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THE

JURIDICAL REVIEW.

THE SCIENCE OF POLITICS—ITS METHODS AND ITS USE.

Part I.

"The bent of our time is towards knowledge, towards knowing things as they are."—*The Study of Celtic Literature.*—Matthew Arnold.

"Political Science has begun to be studied [in America] more energetically than in England where, to be sure, it is scarcely studied at all."—*The American Commonwealth.*—James Bryce.

THE name of "Science" and the name of "Politics" have been unfortunately restricted in recent English usage. It is worth while to inquire whether they can be restored to their full and proper sense. The limitation in the application of a word generally implies the limitation and sometimes the degradation of its meaning. By Science we too often now understand the physical sciences only, and by Politics chiefly, if not exclusively, the contentions of Party.

Yet science is in its original meaning nothing more than a Latin synonym for the English word knowledge. It is indeed one of many useful words the English language owes to its composite character, for it has come to mean something more than knowledge. It implies organised and, so far as is

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allowed to man, complete and certain knowledge of a particular subject or department.

If science in this sense is confined to the physical or material sciences, it may be said without disparagement to the marvellous advances these have made during the last three centuries, that it is deprived of more than half its kingdom. The province of knowledge does not consist of matter alone. It comprehends the mind and the soul of man—his social and political, his moral and spiritual life as well as his earthly tabernacle and his earthly dwelling-place.

This is recognised when we speak of theological science, mental science, the science of jurisprudence, social science, and political science. Such terms, however, at present smack of the schools, and are thought by many to be pedantic. Probably nine people out of ten if asked what they understand by Science would answer natural science or physics.

The name Politics has fared even worse. It too in its popular acceptation, and as generally used, has been limited, and its limitation has been a degradation.

To the Greek, from whom we have derived the word, Politics represented the science of all which concerns the state, its form or constitution as well as its working or administration, the respective rights and duties of the government and the governed, as well as the relations between independent states. What does it represent to the average Englishman? Commonly the debating of party questions, the manipulation of elections, the daily, almost hourly, round of recriminations of the platform and the press. Let us not be unjust to Party. It has done much for England, and something, although not so much, for other countries. It has debated more thoroughly than any other method yet discovered public matters of immediate and pressing importance. It has kept a vigilant watch over the national finances. It has frequently detected and sometimes remedied abuses. It has submitted proposed changes in the laws to a searching examination. Above all, it has helped by substituting reforms for revolutions, and by imposing discipline, to solve

the difficult problem of the orderly government of large democratic communities. It is a milder alternative for civil war.

Yet no one who knows the elements of history can suppose party in its modern sense to be essential to good government or can overlook its palpable defects. In England it dates only from or shortly before the Revolution. Differences of opinion on political questions no doubt existed, but organised parties did not exist in some of the greatest epochs of English history.

In other countries, parties, in the English sense, have been occasional rather than constant and organised. Party at its best is partial. In its interests the interests of the nation are sometimes forgotten. Its spirit is often different from public spirit. It implies divisions, and prevents, so far as it prevails, united action or a continuous policy. Mr. Bryce in his recent work on America has described with close observation and eminent fairness the evils of the party system in that country. Would that it were not possible for an American to retort to an English politician as regards a great part of them—"*De te fabula!*" But it must be admitted that no other instrument has been found which serves equally well, in a free country, the important purposes indicated, and it would be unwise to anticipate or even to desire its immediate discontinuance. One point which concerns the purpose of this essay will be generally allowed. Party deals only with the unsettled and disputed matter of politics. The large parts of political science, which are fixed and settled, lie beyond its sphere. Political science may even be roughly, but with sufficient accuracy, described as the knowledge of those parts of politics—of all matters that relate to the state which are outside of the field of party. It is allowed on all hands that there are many such matters. The practical everyday business of government is carried on independently of party. It is indeed a maxim of English politics that the party in power shall carry on as regards this kind of business what its predecessor has begun. The

leaders of party constantly assert that there are some subjects, as even they say, "above party," such as foreign policy, or the constitution, or finance, or the administration of justice except the appointment of judges. Politics when so regarded have this obvious advantage. Not one party or portion of the people, but all parties, and all persons who belong to no party, are interested in it, and all persons who in any capacity take part in public affairs should, so far as time and opportunity allow, understand its principles and practice.

Politics in this sense is no doubt a complicated and difficult branch of knowledge. But its difficulty is a reason for studying it, and not for neglecting its study. It is a reason also for making its study scientific and systematic, instead of empirical and casual; for in this as in other sciences many complexities disappear when a right arrangement has been adopted, and many difficulties are overcome by a proper method of inquiry.

The prejudice against political science, especially in this country at this time—for it does not prevail on the Continent, nor did it, indeed, exist to the same extent in Great Britain in former times, as the writings of Bacon and Hobbes, Locke, Adam Smith, and Bentham prove—is so general that it will not be a waste of words to consider a little more closely what is the precise meaning, and the fair force of the objection, that there is no part of politics sufficiently certain to be the fit subject of systematic and scientific knowledge. This prejudice is by no means confined to the ignorant, but extends to politicians, public men, and statesmen.

"Il n'est pas indifferent," remarks Montesquieu, "que le peuple soit éclairé. Les prejugés des magistrats ont commencé par être les prejugés de la nation."

It is, of course, true that political science deals with a different kind of subject-matter from natural science. It includes, indeed, and this is sometimes overlooked, many subjects which belong to the world of matter and are subject to physical laws; so that it has frequently to accept the

results of physical inquiries. For example, the geographical conditions of different countries, their boundaries, their capacity for production, and their facilities for trade, must be admitted to be amongst the data of political science.

But its more direct and immediate subject is man; or, speaking more accurately, men collected in societies, as the inhabitants of villages, towns, and countries, as the members of the race or races which form a nation. And in relation to man, political science is, of course, concerned with the physical laws by which man is governed: for example, those which relate to his health, the duration of his life, and the limits of his physical powers. These also, just as much as the physical laws of the material world, must be accepted as part of its data. But then it follows that, so far as political science accepts and depends on the data of physical science, it possesses the same kind and degree of certainty which physical science itself possesses. These, however, are only the preliminary steps in politics. For undoubtedly the proper and immediate subject of political science is man, not merely as a physical being, but as a political being, and associated with other men in political communities or states. Here it is that an element of uncertainty, which must be fairly estimated and allowed for, intervenes. The political philosopher and the statesman must constantly take into account the effect of free will, of the power men collectively as well as individually possess, within certain limits, of independent and often unexpected action.

A fair consideration will, however, convince any one that such limits exist, and that although free will cannot be eliminated from politics any more than it can be from moral science, its effect on political problems is not quite so great as might be anticipated. One of these limits which is derived from physical conditions has been already noticed. Another limit is imposed by positive laws and customs. These may be changed, although the change is generally gradual, but while they exist they are recognised and obeyed.

except in revolutionary epochs, by most, indeed by almost all, persons who live in the country where such laws and customs prevail. This portion of the field of the science of politics—and it is a considerable portion—which deals with the positive laws and customs of particular states at any given time, either in the past or the present, is a quite settled and certain branch of knowledge. There may be—there often is—difficulty in ascertaining what the political laws and customs of a particular country are, but they exist not the less. In some countries, as in France and Germany, they have been reduced to the form of codes, and in others the writers on law have stated them in comprehensive treatises.

A third limit more difficult to apply, and the right application of which it is one of the purposes of political science to determine, arises from the mental and moral constitution of man. Observation had proved that this constitution leads to men in general acting politically under given circumstances in the same way; or, as it is sometimes expressed, to their acting in accordance with the strongest motive. But as the circumstances of any particular state or country are subject to many variations, the strongest motive or tendency cannot always realise itself; and as what is deemed the strongest motive or tendency at one time is by no means the strongest at another, and may be, for example, sometimes self-interest, sometimes patriotism, sometimes faith or religion, at others, and perhaps most frequently, all these combined, it often appears hopeless to use this criterion. That it is not altogether hopeless is shown by the important, though not always quite certain, results which have been obtained by the science of statistics and other important branches of political science, and by the method of averages, which is often useful in political as it is in commercial or financial business. Still when all these and other aids towards the certainty of political science have been employed, it cannot be denied that the solution of political problems is liable to be disturbed to a much larger extent than mathe-

matical or physical problems by the personal equation. A Mohammed, a Cromwell, a Napoleon, or a Bismarck disappoints all previous expectations as to the course of political development. The customs of China, of India, or even of Ulster, may alter materially the results, and falsify the predictions of political economy.

The recent history of political economy affords a striking example of the error of neglecting this consideration. It will also assist in the elucidation of the main argument of this essay, so that we may be pardoned for making an apparent digression with reference to it. Not Adam Smith and the original founders of political economy, but most of those who have written on this subject until quite recently fell into the mistake of supposing that a large part, and, what appeared in their mode of treatment, almost the whole of political economy—such subjects as capital, labour, wages, value, and rent—could be dealt with as if they were subject to laws as fixed as those which govern the motion of the earth or the stars. If this was a mere abstract theory, if it meant no more than that, by isolating from all the other facts of life and action the motives which are regulated by self-interest and by postulating the premise that men will act always as self-interest dictates, certain results will necessarily follow, this section or school of political economists was right in its theory. Their treatises have been and are of undoubted value, not only in themselves, but also as giving an example of the possibility of applying by the method of isolation to certain portions of the subject-matter of politics the most rigid rules of abstract reasoning with a precision almost mathematical. But practically this theory is incorrect and misleading. It does not allow or does not sufficiently allow for the effort of free-will, for the power, often exercised, of independent action, not only by individuals, but by communities. This was at once perceived when political economy came to be studied historically. It could then no longer escape notice that many nations as well as individuals did in the past and might in the future fail to act according

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to the laws which the modern school of political economy claimed to be invariable or necessary. This school of political economy received a further shock when first a few moralists and preachers, and afterwards some practical as well as some theoretical politicians, refused to accept these laws, and succeeded in ignoring them in legislation. A new school, or it might be said new schools, of political economy are now quite legitimately engaged in endeavouring to discover and gain acceptance for new laws for that science. The free and fair discussion of these is an important part of the province of political science. A different and even more serious error was committed when the political economists supposed, as they frequently did, that their science covered the whole field of politics, and that political science was concerned with nothing more than the material interests of man, and required nothing more than the clear statement of the rules along with their necessary consequences, which such material interests, if they alone governed human action, would produce. No such error as this could have been committed if the idea of politics as the science of all that concerns the state had not been lost sight of. For it is obvious that such a science comprehends much more than the production and distribution of wealth in the ordinary sense of that word. It is true that Adam Smith in "The Wealth of Nations" included under it, and may be said to have treated, although as it were incidentally, almost the whole range of subjects which belong to politics as a science. But those who came after him more and more restricted the scope of their science, until it came to mean little, except what the Greeks sometimes called chrematistics, the science which relates to money or its equivalents. With John Stuart Mill a reaction—partly unconscious—began, and is now in full operation. Education, for example, to take a single, but a very notable instance, in so far as it is recognised as a duty of the state, has again received consideration from many modern political economists as it had done from Smith. But this was a deviation or excursion from the subject treated by the stricter school of

political economy. Of course if wealth is taken in its wider meaning of the welfare or well-being of nations, no better description of politics could be given than the science of the wealth of nations. The Greeks in fact so understood it. The science of politics then, in its proper meaning, while it excludes the art of party politics, includes political economy, the science of the production, the accumulation, and the distribution of wealth, with its subordinate departments of finance, including taxation, population, agriculture, manufactures, and commerce. This subject is now frequently called Economics, the science of the administration of these various branches of business, and it would be not amiss to divide it into Private Economics, and Public or Political Economy, which deals with it in so far as it relates to the state. Extensive as the subjects falling under public economics or political economy are, the science of politics includes other subjects as important. The present is the proper point to take a survey of its contents, which must of course in such an essay as the present be of a general character. Regarding its proper sphere then, as has been done throughout, as the science of what relates to the State, another large subject which directly belongs to it is public law. The writer was recently asked by an able physicist who possessed also wide general knowledge, What is public law? Such ignorance in such an unexpected quarter proves the necessity of explaining the term, although it is now familiar at least to all lawyers. It was defined in the Institutes of Justinian where, contrasting it with private law, it is said, "Public Law is the law which relates to the Roman State. Private law is the law which relates to what is useful to individuals." This definition of public law though excellent in intention fails by reason of its brevity. It may be expanded thus: "Public law is the law which relates to the state and to the individual as a member of the state." It fails also owing to the exclusiveness of the Roman ideal which recognised no state but Rome. According to the conception of modern times, public law is the law which deals with the rights and obligations of the state in

its relation to the individuals who are members of it, and to the rights and obligations of independent states in their relations to other independent or subordinate states. It follows that it may be divided into two distinct, and not by any means similar, or even homogeneous parts—National and International Public Law. Some English lawyers have disputed the claim of International Public Law to be called law, because it does not possess the sanctions with which they are familiar in the law of England, but probably the boldest of them (Mr. Justice Stephen, for instance) would not deny its existence, although he might regard it as more accurately described as international custom rather than law. But custom is only one form of law—and there may be other sanctions (assuming a sanction or means of enforcing obedience to be necessary to a law) than fines and imprisonment, as has been well shown in the Lectures on International Law by Sir Henry Maine. It was, in fact, in modern Europe, after Grotius wrote his treatise, "*De Jure Belli et Pacis*," to international law that the term "public law" was first applied. Its name appears along with the *jus naturæ* and the *jus gentium* on the title-page of that treatise and in the prolegomena. Grotius says: "The law which regulates the relations of different nations in their rulers, whether derived from nature itself, or constituted by Divine laws or custom, or introduced by morality and tacit agreement, has been treated by few persons, and as yet by no one in a fixed order, but it should be, in the interest of the human race."(*a*)

These are golden and well-weighed words. We may venture to transfer them to the whole science of politics. Of this science now, as of public international law in the age of Grotius, it may be said,—Few have touched it, and none (since the two great Greek philosophers) have treated it as a

(*a*) "Jus illud quod inter populos plures aut populorum rectores intercedit sive ab ipsa natura profectum aut divinis constitutum legibus sive moribus et pacto tacito introductum attigerunt pauci, *universim ac certo ordine tractavit hactenus nemo. Cum tamen id fieri interesit humani generis.*"

whole and in a definite order. Yet it is the interest of the human race that it should be so treated.

