the qualifying clause in brackets in proposition 2. (*La Cité de Montreal* v. *Les Ecclesiastiques du Seminaire de St. Sulpice;* not yet reported.)

3. The Queen in Council will not review or interfere with the course of *criminal* proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, grave and substantial injustice has been done. See *Colonial Appeals, Juridical Review*, April, 1889—*Reece* v. *Reg.* and *Dinizulu Ka Cetywayo* v. *The Attorney-General of Zululand.*

In *Reece* v. *Reg.*, the appellant, who was the owner of a palm-oil factory on the river Benin, W. Africa, was convicted in the Consular Court of having unlawfully wounded certain natives, from whom he was attempting to recover debts due to him, and was sentenced, *inter alia*, to deportation from the Consular district of Benin for ten years. "The West Africa Order, 1885," under which Reece was tried, provided that no sentence of deportation should be passed unless and until the accused had received the option of finding, and had failed to find, security for future good behaviour. No such option was offered to Reece. The Judicial Committee quashed that part of the judgment appealed against.

Dinizulu Ka Cetywayo v. *The Attorney-General of Zululand* was a fresh application, on the part of Dinizulu, for special leave to appeal against his conviction for treason, rebellion, and violence, before a Special Commission appointed to try him by the Governor of Zululand. The grounds of the application were—(1) that the Governor's Commission, enabling him to make laws and establish Courts for the colony, conferred on him no authority to take from under the operation of the general laws, that he had established for Zululand, particular individuals designated by him, and hand them over to a tribunal created for the purpose of trying them by rules which were made applicable to them alone, and which deprived them of advantages secured to their fellow-subjects by those general laws; (2) that the special law under which Dinizulu was tried was unfair to his witnesses, as they were liable to

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be compelled to answer all questions, even those which were of an incriminating character; and (3) that the indictment was bad.

This case has not yet been officially reported, but the Judicial Committee appear to have held that the last two averments were not relevant grounds for the application, and that while the first averment was relevant, no substantial injustice had been done in depriving the petitioner of trial by jury, as under the general law of Zululand trial by jury is not allowed in capital cases. The petition was therefore dismissed.

A. W. R.

Domicile of Residence for Marriage.—In *M'Mullen* v. *Wadsworth*, an appeal from the judgment of the Supreme Court of Canada, the question to be determined was whether James Wadsworth, by his marriage in 1828 with Margaret M'Mullen, subjected himself to the legal community of property, as then established in Lower Canada. In the certificate, or *acte de mariage*, signed by Wadsworth and his wife, the former described himself as "of the city of Quebec, labourer," and the sole point raised on appeal was as to the legal effect of these words. Did they amount to a representation, which Wadsworth and his representatives would be estopped from denying, that he was domiciled in Quebec? Sir Barnes Peacock, who delivered the judgment of the Privy Council, pointed out—(1) that there could not in 1828 have been any actual fraud on Wadsworth's part, as he had then no expectation of acquiring, as he subsequently did, large property in Canada; and (2) that the words in dispute were probably inserted in order to suggest that Wadsworth had, in accordance with the marriage law of Lower Canada, resided six months in Quebec, before the ceremony. Article 63 of the Civil Code of Lower Canada provides that "for the purpose of marriage, domicile is established by a residence of six months," and the chief difficulty of course arose in connection with the interpretation of the word "domicile" in this enactment. The Judicial Committee hold that it means "residence," and not "international domicile." "It would be monstrous," said Sir Barnes Peacock, "to suppose that an Englishman, Frenchman, or American travelling in Lower Canada, and retaining his domicile in his own country, could not be married in Quebec, after a temporary residence there for six months, without abandoning his international domicile in his own country, and altering his status and civil rights."

A. W. R.

Right of Cargo to General Average where Master Negligent.—The case of *Strang, Steel & Co.* v. *Scott & Co.*—an appeal to the Privy Council from the Court of the Recorder of Rangoon—raised the following question, to which, in the history of English maritime law, no direct answer has hitherto, apparently, been given—Can the owners of cargo jettisoned for the safety of a ship imperilled by the negligence of a master, to whose fault they were not privy, claim contribution for general average?

The Judicial Committee have now answered this question in the affirmative, upon grounds which are set forth by Lord Watson with singular clearness and force.

1. Whether the rule of general contribution is to be regarded, as it apparently was regarded by Lord Bramwell in *Wright* v. *Marwood* (7 Q.B.D. 67), as arising out of an implied contract by those interested to contribute *inter se*, or is simply a canon of the Lex Rhodia (Dig. L. 14, tit. 2) incorporated into the law of England, which was the view taken by Lord Esher, M.R., in *Burton* v. *English* (12 Q.B.D. 220), there is no dispute as to the principle on which contribution becomes due. "In jettison," said Lord Watson, "the rights of those entitled to contribution, and the corresponding obligations of the contributors have their origin in the fact of a common danger which threatens to destroy the property of them all."

2. "These rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved."

3. The only recognised exceptions to the rule of contribution for general average are two. (*a*) "When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which mediately gave rise to the claim, . . . he cannot be permitted either recompense for services rendered, or indemnity for losses sustained by him in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save" (*cf. Schloss* v. *Heriot*, 14 C.B.N.S. 59). (*b*) The owner of deck goods jettisoned is not entitled to general contribution, because "the placing of goods upon the deck of a seagoing ship is improper stowage," and their jettison is, therefore, considered a justifiable riddance of encumbrances, and not a sacrifice for the common safety. The owner, however, in such a case, may have a claim for indemnity against the master and the ship-owners, and the exception does not apply where such stowage is permitted by well-established custom, or has been consented to by the other owners of cargo.

4. These exceptions are limitations on the rule of contribution, introduced, from equitable considerations, in the case of actual wrong-doers. They offer no pretext for creating a third exception divesting of the right to contribution owners of cargo who are not guilty even of constructive wrongdoing. "They were not privy to the master's fault, and were under no duty, legal or moral, to make a sacrifice of their goods for the sake of others, in order to avert the consequences of his fault."

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The statements of Mr. Parsons on this subject, "Treatise on the Law of Insurance" (vol. ii. p. 285), and "Law of Shipping" (vol. i. p. 211), were disapproved of.

The negligence of the master being admitted, no contribution could be recovered by the ship-owners, unless in pursuance of a special contract with the shippers. There was constructive wrong-doing on the part of the owners of the ship.

A. W. R.

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