At a somewhat later period public law came to be used in English in its Roman sense of the law which relates to the state and its members, or, as it may be conveniently called, National Public Law, to distinguish it from International Public Law. Both of these divisions of public law admit, as numerous works in recent times prove, of being treated systematically and scientifically, quite independently of party controversies. The distinction between them must neither be ignored nor exaggerated. National Public Law has all and the same sanctions which municipal or private law possesses for enforcing obedience. It can be stated in as definite and as generally accepted propositions as private law. It may be, and in some countries it has been, embodied in a code. It may be, and in some countries it is, administered by a special tribunal, while in all countries it is recognised by the ordinary Courts when any suit comes before them which requires the recognition.

With International Public Law it is different. Only that part of it which is expressed in treaties has vigour and force similar to private law. The greater part of it consists of more or less recognised custom, and is expressed only in the unauthoritative works of the writers who have treated it. Yet it would be a great error to suppose that it is altogether without sanction, and is not entitled to the name of law. There were persons in the time of Grotius who fell into this error as there are now, but they are now with less excuse. He declares the necessity for his work to have been partly due to the fact that there existed in his time, as well as in later times, those "who despised international law as if it were only an empty name."

But if it possessed no other, public international law has an important and powerful sanction in the public opinion of the civilised world, which States no more than individuals can afford in the long run to despise, to which, indeed, statesmen frequently appeal. "To impress on the consciousness of

the world that England keeps its promises," said Lord Salisbury recently, "is more important than any victory." When, too, in modern times the interpretation or application of the rules of international law has been disputed, effect has frequently been given to them by international arbitration, either by some impartial umpire or a tribunal for the purpose. Of this there have now been too many instances to deny its possibility or practical effect. The payment by England of the Alabama Claims was an example of it, as we say, "in hard cash." The settlement by the Pope of the dispute between Germany and Spain was another. In both cases the stronger power submitted to an adverse sentence. The sword is no longer, as it was called by a natural but false metaphor, the only arbiter of nations. It is not of course disputed that the rules of international public law may be disregarded, but may not the same be sometimes said of those of private law?

Still it must be acknowledged that much remains to be done before international public law attains the same status as private law generally possesses in civilised countries. To attain this end the free and full discussion by persons belonging to different nations of the questions relating to it as a part of political science—the appeal to the reason and the conscience of the members of various independent societies which together constitute the human race are necessary. It takes time to instruct the reason and inform the conscience of nations as of individuals; nor can this be wondered at when there are persons who still deny the possession of conscience by either.

The day is not so long past when England and Scotland required such a discussion and appeal in order to formulate Border laws and procure obedience to them. International public law is in fact a wider and more important border law between the independent states which form the community of civilised nations. There were once many persons in both countries who held that England and Scotland must be eternal enemies; but even before, and apart from the

Union, their opinion proved erroneous. So are there now those who regard the states of Europe and America as necessary adversaries, whose chief duty it is to provide the strongest fleets and armies, and the most destructive guns, and who will admit no common law to regulate their relations to each other. But the student of political science may suggest the question whether this may not also prove a fallacy which the study of this science may end in rejecting.

International private law, it may be noted in passing, is truly a department of private municipal law, and does not fall within the province of the science of politics. It is an important, and increasingly important, part of general jurisprudence. Its existence is, however, an evidence of the possibility of international rules settling the right of individuals of different states in a manner now practically acknowledged and given effect to by all civilised states.

National public law is now more familiarly known as Constitutional Law. This is a good name, yet its choice indicates a time when the extent of political science was imperfectly understood in England. For constitutional law, the law which regulates the form of government, is only one-half of national public law, and not the most important half, if we accept the partial truth contained in Pope's familiar lines:—

> "For forms of government let fools contest,
> That which is best administered is best."

The other half is administrative law: the law and customs which regulate the actual working of government in all its multifarious departments—local as well as national, delegated as well as direct. Taught by the French and German publicists, the importance of administrative law is now fully acknowledged in England: but although several attempts have been made, an English work treating the subject of English administration is still so much a desideratum that the German work of Gneist is being translated for the

benefit of the English reader. It is a subject which more than most demands the discussion of its details by persons specially conversant with its particular parts, and no foreigner can do complete justice to it; yet no review or other periodical at present affords it the requisite degree of attention.

Æ. J. G. Mackay.

THE NEW CODE FOR THE GERMAN EMPIRE.(a)

IN the early German Empire the number of different legal systems was not objectionably great. The imperial legislation, it is true, was so much occupied with questions of public law affecting the maintenance of the peace of the country, that it had scant time left for any other branch of the subject, and least of all, for municipal law. Its decrees, few in number, were binding on every German. For the rest, the legal system under which a man lived was determined by the tribe or race to which he belonged by birth. These tribal systems of law (*Stammesrechte*) were, however, not numerous. In the north, the Frisian and the Saxon; in the middle, the Thuringian and the Frankish; in the south, the Alamannish and the Bavarian. There were, accordingly, in Germany territories of very considerable extent which were under one law.

This condition was completely changed after the thirteenth century. With the rise of the territorial lords or princes the separate lands held themselves jealously apart. By a decree of the empire the lords had gained the right of laying down laws for their respective lands, a right of which they were not long in making an extensive use. Inside the wide area in which hitherto one tribal system—*e.g.*, Saxon or Frankish, had prevailed, there now arose scores of little states, each with its own peculiar national or "state" law.

[(a) This article was written in German by Professor Dahn, and has been translated by F. P. Walton, Esq., Advocate.—Ed. *Jurid. Rev.*]

But this process of separation of laws presently ran perfectly wild. Not only did the "estates" of the empire, about 260 in number, consisting of princes, counts of the empire (*reichsunmittelbare Grafen*),(*a*) and imperial cities, set up their own "state" law, "county" law, "civic" law, as the case might be, but other associations followed their example. Among these were family and professional leagues, the princely or knightly orders, vassals, courtiers, merchants, artisans, peasants, as well as smaller territorial units such as unions of parishes and village communes. To make "confusion worse confounded," the limits of these new authorities and of the old tribes overlapped. One of the greater princes, for example, would count among his subjects both Thuringians and Franks, or Franks and Alamans, and the laws he made were binding on both.

It has been asserted that this multiplication of systems was largely counteracted by the general acceptance of Roman law. But this is only true in so far as the Roman law was regarded as the common law of the country. Recourse was only had to it when the "state" law supplied no principle by which the question could be solved. Moreover, the extent to which Roman doctrines were thus applied, varied greatly in the different states.

In 1806, at the time of the dissolution of the empire, this parti-coloured aspect of the law was perfectly bewildering. The uncertainty which resulted made itself most disastrously felt in the department of commercial law. Commerce is the means by which property circulates. But obstinate clinging to the peculiarities of a race or country prevents interchange. In the law of contract, and in mercantile law generally, it is always possible to eliminate these peculiarities far more completely than in the law of the family, the law of real property, or the law of succession.

(*a*) The expression, "reichsunmittelbare Grafen," translated above "counts of the empire," denotes the counts who exercised sovereign authority in their territory, and owed allegiance to no lower power than the empire.—*Translator's Note.*

Hence it results that the history of mercantile law from the earliest times exhibits a tendency towards unification. In each period of history we see that the law of the leading commercial people tends to become dominant. It was so with the Semitic, the Greek, and, under the emperors, the Roman system, and in more modern times with the Italian. It is therefore easy to be understood that in Germany the need of one system of law for the whole empire should have made itself felt, first and most strongly, in regard to commercial matters. The first thing to begin with was obviously the law relating to bills of exchange or commercial paper. Here the need of uniformity culminates. If commerce makes the circulation of property possible, so, in turn, it is mercantile documents which make commerce, that is to say credit, possible. Hence the first branch of the law which it was successfully sought to codify in Germany, was the laws of bills of exchange (Wechsel-ordnung of 1848). Thereafter the general commercial law was codified (Allgemeines Handelsgesetzbuch of 1859).

It is highly satisfactory to contemplate how the desire of the German people for unity in law, as in other things, has steadily gained in strength during the last forty years. In codifying the two branches of law above mentioned, the greatest care was taken not to infringe on the sovereign authority of the allied states. It was even considered necessary to insert a clause analogous to the well-known "saving clause" in the law of the old empire. By this clause it was expressly declared that no Government which sent representatives to the deliberations in Leipzig, Hamburg, and Nuremberg, should be in any way bound by the decision of the majority there to introduce a "State" law in the same sense. It was long thought necessary to renounce all hope of having one maritime law for the empire, on the ground of the variety of the rules and customs relating to shipping. The greatest anxiety was also shown to avoid coming in conflict, even in matters of commercial law, with the *public* law of any of the separate states. So, for example, no

attempt was made to place the law relating to the Stock Exchange, and, in part at least, to brokers, on the same footing for the whole empire. This fear of collision with the public law—*i.e.*, speaking generally with the administrative law—of the separate states remains too characteristic even of the present "draft-code."

The founding of the North-German Confederation in 1866, and still more the creation of the German Empire in 1871, powerfully stirred the feeling of German unity, and this feeling led to results of which we may well be proud. But even yet a very moderate measure of identity in law was all that was aimed at. Only criminal law, criminal procedure, and procedure in civil actions were, by Article 4 of the Constitution, to become the same for the empire. The codes of mercantile law, including maritime law, bills of exchange, and general commercial law, so far as dealt with in the Allgemeines Handelsgesetzbuch of 1859, were declared laws of the empire—*i.e.*, it was to be incompetent for any individual state to modify them. To these were now added the law of "intellectual property," including patent law and the law of "claims," about which the German Confederation in its day had already passed a number of resolutions. With these exceptions, the whole subject of municipal law—*e.g.*, the law of persons, the law of things, the law of the domestic relations, and the law of succession—was placed outside the legislative authority of the empire. But before long the refreshing growth of the sentiment of national unity broke through those unworthy restrictions, which, even on technical grounds, were quite untenable. By an imperial decree the Municipal Law as a whole was brought under the competence of the empire, and a committee appointed to take into consideration a draft-code for the German Empire. This committee consisted of distinguished judges and professors of law from all the German states. They have been very unjustly reproached with the fact that their labours have now lasted for fourteen years. How long, for example, was the Prussian Landrecht (*a*) in preparation?

(*a*) [The famous Code of Frederick the Great.—Ed.]

The very fact that, to my exceeding great regret, I cannot regard their work as successful, makes it necessary for me to say emphatically that the authors of the code have displayed the most exemplary diligence, the most praiseworthy care, and the most conscientious thoroughness. It has been already indicated that, by their high abilities, extensive legal education, and comprehensive professional knowledge, they are entitled to rank with the first lawyers of Germany. The failure is not the result of want of either industry or ability. It is due to the un-German, non-popular, and *doctrinaire* spirit which inspires and dominates both the substance and the language of the whole work.

The draft-code which is published under the title, "Der Entwurf" (J. Guttentag, Berlin and Leipzig, 1888), has its material divided into five books:—1. General Part; 2. Law of Debtor and Creditor; 3. Law of Things; 4. Law of Domestic Relations; and 5. Law of Succession. The whole occupies 2164 paragraphs. The enactment of 129 paragraphs introducing the code is appended. A draft-code of the laws of registration of titles is to follow shortly. Five volumes of critical analysis (*Motive*) are sufficient to show with what conscientiousness, acuteness, and comprehensive learning the authors have performed their task. One might say that these five volumes contain a critical study of the law which has hitherto obtained in Germany from the standpoint of the highest scientific knowledge, unfortunately, however, Roman rather than of German law. It is well-known that the man who is admittedly the most conspicuous Professor of Roman Law in Germany, I mean Professor Windscheid of Leipzig, has exercised a greater influence than any one else in giving the draft-code its present shape. Professor Windscheid's work on the Pandects, which has gone through many editions, has been for a quarter of a century the leading text-book of the civil law in Germany. He is a man of wonderful acuteness and far more than ordinary capacity. Unhappily, he has a dangerous inclination to make the most liberal use, both of his acuteness and of his power of cold

abstraction, without paying any regard to what is national, popular, in a word *German*, in thought and feeling, as these are expressed in the domestic and economic relations of our people.

With what longing did I wait for the code? At last my hope was fulfilled. A uniform law of persons, family-relations, and property was now drafted. Any one who, like myself, has for two-and-thirty years lectured on so-called "Private Law common to Germany" knows how unsatisfactory this branch of the subject is, and how inconvenient its present limitations. Cramped in on the one hand by the "Roman common law" of the Pandects, and on the other by the "State" laws of the different territories, where was the "General German law" to find expression? Statute law common to Germany existed only in the handful of laws passed by the North German Confederation and the German Empire. How weighty, then, must the considerations be which compel me to regard this much-longed-for code as a failure? My first intention was to publish a full examination of the whole work to justify my condemnation. I proposed to show—1. Its un-German character; 2. Its incompleteness; 3. Its ill-chosen language; and 4. Objections to its determinations in particular points. To this end I had already accumulated a large mass of material, and my purpose was to publish a book of from thirty to forty sheets, containing, in addition to my own, the criticisms of others interested in the question, and forming a symposium of opinions in favour of the code and against it. I have, however, determined to give my work a different shape. After the preface to my intended book was already in print, I learnt, on the best authority, that the Imperial Government had finally resolved to carry the code into effect. A little calculation showed one that they would be able to secure a majority in the Reichstag. In these circumstances I have preferred to change my criticism of the draft into a commentary on the code when it becomes law. Two reasons have weighed with me. In the first place, I did not wish to waste time and

trouble in an attempt to prevent the inevitable, and, in the second, I was moved by considerations of patriotism. The Imperial Government may be of opinion that legal unity is so indispensable for rivetting Germany together and securing imperial unity that it must at all hazards be brought about without delay, whatever the scruples of the lawyers. In that case I bow to their decision. That is a political or patriotic reason which, however regretfully, I am able to accept. At the same time, English and American readers may be interested in hearing the objections which are urged in Germany on many sides against the draft-code. For I am very far from being alone in my unfavourable opinion. In fact, no one is in favour of accepting the draft-code as it stands. Even Professor Windscheid has declared his readiness to agree to alterations, as for example, in regard to the maxim, "Sale interrupts hiring" (*Kauf bricht Miethe*)—very gratuitously borrowed from the civil law, and quite unsuited to our different social relations. Most of the critics take the view that the draft-code should be made law after alterations more or less numerous have been made in its language and substance. And this not because the code is well done, but because legal unity is so important that we must take the faults of the code, however much amended, into the bargain. It is said, "If we can't get one law for Germany now we shall never get it at all, for if we got another draft there would be fault found with it too." On the other hand, other professors of law as well as myself (I may mention particularly, Professor Gierke of Berlin), have been responsible for the phrase, "Rather wait longer than take *this* code" (*Lieber noch warten, als diesen Entwurf annehmen*). But the question is not about a few details more or less—no code will ever be drawn up which satisfies everyone in all respects—but about the spirit which inspires the whole work, and the language in which this spirit is expressed. The spirit is utterly un-German, the language thoroughly unpopular; and nothing will ever alter this, however many points of detail may be changed to

suit our wishes. The only thing would be to completely recast the whole in language and substance, and then, of course, it would no longer be "this code." The style of expression of the code is scholastic, abstract, "bloodless." It never draws from the pure well of German speech. He whose ears have ever been charmed by the purling music of our mother tongue, will hear with dismay the deadly dryness of the code. What would Master Jacob Grimm have said to the German of this German code? I do not mean that it swarms with words of non-Teutonic origin. On the contrary, these are, generally speaking, avoided with commendable care. It is true that this is often done merely by substituting for an alien word some literal German equivalent, without seeking for a German phrase actually current. And this is natural since the whole conception is not German but Roman. "We object much more to the 'Pandect language' of the code," says an acute Professor of the Pandects. It is only to lawyers that this language is intelligible. For example, it is quite impossible that even a highly educated merchant, at the very top of his profession, should understand a great deal of the part relating to obligations. Nay, even Professors of Law such as Gierke, Holder, Gareis, and myself, have admitted to one another that they have had to read many an article in the code three or four times, and to pay the very closest attention, before they were sure that they grasped the full sense and intention, and saw all that was by implication included, and what was by implication excluded. Is that the ideal language of a code? Windscheid has admitted, in fact, that this sort of language is the product of a special process of thought, the severe study of fourteen years. Before a man can understand it he must go through the same process. Poor German people! Out of your forty millions, there are not 10,000 who are in a position to understand the law under which they must live. In face of a riddle book like this, one is to keep up the fiction that every citizen knows the law. The peculiar and quite Windscheidian order in which the conceptions are correlated

makes the sentences hard to follow. The object of this is to settle a lot of old *quæstiones vexatæ* about which the different editions of the Pandects have taken different sides for the last fifty years. Vexed questions, forsooth, of which out of forty millions of Germans, possibly 1000 in all may have an inkling. Without doubt the language of the code will give birth to countless new questions as to its true construction. In addition there is a system of references which is carried to the verge of the ludicrous. The cases are not a few in which the unhappy German who wishes to inform himself about some single small point of law is referred from the article which deals with it to about a hundred places later in the work. Then when he has found his point again, he is sent to about 1000 places earlier, and thence again is referred to some place in the first book. In thirty-nine instances the references are *fourfold!* It is a regular game of hide and seek. Frederick the Great required a statute to be intelligible to every layman, and in this respect his Prussian State Law is incomparably better than this code. Yet the code is a hundred years later, a hundred years in which the German spirit has been mightily clearing itself up, in which the German language has been most successfully cultivated. It has been said that we "Germanists" require a fanciful grace of style. For my part, I should be content with language like that of the German Bills of Exchange Act of 1848 and the German Commercial Code of 1859. Is that to require fanciful grace? Both statutes an educated business man can understand well enough for all practical purposes. Even admitting it was more difficult to present the general part of the code, and the part relating to the summons, in an easily intelligible form, the attempt to do so should have been honestly made. They have failed more from want of will than want of ability. It was not a popular code, but a technical and fine-spun system that they aimed at. Before it can be understood it must be translated into German.

My limited space compels me to deal more briefly with

the legal objections to the code. Of course it has its good points. When we consider that a number of the most prominent expounders of law in Germany, judicial and professorial, have for so many years brought the most admirable acuteness, the most mature legal knowledge, and the most untiring diligence to bear on this work, it is only natural that it should contain a great deal that deserves the highest praise. The analyses (*motive*) are of the highest professional interest and value. Even as regards language, they are better than the code itself. The most successful parts are the law of succession and the law of real property. Here it was impossible to avoid German law. Where it *could* be avoided the code has kept it out, and substitutes conceptions borrowed from the civilians. So utterly hostile to German law is this compendium of the Pandects, so entirely have its compilers forgotten that it was meant to be German, that they think it necessary in their analyses, over and over again, to expressly apologise for having adopted legal ideas of mere German origin. They are anxious to prevent anyone supposing they have preferred any proposition on the ground of its being German. On the contrary, they have inserted it regretfully, because it was practically indispensable. So in substance as well as language the code is open to severe reproach as to its un-German character. Many a German legal institution still quite "viable" and useful is expressly rejected as obsolete, or receives its death-blow by being silently passed over. It is the draft of a Roman code for the German empire. The Prussian Landrecht and the Austrian code are more German than this draft which they have the audacity to foist on the people of united Germany. It was much to be wished that the codification should have diminished the Roman element in our law, whereas our present system contains in the customary law of Germany, and in the laws of the separate States, more home-grown law than is offered by the code. Professor Windscheid himself formerly expressed the opinion that a process of selection was still going on. The parts of

the Roman law which were no longer applicable were being separated from the parts which had been formally accepted, or, more truly, pressed by the civilians on a reluctant or unwitting people. As a matter of fact, a whole set of civil law maxims have in the last hundred years been expressly dropped by the law of the separate States. For example, in the law of universal, legal, and privileged *pignus*. Particularly in the law of obligations many Roman doctrines of very questionable wisdom, sometimes of very unquestionable folly, have been dropped,—*læsio enormis*, *Lex Anastasiana*, limitation of rate of interest, prohibition of *Anatocismus*, prohibition of the *ultra alterum tantum*, limitation of proof of documents of debt and receipts, *Senatus Consultum Velleianum*, and others. Very often the commercial law played the part of pioneer in declaring that business transactions were not to be impeded by this old and worthless heap of Roman rubbish, and subsequently the Legislature extended the same principle to all cases. If codification had been delayed for fifty years there would have been immeasurably less Roman law to be met with in Germany than there is to-day. And here comes this code to throw our German law a hundred years further back. For as we have said, if the Prussian Landrecht, as it now stands, had been adopted as law for the whole empire, instead of this draft of a "Roman code for Germany" (as it ought to be called), more German law would have been saved than this text-book of the Pandects will allow to live.

I have already taken up too much space for my first contribution to this *Review*, and hasten in conclusion to notice shortly the pitiable incompleteness of the code. It may have been right not to include subjects already regulated by laws of the empire, such as the law of intellectual property, patents, protection of samples and models, arrest, rate of interest, usury, &c. But woe to the poor German who hopes in this code of "municipal law" to find anything about the law of water-rights, of mines, of game, fishings, compulsory purchase, notaries, or peasant-estates. On these subjects

even after the code we shall have no *German* law but only Prussian, Bavarian, &c., as before 1871, before 1866, before 1815. The fear of infringing on the sovereignty of the separate States in anything even remotely connected with public law has prevented these subjects being put on the same footing.

To conclude, then, the code is un-German, condemns to death a great number of German legal conceptions quite capable of life, is in spirit utterly unpopular, in language not to be comprehended by the people, fit only for professional readers. Poor German peasant! Unhappy citizen, not grounded in the Pandects! Further, it is highly incomplete, and by no means comes up to what the German people might expect of its law after 1870-71.

However, there is no doubt it will become law. Alterations of detail be they never so numerous cannot alter the "Roman spirit" of the work. It is a victory of the "Romanists" over the "Germanists."

And for this we have had Jacob Grimm and Karl Friedrich Eichhorn! For this Sedan and the German empire! The statue of Germania on the Niederwald should veil her face and mourn on the day when this code passes into law.

FELIX DAHN.

PROFESSOR MUIRHEAD.

BY the death of James Muirhead on 8th November last the English-speaking part of the world has lost its most prominent civilian—the only adept in Roman law who could cope with the Germans in their favourite pursuit—and the science of jurisprudence has lost one of its eminent representatives. Scotland, scarcely knowing it perhaps, has had to surrender one of her most learned men. And the Bar of Scotland feels to-day such a blank as could hardly have been made by the removal of any one else from its midst. To hundreds of old friends and former pupils the published announcement of his death came as a shock and as a surprise, for all could remember the goodly frame and brimming vitality of the man, and he had barely reached the period when middle life begins to merge into old age. To those who were privileged to see him in the interval of four months between the first acute access of the wasting malady which carried him off and the date of his death, the news came, as a shock doubtless, but not without warning. To all the cheerful pluck and zeal with which he stuck to his work almost to the end came as a further revelation of the enthusiasm and devotion to duty which were the leading characteristics of a noble life.

It is difficult in a few lines to give an adequate idea of Muirhead's many-sided modes of thought and action; and I am here concerned mainly with only one of these. But it may be worthy of record that amidst all his intellectual labour he was not indifferent to those athletic exercises so characteristic of his nation. As a sportsman, he was a

keen golfer and curler. Passionately fond of travel, he was at home in France, Italy, and more especially in Germany, where the life of city and wild country retreat was equally familiar to him. In relation to his work as a practical lawyer and man of affairs, it is sufficient to say that he was a sage counsellor, but attained no great success as a pleader, for reasons more creditable, perhaps, to him than to the employers of the Bar. As a public prosecutor, while he held the post of Advocate Depute, he was distinguished among many on whom the same encomium could be passed as conspicuously fair to the accused, kindly to the juniors opposed to him, a merry host in the Deputes' Room when work was done for the day, and, at the same time, a hater of chicane and sly dealing. As a Sheriff he at once gained, and all along retained, the confidence of a large diocese, by a somewhat unusual devotion to his work, by the soundness of his interlocutors, and by the industry he displayed in a long series of elaborate—many thought needlessly laborious—notes in which the reasons of his judgments were explained. As a politician, he was a staunch Conservative, and did noble service at a period when Conservatism was at its lowest ebb in Edinburgh, and in Scotland at large.

In relation to the University, his work was specially valuable. As a member of the Senatus he was, for one-half at least of his academic career, the best informed and most trusted adviser, with perhaps one exception, of a Board, which had managed a huge and ever-increasing mass of business with remarkable success, and which he lived to see deprived—not unwillingly—of most of its functions. As a Professor outside of his class-room and the Senate Hall, he was all along—though member of a small Faculty—regarded by the students generally as among the best of their friends. At a time when many of his colleagues discouraged, rather than fostered, the scanty provision, in debating society, athletic club, and otherwise, for a corporate life among the students, no one championed more vigorously the cause of the affiliated societies, and no one was more frequently seen at a cricket

or football match, or at the annual prize meeting of the athletic club. The project of a Students' Union was, therefore, thoroughly to his mind. He laboured at it assiduously, and was rewarded by being a party to the opening of its handsome building. This was the last occasion of his appearing in public—a few days before the end.

But it is in relation to his work as a scholar and teacher that I chiefly desire to speak of Muirhead.

Born and bred in Edinburgh, he was originally designed for a mercantile career. With a view to this he had his first experience of the Continent, at an early age, at Lille, where he spent a considerable time in studying French. But fortunately this idea of entering into commercial life was soon abandoned, and his attention was turned to the law as a profession. And he in the best way possible set about laying the foundation for further study—and, as it turned out, for the great work of his life—for he went to Heidelberg to attend the lectures of Herr von Vangerow on the Pandects. I wonder how many there are—I know there are some—who are in the position to attest that the best academic lectures they ever heard dealt with the civil law, and were delivered by this master and this pupil of his. But what a contrast! At Heidelberg you saw standing up before his immense class the tall, gaunt, meagre Gelehrter, worn with a life of hard study and harder tuition. He was at his best when, treating of some controverted passage, he had cited an imposing array of authorities, and convinced his class that their views were unimpeachable, and then preluded a still more imposing *catena* and a sounder hypothesis with the words, "Aber, meine Herren," index finger to side of nose, assuming an inimitable air of slyness. In Edinburgh you saw seated before a mere sprinkling of students a broad-shouldered, burdly form, surmounted by a refined, close-shaven face, indicating high intellectual capacity. And enthusiasm kindled there, not over a barren logomachy, but when the gradual development of some important institute was being traced through long eras of Roman history.

Muirhead was called to the English and Scottish Bars in the year 1857, and devoted himself to the latter. In 1862 the Chair of Civil Law in the University of Edinburgh became vacant through the resignation of Mr. Campbell Swinton, who found the addition of a summer session, in accordance with the new ordinances, incompatible with his other duties. The Faculty sent up to the Curators the names of Norman Macpherson (afterwards Professor of Scots Law) and James Muirhead. The younger candidate was elected. The new professor at once began that long unintermitting course of preparation for his lectures which only ended with his premature death. At first he adopted the system of preparing a written course of lectures, beginning with the external history of his subject and its sources and then dealing with the different departments of the law in an order suggested by the works of the German jurists. Latterly he altered his scheme and spoke merely from notes, adopting for convenience the order of Justinian's Institutes. According to this plan, each lecture demanded careful preparation on the evening before it was delivered. Often what was said at nine o'clock of a dark winter morning had been conned, as his friends could testify, far into the preceding night. Whichever form was employed, the real significance and utility of the Roman Law was steadfastly kept in mind. Probably the *corpus juris civilis* has had more influence on human development than any other book, except the Bible. But now-a-days it is of comparatively small moment what Justinian's jurists thought was or should be the law of their times. It is of vastly greater importance to trace the process of evolution, whereby that law came to be what it was. Nowhere else in the history of institutions can the archaic original and its subsequent stages be so accurately and consecutively observed.

A certain fastidiousness of taste prevented Muirhead from putting the results of his vast erudition into a more permanent form than a student's note-book. Fortunately, his preoccupation with history induced him to break his

self-imposed rule and publish the two books on which his fame as a jurist must henceforth depend.

The discovery, in 1816, by Niebuhr, of a palimpsest of Gaius may be said to mark the birth of the *historical school* of jurisprudence. The labour of deciphering the MS. was the work of many years and many hands. The various editions were eagerly welcomed and diligently collated by the Edinburgh Professor; and when, in 1874, Studemund issued his final redaction in the form of an apograph, the time had come for introducing to the English-speaking student a text deciphered or conjectured according to the latest research. The result was the publication, in 1880, of "The Institutes of Gaius and Rules of Ulpian, with Translation and Notes." In this book it is easy to see that the author exercised an independent judgment, differing in many important passages from his German predecessors, and displaying an intimate knowledge, not only of the sources themselves, but also of all that had been written regarding them by a host of commentators.

Prior to 1886 Professor Muirhead undertook to prepare for the ninth edition of the "Encyclopædia Britannica" the article on Roman Law. When the MS. was submitted, it was found, as might have been expected, to have grown to such dimensions as could not find room in such a publication. It had to be cut down; and I can well remember, in reading the proof-sheets, how much it suffered in the process. The work of compressing what was already terse, even to baldness, sacrificed literary form, and tended towards obscurity. It was, accordingly, a distinct boon to the legal world when an arrangement was made with the publisher of the Encyclopædia to bring out in book form the original article, largely added to and rewritten. This is the "Historical Introduction to the Private Law of Rome." It was at once recognised both at home and abroad as a masterpiece. It has been already translated into Italian by Sig. Gaddi, and into French by M. Bourcart; and it obtained for the author in 1888 the high honour of being elected as an honorary

member by the Juridicial Society of Berlin, and by the Institute of Roman Law in Rome.

In conclusion, I venture to point to Professor Muirhead as a noteworthy example of enthusiastic devotion to science for its own sake. His laborious career as professor and scholar was rewarded by little public recognition and by emoluments, which, looking to the length of the academic session and the excellence of the work, were ludicrously small. But he possessed the true scientific spirit, and cared for none of these things.

JOHN RANKINE.

II.(*a*)

The unexpected death of Professor James Muirhead, of the University of Edinburgh, has been the subject of universal regret amongst the friends of juridical science in Italy.

The name of Muirhead first began to be familiar to us in 1880, when he published his admirable edition of the Institutes of Gaius, founded on the apograph of Studemund. Our feeling of respect was further enhanced when it became known that the diligent and conscientious editor of Gaius was also the author of the article upon Roman Law which appeared in the "Encyclopædia Britannica" in 1886—an article which was afterwards published separately, in a more elaborate form, under the title of "Historical Introduction to the Private Law of Rome."

This latter work of Muirhead obtained amongst us a twofold success. On the one hand, it was appreciated for the novelty of its method and the originality of its views; on the other, it pleased by the sobriety and accuracy of its

(*a*) [The following notice has been contributed by Professor Carle of the University of Turin. It has been translated from the Italian by Mr. A. P. Goudy acting Greek Consul, Liverpool.—ED. *Jurid. Rev.*]

diction, by its order and clearness of exposition. So much was this so that it was deemed worthy of being translated into Italian by Dr. Luigi Gaddi, and adopted as a text-book in some of our Universities. And of late years there has been scarcely any work published in Italy on the subject of Roman Law which has not given due consideration to the opinions expressed by Muirhead.

The writer of these lines, whilst profiting by the opportunity here afforded him to thank the English press for the kind reception extended to his recent publication on the "Sources of Roman Law,"(*b*) feels it his duty to state that the idea of that work was partly inspired by the work of Muirhead, his study of it having materially assisted him in getting rid of difficulties which previously perplexed him.

There can be no doubt that for some time past Italy has been following with increasing interest the development of juridical and social science in England. The attention which distinguished English authors have been recently bestowing upon some of our eminent writers and thinkers (for example, Holland's work upon Alberico Gentile and Professor Flint's monograph upon Vico), the sympathy which our national cause has awakened in England, the kindness and hospitality shown to some of our statesmen in that country, and, indeed, a certain similarity in the mental characteristics of the two peoples — all this has of late years contributed to stimulate that intellectual intercourse which has never been altogether wanting between Italy and Great Britain. The students of juridical and social science in Italy were among the first to recognise the great influence which was destined to be exercised upon the study of law by the researches into comparative jurisprudence made by Sumner Maine and the sociological doctrines of Spencer. The works of Sumner Maine, Freeman, Hearn, Buckle, Spencer, Bagehot and Tylor, were not only read in Italy but were the subject of

(*b*) *Le origini del diritto romano.*

careful examination and discussion. Moreover it was with especial pleasure that we saw recognised in England the great importance to be attached to the study of Roman law and its history in legal training. It became apparent to us that this common branch of study would serve to bring the two nations still closer, and we welcomed with satisfaction the works of Goodwin, Roby, Clark, Strutton, Holland, Pollock, Sheldon Amos, Middleton, and others, showing, as they did, the vigorous impulse which the studies of Roman law had now received in England.

It was therefore natural that a work like that of Muirhead, which reproduced in a marked degree the scientific spirit of the place in which it originated, should meet with a favourable reception over here. Muirhead to us is not only the learned editor of the "Institutes of Gaius," but also the compatriot of Sumner Maine and of Spencer; not only is he a distinguished jurist, but one profoundly versed in the general history of Rome.

In the work referred to, the author properly distinguishes the period of the origin of Roman law from its historical development. In the study of its sources, the attempt has been made to reconstruct a social state that had entirely disappeared—a state bordering on prehistoric times—and in accordance with this, Muirhead did not hesitate to carry back his readers into the early conditions of society in which Rome had its origin, and to have recourse even to conjecture where necessary, availing himself of the results which the studies of comparative jurisprudence and of sociology afforded him. On the other hand, on arriving at the period of the legislation of the Decemvirs, he felt himself on firmer ground, and, supported by the evidence of writers and ancient fragments that have come down to us, he has endeavoured always to proceed with due regard to his authorities, at the same time turning to the best account the laborious researches of German scholars on the subject of the remains of the primitive law of Rome. Yet even in this part of his subject, the originality of Muirhead manifests itself. By dividing

his historical exposition into the periods of *jus civile*, *jus gentium* and *jus naturale*, he has succeeded not only in co-ordinating, but also in clearly explaining the slow and gradual changes that took place in the legislation of Rome. So also, by prefixing to each period an admirable compendium of the changes that had occurred in the social condition of Rome, he has succeeded in making the history of the law develop itself in harmonious progression with the social and political life of Rome. By such means Muirhead has been able, within small compass, to delineate accurately the historical changes which Roman law underwent from its origin down to Justinian, and has thereby shown the true method in which its history must be treated in order to awaken the interest of the youthful student, and to become a useful guide in legal education.

It is truly a great misfortune for the youth of Scotland to have lost such a master; but they must comfort themselves with the thought that he still survives in a work which bears on its pages the impress of his mental qualities and sympathy of heart.

It is sufficient to read the Historical Introduction to feel oneself in contact with a mind at once clear, well-ordered, in touch with contemporary scholarship, and yet modest and unpretending—the mind of one who writes not to put himself forward, but rather to help others to the acquirement of knowledge. All through the work there is clearly apparent the enthusiasm which he brought to bear on the subject of the external history of Roman law, and his profound conviction of the necessity of such study in the legal curriculum. It was this very conviction which he gave expression to in one of his letters to me written at the time when it was reported that our Government was desirous of abolishing this branch of instruction in the Italian Universities:—"It astonishes me to hear," he wrote on the 9th January, 1889, "that your Government proposes to displace the History of Roman law from the curriculum of the Universities so soon after introducing it. But I hardly think

that will make any change worth speaking of. The study of it has been taken up too heartily and energetically by Italian jurists to be given up for so slight a cause."

It is indeed true that the danger referred to has not yet been wholly removed in Italy; and in the hope of averting what would be a distinct misfortune for our Italian Universities, I think it my duty here to appeal to the great authority of the two English writers, Sumner Maine and Muirhead, whose labours have so largely contributed to the study of Roman Law and its history being taken up in recent years with such earnestness and such excellent results in Great Britain.

GIUSEPPE CARLE.

LAND LAW REFORM IN SCOTLAND.

THE question of the ultimate shape which the system of land laws in Scotland is to assume is a great and perplexing one. It cannot be taken as beyond doubt that the public will be satisfied if land is simply turned into a freely transferable commodity. It may be that the State and the subordinate public authorities will be called upon to exercise a large measure of control over the disposition and use of this commodity. But in the chaos of confused and conflicting opinion on the matter, there is one point on which for some time no observer has been able to entertain reasonable doubt. The public has made up its mind that it desires to get rid, as far as practicable, of the restrictions on the free disposition of land which are due to the existing systems of settlement and entail. It is for Parliament and the legal profession to give effect to this wish, and it appears to be in the interests of both that they should act in accord.

The term "settlement" is not, when used in this context, a Scottish one. But no other word, of which I am aware, describes the system under which, apart from the power of entail, land can be tied up in the hands of trustees, so as to confer a limited beneficial ownership upon a succession of persons. The kind of ownership corresponding to this in English law, as well as other kinds of limited ownership, comprising all interests, whether feudal or obtained through the medium of trustees, not less than a life estate, were subjected to a great change in 1882. The genius of Lord Cairns, certainly so far as England is concerned, the most successful land law reformer the country has had, devised a

means by which, as between himself and the public, the limited owner became as free to deal with his land as though he had a feudal title in fee-simple. The object of this paper is to consider whether there is any feature in the land laws of Scotland which precludes a change which has given universal satisfaction in the country where it has been brought about, from being extended to Scotland also.

The theory of the Settled Land Acts of 1882 and 1884 is that every one in possession of land by a title not less than a beneficial life-rent, should be able to deal with the land, or the interest in it which is settled, so as to turn it to the best account, to the same extent as if he were a prudent owner absolutely entitled and having complete power of disposition. As against succeeding fiars, he can, for instance, turn the land into money by selling it, or make it productive by leasing it. But he cannot, as against these fiars, put any money, which represents the capital value of the land, into his pocket. This money passes into the hands of trustees or the Court, and, being properly invested, takes the place of the land by the realisation of which it was produced. Thus there is no longer power, so far as England and Ireland are concerned, to tie up land. Its value only can form the subject of an entail or settlement.

Previous to 1882, settled land, in these countries, was dealt with under a series of statutes, which enabled summary application to be made to the Court for powers to limited owners to sell and lease, and which conferred various powers of sale and leasing upon trustees. The common law of England and Ireland was probably at all times, so far as land was concerned, a more clumsy and cumbrous law than that of Scotland. But, whatever the reason, its excrescences had been subjected, even before 1882, much more freely to the pruning hook of the reformer. It is not too much to say that, even as the law stood prior to the Settled Land Acts, limited owners possessed powers of dealing with settled land, at least as wide and as cheaply put in operation as such owners have at the present moment in Scotland

under the Entail Amendment Act of 1882. And a practice had become almost universal of precluding the necessity of any application to the Court by giving the trustees, under every well-drawn settlement, the most ample powers.

Why then did there come about a general consent that even fuller powers should be conferred on the beneficiaries themselves. Simply because common experience showed that trustees had not the same motive for putting their powers in force as the beneficiary in possession had, and that consequently, even when legally free, the land was morally as tightly as ever in the grasp of the dead hand. The result was a revolution in the system, and a revolution which has given universal satisfaction. Not only has the new machinery worked with perfect smoothness, but no case, so far as I have been able to ascertain, has occurred, in which any fiar has been defrauded of his money value. The advantages of the new system over a complete abolition of the power of settling land are obvious. It may be right to get rid of entails altogether, and even to restrict the power of creating life interests. But if you abolish the latter altogether, you at once introduce a new artificial distinction between land and other kinds of property, which prevents the small investor, who wishes to make a provision for his widow for life and afterwards for his children, from buying his house or a small piece of land.

Why should the new system not be applied to Scotland? Whether there are technical difficulties in the Scottish common law, I will consider presently. In the first place, I should like to make it clear that there are no social or economic reasons to the contrary. As far as I can discover, the owners of the land are pretty nearly of one mind on the subject. Speaking as a trustee of one of the largest building estates in Scotland, and of at least one small one, I can myself testify to the not unreasonable indisposition of a trustee to concern himself further than the strict obligation of the law compels him in the development of the trust-estate. It is nearly always with a sense of risk and uncer-

tainty, arising from want of knowledge and personal interest, that a trustee of land puts his powers into operation. The family legal adviser is the real owner of the property. It may be predicted, with more confidence than is usually prudent in prophesy, that any attempt to meet the general demand by merely extending, however widely, the powers of trustees will fall flat. The problem is not a legal but a social one. It is not the lawyers but the public who have to be satisfied, and unless the reformer determines to go at least as far as Lord Cairns saw to be necessary in England, he may make up his mind that he will not merely add another useless statute to the Parliament Roll, but that he will probably be met with keen opposition from the mandatories of the lay public.

Is there, then, any technical difficulty in the way? Is it true that the land system of Scotland is theoretically very different from that of England? In the latter country the fee-simple in possession is settled by being cut up into estates for terms of years, for life, in tail, and in fee-simple, the estates subsequent to the first taking effect by way of remainder, either vested or contingent. The rule against perpetuities, which has been in existence for a couple of centuries, not only prevents the limitation of any of these estates to take effect in future, otherwise than within the period of a life or lives in being and twenty-one years afterwards, but prohibits any restrictions or alienations sought to be made operative beyond that period. The owner of an estate tail in possession can enlarge it into a fee-simple by merely enrolling in the proper office a short deed, and without any consent of or payment of compensation to the owners of the subsequent estates in remainder. He is in substantially as good a position as a fee-simple owner, excepting that, unless he disentails, he cannot dispose of his property by will. But a mere tenant for life, while he has the freehold or seisin, and is as much a feudal holder as if he were tenant in fee-simple, has an estate which cannot at common law be enlarged or disposed of beyond the lifetime of its owner. This state of

things was in England, as it has been in Scotland, declared to be intolerable. The result was a series of statutes which culminated in the Settled Estates Act of 1877. The principle of this and the preceding Acts was similar to that of the Scottish Entail Amendment Act of 1882. It enabled certain limited owners to lease, sell, and improve the property, but the powers conferred were made exercisable only after the cumbrous and costly preliminaries of obtaining orders from the Court, and in some cases of procuring and proving consents, had been gone through. It is true that in England strenuous attempts were made to reduce these preliminaries to a minimum by enabling applications for judicial authority to be made in Chambers instead of in open Court, and without the attendance of counsel. These attempts have had useful results, but it became at an early stage apparent that if the landowner had to go through *any* formalities involving a considerable expenditure of time and money he would not exercise his new powers. The consequence was that in 1882, when Scotland first got to the full extent the benefit of the principle of the English Act of 1877, that Act was thrown overboard by English law reformers, and the Settled Land Act adopted on the recommendation of Lord Cairns.

It is true that the common law of Scotland presents to the would-be reformer some striking points of contrast in its theory. The fee-simple could, at no time, be split up into estates. A liferenter has not got the freehold or seisin, but merely owns a real right in the nature of a burden on the estate of the owner in fee. The consequence of this is, that the rights of a liferenter in Scotland are, at common law, narrower than those of an English tenant for life. Not only can he not deal so freely with the land during his occupation of it, but he is even liable, during that occupation, to interruption by the fiar, who may enter and work the minerals, or cut timber, on paying compensation for the interruption. Again, under an entail, the entire fee is in the institute, but destined to a series of heirs under fetters which would have been wholly inoperative at English law,

but which, until 1848, made an entailed estate in Scotland absolutely inalienable, there being no restriction analogous to the English rule against perpetuities. Prior to 1848, the only modifications of the common law, consisted in the introduction of certain greatly restricted powers of charging, leasing, exchanging, feuing, and selling, which were conferred, subject to costly and complicated preliminaries, on owners of entailed land. The Rutherfurd Act of 1848, and the Entail Amendment Acts, which were afterwards passed, made considerable improvements in the law. Power to disentail, but only under the order of the Court, and on obtaining certain consents or paying large compensation for the disappointment of expectant interests, were introduced. A restriction on perpetuities was enacted, consisting in the prohibition of liferents in favour of unborn persons, and of restrictions (other than such as were expressly recognised as legal), in the interests of future heirs of entail. The then existing powers of selling, feuing, leasing, exchanging, and charging the entailed land were extended, but were still hampered by the necessity of expensive and tedious petitions. The Entail Amendment Act of 1882 simplified the law relating to disentail, which, under this statute, became possible in all cases, on payment of the proper amount of compensation. The Act may originally have been intended to extend to Scotland some of the beneficial reforms given to England by Lord Cairns' Settled Land Act of the same year. But the mere mention of three parts in which it did not carry out this purpose, will show what remains undone. In the first place, its powers were not conferred on liferenters, feudal or beneficial. In the second place, such powers as it did confer, fell far short in their scope of those conferred by the English Act. In the third place, these powers were not permitted, as under the English Act, to be freely put in force without the sanction of the Court.

Of course this has not passed unnoticed. During the recent agricultural depression, the complaints of Scottish landowners about their legal position were both long and

loud. In the case of a landlord, in a period of depression, there is special cause for pity. He is a scapegoat who has to bear the burden of the sins of a number of persons who are often more guilty than he, if hard dealings with dependents take place. He is, as a rule, not, as is popularly supposed, a single individual battening and fattening in his castle on the produce of the land around; but a highly composite legal entity. The legal landlord consists of the owners of the various estates and interests, plus the owners of the various bonds, family charges, and other incumbrances which affect the settled land. The majority of these have nothing to do with tenants or adjacent municipalities, and they therefore put their legal rights in force without consideration of circumstances. And the brunt of all this has to be borne by a solitary figure, often subsisting on a small margin, who is in occupation, and is accordingly the only individual whom the public see. Now, one great merit of the change introduced by Lord Cairns was, that it enabled this individual, by a simple legal process, to turn the whole of the settled property into money, and transfer the burdens on his ownership to what afforded a far better security for them than the land,—carefully made investments of the price. Why should not such a power be conferred on the owner of land in Scotland? There appears to be absolutely no real reason for refusing it. The theoretical differences in the common law of the two countries, already alluded to, have no substantial consequence in practice, or at least none which cause embarrassment. The comparatively slight points of divergence which arise from a liferent in Scotland being in theory a burden only, and not a feudal estate, necessitate nothing more than provision for one or two exceptional cases, such as the right of the liar to open and work minerals during the liferent. The two or three points such as these will not, if the law be altered, arise in the future, and so far as existing titles are concerned, they can be met by an allowance to the liar of a proportion of the income to arise from the investment of the capital money.

It it said that there exist fewer feudal liferents in Scot-

land than in England. The answer is that there are at least as many beneficial liferents, created through the medium of a trust, and demanding the application of the principle which has been successfully extended in the sister country to equitable and legal tenants for life without distinction. Those who have not been familiarised by practical contact with the miserable position of a beneficial liferenter may have difficulty in realising how hard it is for him to get his trustees to put their powers in motion, and how cruelly unjust from an economic point of view is the position of a landlord holding under such a title. No consolidation of the entail laws, no extension of the powers of trustees, can meet such a case. It may be right to loosen the grip of the dead hand by restricting the power to create such ownerships. At least it is expedient to restrict that grip to the money value, as distinguished from the specific acres. The public is slow to move. But when it does move it is prone to exert its strength with at least as much force as caution. Is it not better to grapple, while it is yet possible, in a moderate and reasonable spirit with grievances which practical people admit, rather than to leave them to the handling of iconoclasts?

R. B. HALDANE.

THE BURGH POLICE AND HEALTH BILL FOR SCOTLAND.

AS this measure, which was in 1888 under the consideration of a Select Committee consisting of twenty-five members of the House of Commons, is likely to be introduced next session, and as the executive officers of the Convention of Royal Burghs have been urging local authorities to assist in getting the Bill passed into law, it may be instructive to look into it as revised and amended by the Select Committee, with a view to discovering whether it is not yet capable of improvement.

It appears from the report of the Committee that very great care and attention was bestowed upon the measure, and that sixteen meetings were held for its consideration. The members of Committee were very frequently divided as to proposed amendments, and a number of these amendments were carried only by the vote of the chairman. When the Bill was submitted to the Select Committee in May, 1888, it contained 555 clauses; after revision by the Committee it consisted of 571 sections, being an increase of 16.

But despite the care bestowed on it, the Bill contains defects. *Inter alia*, there are several inconsistencies in regard to the titles of officials, which may probably be accounted for by the haste with which it was printed in order to afford an opportunity of getting it passed before the end of the session. For instance, in numerous sections of the Bill the title "procurator-fiscal" is used to denote the burgh procurator-fiscal or public prosecutor for the burgh, whereas the title "burgh prosecutor" is used in other sections to denote the same

official. The title *Procurator-fiscal* is an ancient one, and no good reason has been given for its abolition. At present, a procurator-fiscal acts as prosecutor—(1) in Sheriff Courts; (2) Burgh Courts; (3) Police Courts; (4) Justice of Peace Courts; and (5) in Dean of Guild Courts. No confusion has arisen in consequence of the prosecutors in these respective Courts holding the title of procurator-fiscal, for the reason that the procurator-fiscal is usually named in conjunction with the Court to which his office is attached. In the event of the title of procurator-fiscal in the Bill being superseded by that of "burgh prosecutor," the title of procurator-fiscal will still be retained in connection with the Police Courts of Glasgow, Edinburgh, Dundee, Aberdeen, and Greenock, unless the Police Commissioners choose to adopt the sections of the Bill containing the new title of burgh prosecutor. Again, it is to be noticed that in many sections of the Bill "chief constable" is used to denote the chief officer of police of the burgh, whereas in some other sections "head constable" is used to denote the same official. I now proceed to more substantial criticisms.

Application of Act.—When the Bill was before Parliament several years ago, it was proposed that the portions of it referring to police and sanitary matters should apply to all the burghs in Scotland including Glasgow, Edinburgh, Dundee, Aberdeen, and Greenock; but it is now provided that the Bill shall not apply to any of these cities or towns, but they are permitted to adopt it in whole or in part. It is most important that the police and sanitary provisions shall apply to all burghs without exception. I cannot see any good reason for abrogating such a wise provision, and would urge that Part III., relating to "police force," Part V., relating to "sanitary provisions," and Part VII., relating to "offences and penalties," should be made applicable to all burghs. It is anomalous that what is an offence in Edinburgh should not be an offence in Leith, and *vice versâ*. On the other hand, the Bill is, or ought to be, more enlightened in its sanitary policy than the local statutes of these great towns.

Medical Officer of Health.—Section 78 of the Bill provides that the medical officer of health for the burgh must be appointed *annually* by the Police Commissioners, whereas among the numerous officials whom the Commissioners are empowered to appoint, the Bill does not provide for any other one requiring to be appointed annually. The medical officer of health of a burgh should be placed in a comparatively independent position, in order that he may be encouraged to discharge his onerous duties without fear or favour. I do not see any good reason for singling him out for annual appointment. It would have been more to the purpose to provide that the medical officer shall be appointed in the same manner as the other officials of the Police Commissioners, and that he shall not be dismissed without the concurrence of the Secretary for Scotland. This last is the existing provision of the Lindsay Act.

Appointment of extra Constables.—At the end of section 83 it is "provided that the chief constable of any burgh may, with the sanction of the chief magistrate, appoint additional constables to act within such burgh on any special occasion or for such period for which such additional constables may be deemed by him to be necessary, and such additional constables so appointed shall have all the powers of police constables." I doubt the expediency of a power being granted to the chief constable of a burgh, even with the sanction of the chief magistrate, to appoint constables in excess of the number fixed by the Commissioners of Police of the burgh, more especially when it is kept in view that by section 97 special constables may be appointed by the magistrates to aid the regular police force in emergencies, and that the Secretary for Scotland can order constables from one force to another for special service.

Secretary for Scotland empowered to detail Constables for duty elsewhere.—In conferring power to detach constables to act in other places it is provided as follows at the end of section 84:—"On the requisition or order of the Secretary for Scotland the chief constable of any burgh, or the chief

constable of any county, shall have power to supply a certain portion of the police force under his charge for any special or temporary duty or service elsewhere within Scotland, the proportion from any one force not to exceed ten per centum, and the expense to be defrayed by the force requiring the extra police assistance."

I approve of this power being vested in the Secretary for Scotland, but I presume that, in consequence of the provision contained in section 5, sub-section 1, it cannot apply to the police forces of Glasgow, Edinburgh, Dundee, Aberdeen, and Greenock, unless the police authorities of these cities or towns choose to adopt section 84. This affords a strong argument in favour of making the police provisions of the bill applicable to all burghs.

Power to Police to call Assistance.—Section 88 prescribes penalties on persons obstructing and assaulting constables while engaged in the execution of their duty, and is very similar to clause 393 of the General Police and Improvement (Scotland) Act, 1862, but it omits the following very important provision, viz.:—"Every person who shall not when required by a constable afford him every reasonable aid and assistance in preventing the escape of any person whom he has taken into custody, and is conveying to the police office or to prison, such person so offending shall for every such offence be liable to a penalty not exceeding five pounds."

As a rule, the police seldom call upon citizens to aid them in preventing the escape of persons whom they have in custody, but I deem it to be in the public interest that they should continue to have this power, which affords very considerable moral support. Otherwise we may naturally look for an increase of the numerical strength of the police and of the police expenditure.

Special Constables.—By sections 97 to 99 it is provided that the magistrates may appoint special constables, that a roll of them shall be kept by the chief constable, and that they shall be under his direction when on duty; but there is

no mode prescribed for enforcing the attendance of special constables when they are required. The sections referred to are somewhat similar to sections 80, 81, and 82 of the Glasgow Police Act, 1866, but omit a most necessary provision at the end of section 80 of that Act:—"And if any person so appointed shall refuse or fail to attend and be sworn, or to act when required, without a reasonable excuse, he shall be liable to a penalty not exceeding five pounds."

Magistrates' Bye-laws.—Under the General Police Act of 1862 now in force, the magistrates of burghs are authorised to make bye-laws for various purposes which we need not enumerate. These bye-laws do not require to be confirmed by the Sheriff or by any other authority. By the Bill, magistrates are likewise authorised to enact bye-laws; but it is provided by section 320 that all bye-laws made under the Act must be confirmed by the Sheriff before they can come into operation. It is also provided that they must be confirmed by the Secretary for Scotland. The system at present in operation in regard to such bye-laws has worked in a satisfactory manner, and I fail to discover any good reason for this innovation. At any rate the single confirmation by the Sheriff would seem to be amply sufficient. A different policy, however, has been followed in the recent Local Government Act for Scotland, as the bye-laws made by County Councils under that Statute are subject to confirmation by the Secretary for Scotland.

Slaughter-houses.—According to existing legislation as found in the General Police and Improvement (Scotland) Act, 1862, clauses 358 to 363, Police Commissioners for burghs are authorised to provide slaughter-houses, and, where they do so, slaughtering cattle within the burgh or within two miles of it (except in the houses provided), is prohibited by penalties; and persons bringing slaughtered cattle into the burgh from a distance for sale are charged slaughter-house dues.

Police Commissioners have very generally exercised the powers so vested in them by establishing public slaughter-

houses at the expense of the ratepayers, and they are recouped by levying charges on butchers for the use of the slaughter-houses, and also by levying dues equal to the slaughter-house dues on all persons who may bring butcher meat into the burgh which has been slaughtered more than two miles beyond its boundaries, the slaughter of cattle within the burgh or within two miles of it elsewhere than within the slaughter-house being absolutely prohibited.

The slaughter-houses so provided have in many cases cost large sums of money, the accommodation being of a high order. They are not infrequently placed near to the boundaries of the burgh, so as to be at a considerable distance from the densely populated parts of it.

Sections 280 to 286 of the Bill, which deal with this subject, would make important changes on existing legislation. Under the Bill, although the Police Commissioners of the burgh have provided public slaughter-houses, there is nothing to prevent persons from slaughtering cattle at any place beyond the burgh boundaries and conveying the carcases into the burgh for sale without being liable to pay any slaughter-house dues.

The prohibition against slaughtering cattle within two miles of the burgh, and the liability for the payment of dues for carcases slaughtered more than two miles beyond the burgh and conveyed into it for sale or consumption, which presently exist in the General Police Act of 1862, have been omitted.

This would probably result—(1) in shambles or slaughter-houses of a primitive and inexpensive character being established by butchers beyond the burgh boundaries to avoid the payment of the public slaughter-house dues; (2) in the public slaughter-houses, which have been constructed out of the public rates, in many cases being little used; and (3) it would afford much greater facilities than exist at present for conveying diseased and unwholesome butcher meat into burghs, seriously lessening the chances of its detection.

It is scarcely necessary to add that these important and

objectionable omissions will not affect the five large cities and burghs before mentioned, unless they elect to adopt the slaughter-house sections of the Bill.

Fires.—Clause 346 of the General Police and Improvement (Scotland) Act, 1862, in dealing with the extinguishing of fires, provides that the Commissioners of Police shall be entitled to "recover from the owners or occupiers of the premises where any fire shall happen such reasonable sums of money as they shall consider just, not exceeding in the whole fifteen pounds, or whatever less sum is equal to one-half of the actual expense of extinguishing any such fire." Section 301 of the Bill, which in other respects is the counterpart of the above clause, omits the provision quoted. The effect will be that the Police Commissioners of burghs to which the Bill will apply—*i.e.*, all the smaller burghs of Scotland, will not be able to recover any portion of the expense incurred by them in the extinguishing of fires. This appears to be very unfair. The extinguishing of fires is a duty imposed upon the Police Commissioners of burghs, the expense being defrayed out of the burgh rates, and a large proportion of these rates is, in many of the burghs, paid by the industrial classes and occupants of small houses. As a *rule*, fires do not occur in the houses of the industrial classes, and is it unreasonable that the owners or occupants of buildings in which fires occur should pay the Police Commissioners a proportion of the expense incurred in extinguishing fires similar to that provided for in the General Police Act of 1862? The retention of the provision now in existence, but increasing the amount payable, would be an additional incentive to proprietors to be more careful in the erection of buildings, to see that they were constructed so as to make the risk of fire as small as possible, while it would act in the same direction by inducing occupants to exert themselves to take all due precautions against fire.

Common Lodging-houses.—Section 8 of the Public Health (Scotland) Act, 1867, provides that the "sanitary inspector" shall be inspector of common lodging-houses, while section

76 of the Bill ordains that "the Commissioners shall appoint a sanitary inspector, subject to the provisions of the Public Health Acts, whose duty it shall be to superintend and enforce the sanitary provisions of such Acts and this Act." Notwithstanding the above, the duty of licensing common lodging-houses is, by section 376 of the Bill, imposed upon the chief-constable instead of the local authority. It is proper that police officers should have the right of entry to all licensed common lodging-houses while acting in the discharge of their duties, but the licensing and inspecting of these houses, being a matter closely allied to health and sanitation, should, as hitherto, be delegated to the local authority and not to an officer of police.

Street Singers and Musicians.—Section 441, in regard to street musicians, is as follows:—"It shall be lawful for any householder, personally or by his servant, or by a constable of police, to require any street musician or singer to depart from the neighbourhood of the house of such householder; and every person who shall continue to sound or play any instrument, or sing in any street, at any time after being so required to depart, shall be liable to a penalty not exceeding twenty shillings."

There is no greater encouragement to vagrancy than that afforded by the legal toleration extended to street singers and musicians. In the great majority of cases, the singing and playing, or attempt at singing and playing, is a mere cover for begging. The evil is on the increase, and dissolute persons are now sometimes found singing in back courts on Sundays for the purpose of obtaining charity.

The provision in the Bill is very similar to that contained in clause 257 of the General Police and Improvement (Scotland) Act, 1862, which has been found quite inadequate to enable the public authorities in burghs to deal effectually with this evil.

The public naturally look to the police to rid them of such annoyances as are caused by persons singing or playing musical instruments in the streets. Busy thoroughfares

are sometimes blocked by crowds occasioned by street musicians and singers, who frequently go in bands, but a constable is not authorised under the above section to interfere with those who occasion such obstructions until he is first asked to do so by a householder.

It is customary for such persons to call at dwelling-houses, shops, and business premises soliciting contributions, and opinions differ as to whether such conduct would justify a prosecution against them for begging.

It is surely in the public interest to legislate so as to discourage vagrancy by all legitimate means, and I would urge the necessity of this section being amended having that aim in view.(*a*)

Licensing of Theatres.—Section 445 provides for theatres within burghs being licensed by the magistrates, and reserves the powers belonging by statute to the Lord Chamberlain as to theatres.

It requires to be kept in view that, by the Act 6 & 7 Vict. c. 68, Her Majesty's justices of the peace have power [which it is not proposed to repeal] to grant licenses for theatres, and that any person keeping a theatre without such license is liable to be fined in a heavy penalty. It is contended by many that the theatre license granted by Her Majesty's justices of the peace carries with it *per se* the right to retail excisable liquors. I believe that keepers of theatres in burghs will, in the event of this section being passed in its present shape, be under the necessity of taking out two licenses, one from the justices and the other from the burgh magistrates, to save themselves from prosecution. This could easily be rendered unnecessary by leaving the licensing of theatres to the justices, or by repealing the powers of the justices in regard to the licensing of theatres within burghs in Scotland, and appointing the magistrates of burghs as the Licensing Authority.

(*a*) It must, however, be recollected that the playing of music or singing in a street may be so conducted as to be a perfectly legitimate and harmless industry.

Offences which must be Tried before Two Magistrates.—It seems inexplicable that the only offences under the Bill which cannot be tried before one magistrate, but must be tried before two magistrates or the Sheriff, are brothel-keeping and keeping disorderly rooms or houses, which are to be dealt with in the manner defined in sections 453 and 454 of the Bill.

It is difficult to conceive why the interests of the brothel-keeper are to be more scrupulously safeguarded than those of the publican, the pawnbroker, the baker, the milk-seller, and the thousand and one other individuals who may be charged with offences against the provisions of the Bill, or against the provisions of many other public general statutes specially referred to in the Bill. They can all be tried before one magistrate, while such a course cannot be adopted as regards the keeper of a house of ill-fame. This anomaly should certainly not be allowed to continue.

Suspected Persons of the Thieving Class.—Clause 331 of the General Police and Improvement (Scotland) Act, 1862, contains certain provisions with regard to unconvicted persons found in possession of housebreaking implements, and convicted persons who cannot account for articles in their possession.

The foregoing provision has been found most valuable for the suppression of crime, but the counterpart of it, which is section 459 of the Bill, is seriously changed for the worse. It is as follows, viz.:—"Every known or reputed thief, or associate of known or reputed thieves, who is found in any house or building, or part of a house or building, or other enclosed place, or who is found frequenting any street, court, house, or building, or place adjacent, with intent to commit any crime, or who is in possession of any picklock, key, crow, jack, bit, or other implement usually employed in housebreaking, or who is found in possession of any money or article without being able to give a satisfactory account of his possession thereof, may be apprehended, and on conviction be committed to prison for

any term not exceeding sixty days; and it shall not be necessary, in proving the intent to commit a crime, to show that such person did any particular act or acts tending to show his purpose or intent, and he may be convicted if, on the circumstances of the case, and from his known character, as proved to the magistrate, it appears to such magistrate that his intention was to commit a crime. For the purpose of this section the word 'crime' shall mean any description of theft, robbery, housebreaking, reset of theft, and any similar offence involving dishonesty; and any money or article found upon the accused, if not claimed by the owner within twelve months, may be forfeited and applied for the purposes of this Act."

It will be observed that the section has no applicability to any person who is not "a known or reputed thief or associate of known or reputed thieves," whereas by the present law, if any person is found in possession of housebreaking implements, or in any building or enclosed space, *for any unlawful purpose*, he is liable to apprehension and punishment. If thieves were not individuals of migratory habits, the provision in this section might suffice, but it is well known that very serious burglaries and thefts are frequently committed by persons whose antecedents and associates are quite unknown to the local police. Although such individuals were captured in a house or other enclosed space, with housebreaking implements in their possession, who refused to give names or any account of themselves, and who were without doubt there for the purpose of committing a crime, the provision of the section referred to, would not authorise their apprehension or detention, and they would consequently be allowed to go at large without punishment.

While the present law authorises the apprehension and conviction of convicted thieves *found in* any public or private street or other place with intent to commit any penal or police offence, the section of the Bill only authorises similar treatment if the person is *found frequenting* any

street, court, house, or building, or place adjacent, with intent to commit any crime.

The Judges of the High Court of Justiciary, in the case *Linton* v. *Clark*, 10th November, 1887, 15 Ret., Just. Ca. 25, gave such an indication of the meaning which they attached to the word "*frequenting*," that it is apparent the difficulties in dealing efficiently with professional thieves in order to the prevention of crime will, in the event of the section referred to passing without amendment, be very greatly increased.

I believe that such a section would not be adopted by the five populous cities and towns to which the Bill is permissive, and that the retention of it in the Bill in its present shape would be sufficient to induce the authorities of these cities and towns to insist upon the Bill remaining a permissive one.

Assault aggravated by Two previous Convictions.—Clause 413 of "The General Police and Improvement (Scotland) Act, 1862," which narrates the crimes not competent to be tried in the Police Court, and which must be remitted to a higher Court for disposal, includes the crime of *assault aggravated by two previous convictions*. Section 514 of the Bill, which is the counterpart of said clause, omits assault aggravated by two previous convictions. I think there should be severe punishment meted out to persons who are in the habit of committing assaults upon the lieges, and that, when persons have been several times convicted of the crime of assault, they should be remitted to a higher Court to be dealt with. Wife-beaters and persons who commit unprovoked assaults upon females and others are, as a rule, far too leniently dealt with, and, instead of relaxing the rules of law as to persons who commit crimes of violence, I would urge that they should be made more stringent. Of course there remains a discretionary power to remit such cases to a higher Court.

Public Billiard Playing.—The Select Committee have expunged from the Bill, clause 434, which ordained that

premises kept for public billiard playing be licensed by the magistrates, and they have also taken away the power which was vested in the police by clause 438, sub-clause 1 of the Bill, of at any time entering any house or building licensed or used for public billiard playing.

By the Act 8 & 9 Vict. cap. 109, sect. 11, an Act to amend the law concerning Games and Wagers, applicable to England but not to Scotland, it is provided:—1. "Every person keeping any public billiard table, or bagatelle board or instrument used in any game of like kind, for public use without being duly licensed so to do, and not holding a victualler's license, is liable to a penalty of £10 a-day or one month's imprisonment with hard labour." 2. All police officers may enter any house, room, or place where any public table or board is kept for playing at billiards, bagatelle, or any game of a like kind, when and so often as is necessary; but it should not be done without the authority of a superintendent or inspector."

In the local Police Acts of Edinburgh and Dundee somewhat similar powers exist, and I do not see why legislation on the subject which is considered beneficial for the metropolis and the boroughs of England, and for Edinburgh and Dundee, should be withheld from the other burghs of Scotland.

Magistrates' Jurisdiction.—Jurisdiction to try a variety of offences under public general statutes which was not formerly granted to police magistrates has been conferred by this Bill. In addition to offences under the Bill itself the police magistrate is by the undernoted sections empowered to try persons according to the forms of procedure applicable to Police Court prosecutions for committing offences under the following public general statutes, viz.:—

Section 486. The Weights and Measures Act, 1878 [which has been considerably extended in 1889], and

" " The Criminal Law Amendment Act, 1885, in so far as it relates to the suppression of brothels.

Section 487. The Bakehouse Regulation Act, 1863,
" " The Sale of Food and Drugs Act, 1875, and
" " The Sale of Food and Drugs Amendment Act, 1879.
" 508. The Merchant Shipping Act, 1854, as regards offences by marine store dealers and manufacturers of anchors, and
" " The Pawnbrokers' Act, 1872.

It is a matter for consideration whether it is wise to increase the jurisdiction of the citizen magistrate to the full extent above mentioned, and whether the training and experience of a sheriff or stipendiary magistrate are not required for the just treatment of some of these cases.

Section 569 of the Bill also provides that complaints of Breaches of Certificates under the Public-Houses Acts may be tried in the Police Court. Such offences can at present be tried before the Magistrate presiding in the Police Court in Police Burghs. This was settled by the judgment pronounced in the High Court in the case of *M'Isaac* v. *Laing*, 6th December, 1864, 37 *Scot. Jur.* 92, 3 M'Ph. 189.

Habitual Offenders.—The only suggestion made by the Bill for dealing with the host of Police Court habitual or incorrigible offenders is to be found in sections 432 and 520. The former provides:—"It may be charged as an aggravation of the offence of being drunk and incapable that the accused person has within the last twelve months preceding been three times previously convicted of such offence; and if the accused person is convicted and such aggravation is proved, the magistrate may impose an additional penalty of not exceeding forty shillings in respect of such aggravation, and may sentence such person to imprisonment for any period not exceeding sixty days without the option of a fine."

The latter is as follows, viz. :—"It shall be competent for the burgh prosecutor, in any libel charging any person with an offence under or a contravention of any of the provisions of this Act, or any bye-laws, orders, rules, or

regulations made under or by virtue of this Act, to include in his libel a charge that said offence or contravention has been aggravated by previous conviction within seven years for a like offence or contravention of this Act, or any other Act, or any bye-laws made under the same, and to lead proof in support of said last-mentioned charge; and in the event of said offence or contravention, together with the said aggravation, being proved to the satisfaction of the magistrate, it shall be lawful for the magistrate to impose a penalty not exceeding forty shillings or thirty days' imprisonment without the option of a fine in respect of such aggravation in addition to the penalty or imprisonment which he is authorised by this Act to impose for the offence or contravention itself."

The case of habitual offenders is most inadequately dealt with by the above provisions.

All our large cities and towns, and most of the smaller burghs, have a considerable number of individuals who are frequently before the magistrates for crimes and offences, and not a few of them have appeared upwards of a hundred times.

In the annual report of the chief-constable of the city of Edinburgh for the year 1888, it is stated that the 8186 arrests which were made during that year by the Edinburgh city police represented 5702 distinct individuals, the difference being accounted for by persons arrested more than once during the year. What is true in this respect of Edinburgh is equally applicable to other large cities and towns throughout the United Kingdom. Considerably more than half the number of offenders brought before the police magistrates have been previously before the Court. The most of them are habitual drunkards, and, as a rule, have paltry sentences imposed upon them every time they are convicted. The short sentences of imprisonment imposed are quite inadequate to subdue their craving for strong drink, and there is, therefore, little or no chance of amendment in their conduct. It is quite common for such offenders to fall into the hands of the police for a new offence on the very day

they emerge from prison. Their short incarcerations invigorate them, and they almost invariably drift back to their old and accustomed evil courses. The prison may be regarded in the light of a hydropathic establishment for them. They are cleaned and fed better than they would be outside, and their lives are prolonged by its salutary influences. When at liberty they mix freely with the opposite sex, and there is good reason for thinking that their children are born with a vicious hereditary taint. The following reasons may be adduced to show the evil of the present method of dealing with such habitual offenders :—

1. It is unfair to themselves, as they would be more humanely dealt with, and greatly benefited (after they had been tried several times with short sentences) by lengthened periods of incarceration, where the drink craving would be much modified, if not eradicated ; where their spiritual wants would be carefully attended to ; where they would be usefully and profitably employed, and from which they, at the expiry of their periods of detention, would be helped into employment with a will strengthened for good in a new locality by a Discharged Prisoners' Aid Society or other agency.

2. It tends to bring the administration of law into contempt, and has no deterrent effect, but the opposite.

3. It is most unfair to the general body of citizens, who are subjected to the corruption and contamination due to an army of habitual offenders being constantly maintained amongst them, while such persons might be profitably employed under a system of lengthened incarceration ; and

4. It is bad for the State, which is interested in all its subjects being law-abiding and industrious. Besides, the expense to the State is increased by the present system being continued. Its existence undoubtedly renders the necessity of a larger police force and a larger prison staff being maintained than would be the case if such offenders were dealt with as indicated above under No. 1.

There does not appear to be any necessity for the establishment of new institutions for such offenders. They should

be subjected to a species of imprisonment where useful work suitable for them would be carried on, and where the same amount of strict supervision, as is necessary for convicts, would not be required. If such persons were made too comfortable in their places of confinement, and if their incarceration had not the stigma of imprisonment attached to it, some might not be slow to qualify themselves to get into the list of habitual offenders.

It may be mentioned that the Colony of Victoria recognises the importance of dealing much more stringently than is done in this country with such offenders. By section 35 of 8 Vict., No. 265, the Police Offences Statute, 1865, applicable to Melbourne and other cities of that colony, it is provided, that "any habitual drunkard having been thrice convicted of drunkenness within the preceding twelve months, and any common prostitute who, in any street or public highway, or being in any place of public resort, shall behave in a riotous or indecent manner, shall be liable to imprisonment in any gaol for any time not exceeding twelve months, with or without hard labour."

It is hoped that advantage will be taken of the opportunity afforded by the Bill to introduce an improved system of dealing with this class of offenders which may prove effectual.

Subjects not dealt with by the Bill.—There are a variety of subjects not treated of in the Bill, which I submit ought yet to be dealt with. I may indicate some of these :—

Carriage Lights After Sunset.—It is imperative that hackney carriages, omnibuses, and tram-cars carry lights when being driven on the public streets after sunset, and I cannot understand why the same rule is not made applicable to private carriages, spring vans, and all swiftly-driven vehicles.

Giving False Alarm of Fire in Theatres, &c.—Wilfully giving false alarms of fire in theatres, public halls, and similar places, to the annoyance and danger of the lieges, should be constituted an offence. Such false alarms have been

productive of the most disastrous consequences; but, unfortunately, unless one or more lives are lost as the result of giving a false alarm of fire the guilty person is not reached by the criminal law.

Purchasers of Second-hand Jewellery, Lead, &c.—Purchasers of second-hand jewellery, old lead, brass, &c., should, be bound to enter the names and addresses of sellers, &c., in books open to police inspection, in the same way as is made imperative by the Bill on brokers and marine-store dealers. Such articles should be kept intact for a specified period. Many stolen articles of this description are irrecoverable on account of the ease with which such property can at present be disposed of to persons who very soon put it beyond the possibility of identification.

Lotteries and Distributing Gifts in Places of Public Amusement.—It is understood that public prosecutors in Scotland take no notice of lotteries unless they have evidence that such lotteries are carried on in a manner "calculated to prejudice public morals, or to constitute a fraud on the public." Some caterers for public amusement are in the habit of presenting gifts to those resorting to their places of entertainment. This is done by the lottery system, is calculated to draw large audiences to entertainments of insignificant merit, and is very injurious to those of a legitimate character. I believe that it would be advantageous to have the same statutory enactments in Scotland as exist in England and Ireland regarding lotteries. In England, these things are regulated by the Acts 42 Geo. III. c. 119 and 9 & 10 Vict. c. 98.

Shebeen Customers.—In order the more effectually to enable the police to check the illicit traffic in excisable liquors, I strongly recommend that the powers contained in section 138 of the Glasgow Police Act, 1866, by which all persons found in shebeens without lawful excuse should be liable to apprehension and punishment, whether or not they are found drunk or drinking, should be made part of the general law. To enable the police elsewhere than in Glasgow to get

the customers of a shebeen-keeper apprehended and punished, they must find them either drunk or drinking in a shebeen. As a rule, unless the customers are drunk, they take care not to drink excisable liquors in a shebeen in presence of the police, and they thus avoid liability to punishment.

Persons Falsely Accusing Themselves of Crime, &c.—A person who falsely gives himself up to the military or civil authorities as an Army deserter is by the Army Acts liable to punishment, and I strongly recommend that a section should be added to the Bill providing that persons who falsely accuse themselves of having committed crimes should also be liable to punishment.

This practice has of late become not uncommon. It is sometimes done by individuals giving themselves up to constables and admitting that they have committed crimes. In other cases, it is done by persons writing and sending anonymous letters to the newspapers or to some police authority, boasting of having committed serious crimes, and the confession is often accompanied by threats to commit further outrages. All this is calculated to cause considerable trouble and expense to the criminal authorities, and in some cases may temporarily have the effect of causing them to relax their efforts in searching for the real perpetrators of serious outrages.

Sending Threatening Letters.—The writers and senders of threatening letters, even although such letters do not indicate the individual threatened, should be liable to punishment.

In conclusion, I may state that my object in bringing the foregoing matters under notice is with a view to get the Bill made as perfect as possible. The present General Police Act has been in force for over a quarter of a century, and it is extremely probable that, after the present Bill is passed into an Act, it may have an equally long lease of life.

D. Dewar.

INSANITY IN ITS RELATION TO THE CRIMINAL LAW.

Part III.

THE two forms of insanity at one time rejected, but now, after riper experience, fully recognised—the so-called *moral* and *impulsive* insanity—are among the most singular and obscure phenomena in the whole range of this subject. The former species—Moral Insanity—in which the reasoning powers, and indeed the ethical faculties themselves, may not be impaired, and the disease may consist in an entirely irresistible propensity to some particular vice, such as theft or drunkenness, produces criminal acts which differ from ordinary crimes in this feature—that they generally have little or no reference to any profit or pleasure to be got by the transgressor, excepting, perhaps, that of the commission itself. Thus, in the case of *kleptomania* there may be no more intention to make use of the articles stolen than in the instance of the jackdaw which carries off rings or coins to its hiding-places; even perishable articles of food, skilfully purloined, have been known to be secreted and stored up to lie and moulder for years, as in the case of the Scottish clergyman who was found to be a kleptomaniac, and in whose manse a perfect magazine of old rotting tarts and odd and broken crockery was found. It has by some biologists been referred to what is called Reversion, but it bears a very striking resemblance to some vice beginning in the habits of ancestors, coming in time to operate like instinct without any conscious purpose, and yet, in consequence of being of

no use, not being selected and continued by nature in any race or nation. But the whole question of the origin of this form of insanity is still obscure, and equally obscure is the nature of what is sometimes called Impulsive Insanity. The melancholy case of Eliza Sinclair or Clafton is in some respects typical (High Court, 12th June, 1871). Mrs. Clafton was a respectable married woman, living in Stow, Mid-Lothian, with her husband and two young children. She was of an affectionate character, was a sober woman and good mother, and lived on comfortable terms with her husband, who was in regular employment at good wages. She had never exhibited the slightest trace of insanity, but she laboured under rupture of the bladder, and had weakened herself by prolonged lactation, which is sometimes a cause of suicidal or homicidal impulse. A shopwoman in the village having, in consequence of some trivial occurrence, expressed the opinion that Mrs. Clafton had come into her shop with intent to steal, she proceeded home, and almost immediately cut the throats of herself and children. They died, but she survived, and in a few minutes after the event she was found, silent indeed and abstracted, but showing no trace of depression or excitement. A letter was found beside her, containing the following passages:—"Dear husband, I write you a loving farewell and my children. Give my kind love to mother, sister, and all enquiring friends. Be good to to the bairnys." Sergeant Wilson, who apprehended her, deponed in his evidence that she said "that she did not know what she was doing when she cut their throats; that she did not know she had done so for some time after; she could not remember how long after; but it looked like days, she said; I asked when she wrote the letter, and she said it was before she cut her own throat." It was thus shown by her letter, written at the very time, that she cut her own throat purposely, and for a cause which though insufficient is intelligible, and that when she did so she had no intention to harm the children. It was further established by the evidence that the woman did not know

that she had injured the children till after an interval that looked to her like days. This total unconsciousness of the act committed seems to be a marked feature of impulsive insanity. In the case of *Alexander Smith* (High Court, 19th July, 1858), a person who believed that his wife had, by poison, destroyed his stomach and bowels, and that he had no place in which to put his food, and who suddenly stabbed a policeman in his search after her, seemed to remember nothing about his deed. *Douglas* (High Court, 28th May, 1827), an officer, who set fire to the furniture in the apartment where he lodged, was unconscious of what took place. *Isabella Blyth* (Perth, 22nd April, 1852), who suddenly attacked and murdered her grandmother, said, "I do not know what induced me to take up the tongs and murder my grandmother." *Alexander Murray* (High Court, 15th November, 1858), who murdered his grandmother, could not explain why he did it. And so also in the case of *Alexander Dingwall* (Aberdeen, 19th September, 1867). Our ignorance of the cause of such phenomena is easily understood when it is considered how little is really known about the brain itself, and that no continuous attempts have been made in this country, by *post-mortem* examinations and the like, to ascertain the appearances of morbid nervous conditions. But the feature of unconsciousness, so often mentioned in cases of impulsive insanity, suggests a reference to the interesting views of *Bastian* (*a*) about some curious phenomena of mind. *Bastian* points out that the molecular motions of the nervous substance, which usually form the objective sides of thought and feeling, in some cases proceed, as it were, under the surface, without their subjective sides arising, or at least without their arresting attention; and if such be the case, it is quite possible that, in the tumult of the soul, such unconscious processes, without the usual check or control from their subjectives, may hurry on mechanically to their end in murder or suicide.

(*a*) Bastian "On the Brain as the Organ of Mind."

Want of space permits only a mere notice of the startling paradox, sometimes propounded from the Bench, that a jury chosen by ballot, and guided by what is called "common sense"—that is by the loose and haphazard notions picked up in the course of daily life—are better judges of the presence of insanity than medical experts guided by long and systematic experience of the disease. When it is considered that possibly a majority of the jury may never have actually seen a lunatic at all, or observed his many deceptive and anomalous symptoms, much less have become acquainted with the singular but steady laws which control the disease, such a notion, especially where the medical witnesses are present during the leading of the evidence, seem little better than an absurdity.

It is now only requisite to say a few words on the mode in which the Court has dealt with hereditary insanity. In two of the earliest reported cases in the High Court of Justiciary it seemed as if a correct course of procedure was about to be followed. In the first of these two, *Archibald Robertson* (Glasgow, 6th January, 1836), the fact that the prisoner's mother was insane was allowed to be proved, seemingly without objection. In the case of *Malcolm M'Leod* (Inverness, 14th April, 1838), where it was alleged that the panel's uncle's son was insane, the objection was taken, but not pressed. But the medico-legal war having now begun, the course of practice altered. In the case of *Gibson* (High Court, 23rd October, 1844), it was decided that it was incompetent to ask whether a maternal aunt was insane. In the case of *Brown* (Perth, 25th April, 1855), the same decision was given as to a paternal uncle. The question was not raised in a convenient form in the trial of *Ann M'Que* (12th March, 1860), but it came up in a very serious shape in the case of *Dingwall* (Aberdeen, 19th September, 1867), when it was proposed to ask whether the uncle, grand-uncle, and two aunts of the prisoner had been inmates of lunatic asylums. This was held incompetent, and a similar decision was given in the trial of *Agnes Laing* or *Paterson* (Perth.

22nd April, 1872), when it was sought to prove that the panel's mother had long been in confinement as a lunatic, and had attempted to commit suicide, and that several other relatives, both on the father's and mother's side, had been cognosced and confined as insane. This case of *Paterson* was indeed the strongest possible for admitting the evidence. The insanity was on both sides of the family, and included (most conclusive of all) that of the mother; and the evidence offered did not raise the point in such a way as to require a number of lengthened inquiries, which might be impracticable, but was limited to cognitions and to actual confinement in asylums. In the case of *Dingwall*, Lord Neaves, in giving his opinion, observed :—"A man's insanity, if not proved *directly* or *substantively*, could not be proved by evidence that *any number* of his relatives had been insane." And this argument was trumped by Lord Deas, who said :—"Even if the prisoner himself had been insane at some former period, that would not *affect the result*." These observations demonstrate a very imperfect appreciation of the course of insanity, of its persistent tendency to revert in the case of the same individual,—most of the cases, indeed, tried in Court being cases of reversion, often of repeated reversion—as well as of the laws of heredity which, as it were, bind the diseases of a family in the same fatal chain as the successive mental conditions of a single person. It would be superfluous to answer the dictum of Lord Deas, for it has never been doubted in any civilised Court that the previous lunacy of the panel is a most important element in the proof of his condition, even at the time of the crime; and such evidence has never been objected to, so far as can be seen from the Reports. As for Lord Neaves' observations, it is quite impossible, in many instances, to obtain any "direct" or "substantive" proof of the prisoner's condition of mind at the time of the deed. Sometimes the madness has come on immediately before, and has passed off within a few minutes after, without any person being there to see; and, therefore, the only possible light that can be thrown on its nature in

such cases comes from the panel's previous morbid conditions, and the malignant and manifest taint which may have been inherited by him. Take an instance from a curious but well known class of cases. Say that, out of everybody's sight, a person aged forty-five has, without apparent cause, suddenly committed suicide with a dagger: is it not relevant, in the question of the sanity of the act, that his father also, without cause, committed suicide at the same age and with the same weapon? and does the presumption not become stronger when it is shown that his grandfather, without cause, also committed suicide at the same age, and with the same weapon? Few juries could resist such evidence as "direct" and "substantive" proof of the condition of the panel at the date of the crime. Yet such cases have occurred, and a thousand other illustrations might be given of a similar kind. It must also be kept in mind that the laws of heredity, very superficially known to Lords Neaves and Deas in 1867 (who indeed, probably, regarded such cases as rare and occasional freaks of Nature), are now, to a great extent, as familiar as the commonest laws of physics, and indeed are simply one great form of the conservation of force. We must go back to the simplest kind of a-sexual propagation in order to comprehend the presence of heredity in all physiological states, lunacy included. In the so-called *Fission*—the division of the parent animal into two or more separate individuals (see Hæckel's *Schöpfungs-Geschichte, Vortrag* 8)—we can see at once how it comes that the new creatures, which are but parts of the old, should be like it in all respects; and in gemmation and the higher processes of sexual multiplication, where the process is somewhat disguised, heredity still works, though from the fact of the double origin of the offspring, and other reasons, its developments are more complicated, and are allotted among more individuals. It is surely unwise that a Court of Justice, in investigations involving life or death, should ignore the very existence of one of the two great laws of Biology. It is vain to say that the proof of hereditary taint is shut out by the

law. Decisions of Judges, proceeding on imperfect knowledge of scientific facts, are not, and never were, the law of Scotland; and it might deserve the serious consideration of a judge of fearless moral courage—of whom there are some now on the Bench — whether, on the very next occasion which arises, he should not admit proof of heredity, so far at least as it might be offered in the shape of facts established by previous verdicts or by actual confinement in lunatic asylums. As ample illustrations have already been given of this natural law in the case of vice and crime, and of the mode in which they are interchangeable, in their course of descent, with insanity and idiotcy, it need only be mentioned that heredity has now been abundantly established in every species of madness and imbecility. The percentage of such cases, as given by different authorities, seems to vary greatly. But this variance is in truth merely apparent, and arises from two causes—viz., (1) the extent of the field of inquiry—the percentage rising higher according to the smaller number of cases under investigation, rendering a more stringent inquiry possible; and (2) the different principles on which experts proceed; some merely reckoning heredity of the identical disease, while others include also the much more common case of transformed heredity. In melancholia, Esquirol noted, out of 482 cases, 110 which were hereditary; in mania the same physician, at the Salpêtrière, found, out of 220 cases, 88 which were hereditary; and in his own establishment in Paris, where he could make more complete investigation, 75 cases out of 152. We shall only further cite from Ribot a case out of many narrated by Doltrebente (*Etude généalogique sur les aliénés hereditaires*), showing the result of the union of an insane father with a nervous and emotional mother:—

1st Generation.	2nd Generation.	3rd Generation.	4th Generation.
Father, intelligent; a hypochondriac, under the delusion of being persecuted; died in a fit of furious mania.	1. Child died suddenly at 16.	None.	None.
	2. Child died suddenly at 18.	None.	None.
	3. Child died suddenly at 15.	None.	None.
	4. A daughter, the eldest; hypochondriacal, emotional.	1. A child died in infancy. 2. Do. 3. Do. 4. Do. 5. Do. 6. Married; very intelligent, but physically deformed. 7. Married; very intelligent, but physically deformed. 8. Married; very intelligent, but physically deformed. 9. Eccentric — extravagant. 10. Has had three attacks of temporary insanity.	None.
	5. Daughter; insane from her 20th year.	None.	None.
Mother, nervous — emotional.	6. Daughter; weak-minded.	Child imbecile — hermaphrodite.	None.
	7. Married woman; attacked by delusions of persecution; committed suicide.	1. Boy died of apoplexy at 24. 2. Imbecile. 3. Boy; an artist—extravagant.	None.
	8. Boy, weak-minded.	1. Boy, nervous; died in a fit of furious madness. 2. Daughter disappeared.	None.
	9. Boy, hypochondriac; would not live with his wife.	None.	None.
	10. Boy, hypochondriac.	Half-imbecile.	None.

Thus, previous to the fourth generation, the whole of this ill-fated family were extinguished.

Before leaving the cases, it may be desirable just to mention the recent trial of *Laurie* (High Court, November, 1889), generally known as the Arran murder, where the ultimate result to the prisoner has been made to depend on the problem of his sanity or insanity. Thus, the question of life or death has been solved on an issue entirely different from that put before the jury, and which was not in the view of the judge or the counsel on either side. That was in no way the fault of the learned counsel who acted for the prisoner, as in all likelihood they had nothing put before them indicating insanity on the part of their client, excepting the facts of the case itself, which, certainly, were entirely insufficient to protect the prisoner from punishment. Further, though it is certain that the experienced medical men, who were employed after the trial to test the mental powers of Laurie, did not issue their report without sufficient grounds, yet the fact remains that the public are left in entire ignorance of what these grounds were. Surely it is desirable that where there are any reasons for suspecting the existence of insanity, these should be pleaded and sifted at the trial, even when they may appear to the prisoner's advisers to be, on the whole, insufficient! Irrespective altogether of the question of sanity, they may throw an important light on the facts themselves. Nowhere could this be better illustrated than in the case of *Laurie*. There was a conflict of medical testimony as to the cause of death—Dr. Heron Watson powerfully supporting the view that it was got by a fall from a cliff of thirty-two feet in height on the vertex of the head, a view which was also supported by some of the facts, such as the finding of Rose's knife and pencil at the base of the rock. It was difficult, however, for the jury to accept this view, in the face of Laurie's behaviour, and particularly of his walling up the body by a barrier of stones; and here it was that evidence of the insanity of Laurie might have come in with strong effect to explain the facts. Granting that no sound man, if innocent of murder, would have acted as he did, what might not a wholly or partially insane, or even a merry,

flighty, and scatter-brained person have done in the way of eccentricity or absurdity? This single additional consideration might, and in all probability would, have turned the majority of the jury in favour of an acquittal.

It now remains to draw some practical conclusions, which follow from the facts which have been mentioned. First of all, the Courts ought to dismiss from consideration all preconceived notions in regard to the nature of mind—its entity—its essential unity—or its fundamental basis. In regard to what lies at the bottom either of matter or of mind, absolutely nothing is known. Man can only slowly and painfully observe and generalise the phenomena—and even of these he can only observe an infinitesimal part. But whether mind is material or spiritual, a unity or a duality, so far as legal practice is concerned it must be treated as composed of numerous parts which, to a certain extent, can be separately dealt with. It must be viewed as a complicated organ, where each separate pipe may be separately, and more or less, defective, and may or may not involve others; or where the failure of the bellows may make the whole music mute. The state of each instrument can only be known—not from theories, but from facts. It will then be seen, if the judgment be kept entirely unbiassed, that, in the general case, no cut and dry lines of division can be drawn between the different kinds and degrees of madness. A man may administer a kingdom with vigour, or compose brilliant poesy or music, and yet in other respects be stark, staring mad. Peter the Great, and many other distinguished men, combined genius with insanity. Cowper's delusions did not extinguish his poetic inspiration. In the same way a person may skilfully plan and commit a murder for purposes of revenge, and may afterwards try to escape, and yet be a dangerous lunatic and entirely irresponsible. But though insanity cannot itself be measured, it is like time, which, incapable of being measured by itself, is yet measurable in terms of motion. So insanity can be divided off, so far as it

bears on the objects of the Criminal Law, the reformation of the criminal and the prevention of crime. Many madmen are not incapable of being restrained by fear. On the contrary, most madmen in asylums are systematically so restrained, and are habitually punished and rewarded for their conduct. Outside of such places, it cannot be expected that they will be so amenable to treatment, but still, to an important extent, even congenital idiots may be so. There is no reason why the penal law should not be applied in many cases of lunacy, as tending, to some small extent, towards reformation, and to a large extent towards prevention. At what point, then, should the responsibility of lunatics cease? Clearly where punishment can not possibly produce any effect upon them—to be ascertained only from proof of their actual condition. Somnambulism and hallucination *in essentialibus* are clear cases of irresponsibility, where punishment would be a mockery. *Delirium tremens* is doubtful, and depends for the solution of the problem on the question whether the prospect of punishment for a crime committed in such a condition would have any effect on a person commencing habits of drinking. That is extremely improbable, and it is not likely that such a consideration, at so early a stage, would be present to the mind at all. It has been sometimes argued that, as punishment is not inflicted in respect of the criminal's merit or demerit, the simple plan would be to except nobody from the pains of law, as the best mode of striking terror with a view to prevention. But a criminal system of that kind would be like the action of a child, which beats the unconscious floor on which it falls, and would neither attract the sympathy nor the respect of the people which it was intended to influence. Lastly, with regard to mitigation of punishment in the case of a person more or less weak-minded or insane, there is no logical coherence in the principle on which it is at present put in a system of prevention. The prisoner is not being punished for his wickedness, however black it be, and therefore should not be spared for being less wicked. In all cases the exact amount

of punishment should be inflicted that is calculated to "prevent others from doing the like," and not an atom more or less. But it may fairly be assumed that a less severe penalty is required to influence a prisoner whose act implies a less brutal or hardened nature; and further, it may be logically said that it is allowable to mitigate the amount of pain inflicted by justice, so as not to exceed that occasioned by the crime. It has thus been attempted to treat, in the space of three articles, what would have required volumes for its adequate consideration, and many things have necessarily been omitted, as well as many truths for which people's minds are not prepared.

CHARLES SCOTT.

Current Topics.

International Arbitration—The Van Bokkelen Case.—Students of political science, who look a little deeper than the surface of things, cannot have failed to observe that the idea of International Arbitration is year by year making progress, and that Governments and States are gradually coming to understand that the *arbitrium* of the sword is not the only way of settling disputes. Certainly, at first sight, this is not apparent. At a time when the standing armies of Europe are estimated at a number exceeding four millions, and the cost of European armaments at a sum of over five hundred millions of pounds sterling; when vast districts like the provinces of Elsass and Lothringen, and the widely extended frontiers of France and Russia, are little better than armed camps; when the resources of physical science are everywhere being directed towards the production of weapons for human destruction; when success in arms is still the surest passport to honour and fame—it may seem a paradox to say that the reign of "violence and sword law" is less secure than ever it was. And yet in the very magnitude of the evil lies the remedy. Among the slowly-awakening democracies reason must assert her sway, the peoples will not long submit to be crushed to earth by the enormous expenditure necessary to maintain great standing armies, or to be kept in a state of perpetual apprehension for the destruction of their commerce and industry, as well as for the safety of their persons and property. The creation of an international tribunal for the settlement of disputes is not a dream of Utopia; it remains for the twentieth century to realise it.

But, apart from prophecy, the actual fruits of international arbitration during the last quarter of a century have been sufficient to awaken the liveliest feelings of satisfaction in the hearts of every true philanthropist. This country alone has been saved in this way at least two wars, which would have inflicted incalculable injury upon us, no matter how they had resulted, and which might, indeed, have shaken our Empire to its foundations. We refer to the Alabama case, and the arbitration between Great Britain and Russia regarding the Afghan boundary at Panjdeh. At least a score of other instances of successful international arbitration during the same period could be mentioned, several of them of great importance.

For a complete enumeration of them we may refer our readers to the papers on this subject read by the late Mr. Henry Richard before the Conferences of the Association for the Reform of International Law, held at Cologne in 1881, and at the Guildhall, London, in 1887.

We desire, however, to say a word about what is apparently the most recent instance of international arbitration—the so-called "Van Bokkelen Case"—between the United States of America on the one side, and the Republic of Hayti on the other. The dispute between the two Republics was referred to Mr. Alexander Porter Morse, of Washington, and his award, which has been sent to us, is altogether an admirably prepared document, stating in a clear and succinct manner, the facts in dispute, the arguments of counsel, and the legal principles on which he rests his decision. The protocol making the reference to Mr. Morse was signed on 4th May, 1888, by the Secretary of State of the United States, and the Minister Plenipotentiary of Hayti, and the award was issued on 4th December, 1888.

The controversy, briefly stated, arose in this wise:—Mr. Charles A. Van Bokkelen, a citizen of the United States, resident in Hayti, having become insolvent, was imprisoned during the years 1884-85 as a civil debtor, under a warrant of the judge ordinary of Port-au-Prince. Against this warrant Mr. Van Bokkelen appealed on the ground that it was in violation of a treaty between the United States and Hayti, entered into in 1864, by one of the clauses of which it was provided that citizens of the United States were to enjoy the same private rights as native subjects. Now, by the Civil Code of Hayti any debtor who has made a *cessio bonorum* in favour of his creditors is entitled to protection from imprisonment, and Mr. Van B. pleaded that, as he had made such a cession (*a fact which was not disputed*), he was entitled under the treaty to the same immunity. The Appellate Court (*Cour de Cassation*), however, confirmed the judgment of the inferior Court on the ground that the Haytian Code expressly declared that its provisions were not to be applicable to foreigners. On his release from imprisonment, which lasted fifteen months, Mr. Van B. brought his case directly before the United States Government (previous efforts by the representative of that country in Hayti to obtain his release having proved unavailing), and on his behalf a claim for damages, estimated at over 100,000 dollars, was made by the Secretary of State against the Government of Hayti. The latter refused to admit the claim, and denied that the decisions of its Courts had in any way infringed the treaty referred to. Ultimately, however, after considerable correspondence, it was agreed to refer the matter to arbitration. The terms of the reference were—Whether Mr. Van Bokkelen's imprisonment was in derogation to the rights which belonged to him as a citizen of the United States, and, if so, what damages were due? Elaborate briefs on both sides seem to have been laid before the arbiter—the Haytian Government pleading, in the first instance, that the claim was irrelevant (*i.e.*, by way of demurrer), in respect that the judgments

complained of were in conformity with the provisions of their Codes; and that the Treaty of 1864 could not be held to override the enactments of these Codes. All the arguments both on this plea and otherwise upon the facts and law are considered and disposed of by Mr. Morse in the most thoroughly judicial manner—his various positions being supported by citations from the best writers on International Law, and he finally arrived at the conclusion that the Haytian Government had disregarded the Treaty of 1864, and that they were therefore liable in damages, which he assessed at 60,000 dollars. The whole proceedings seem to us to be a model of what an International arbitration should be.

Fustel de Coulanges.—By the too early death of M. Numa Denis Fustel de Coulanges, Professor of History in the University of Strassburg, historical science has sustained a great loss. Born in 1830, professor at Strassburg since 1861, and elected a *Membre de l'Institut* in 1875, M. de Coulanges has written several historical works of great value, foremost among which are his well-known "*Cité Antique*," now in its 10th edition, and his important but unfinished "Histoire des Institutions de l'Ancienne France," both of which have had the high distinction of being "crowned" by the Academy, and both are invaluable to the student of ancient institutions. To the student of Roman Law in particular the former work is exceedingly helpful and suggestive, justly emphasising the importance of tracing many of the laws and customs of a people to their ancient religious cult. As usual with the works of the best French savants, these treatises are monuments of patient and indefatigable research, embodied in the most perspicuous and attractive language. We may not always agree with the conclusions which the learned author reaches in these and other works, but all are eminently interesting and instructive. J. K.

British Guiana—Curious Criminal Case.(*a*)—In our Colonial courts novel points and curious combinations of circumstances are not unusual. We have just concluded here a criminal trial, which was remarkable amongst other things for the variety of races and nationalities which in one way or another were concerned in it. I shall give an outline. About six months ago a decapitated body of an East Indian was found on a public thoroughfare in the outskirts of Georgetown, the chief city of this Colony. The head was found about a mile off, in one of the trenches of a sugar-field. For months an impenetrable cloak of mystery enveloped the case, but at last the police obtained a clue; and after preliminary inquiries before the

(*a*) [This note has been kindly communicated by Sir David P. Chalmers, Chief Justice of British Guiana—Ed. *Jurid. Rev.*]

district magistrate, four persons were indicted for the murder—three of whom were Arabs who had apparently found their way into the Colony through the neighbouring French settlement of Cayenne, and one was an East Indian. The latter was acquitted—no evidence being offered against him—and afterwards gave very important evidence, implicating the three Arabs. Forty-three witnesses were examined. They were English, Scotch, Irish, Portuguese, Hindus, Afghans, Chinese, and Negroes. The evidence and all the proceedings of the court were interpreted in Arabic to the prisoners by a French officer from Cayenne; but as he understood very little English, interpretation had first to be made to him in French. Most of the evidence was given in Hindustani and interpreted into English, so that a triple interpretation was generally going on. As a further illustration of the diversity of nationalities that came together, I may mention that of the three counsel who defended the prisoners, one is a Creole of this Colony, of English descent, and an English barrister; the second is a Dutchman, a Doctor of Laws of the University of Leyden; the third a dark Mulatto, and a member of the English Bar; the attorney-general who prosecuted is a Creole of Barbadoes, of English descent, a D.C.L. of Durham University, and an English barrister; and the presiding judge is a Scotchman, and a member of the Faculty of Advocates. The trial, including the speeches of counsel and the summing up of the judge, occupied eleven days. It resulted in the conviction of the three Arabs. It was raised as a point of law during the trial that an accused person could not in his defence give any evidence tending to show that the crime was committed by some specified person other than himself, but the Court overruled this contention.

Privilege of Peers.—A recent and probably unique case, in which a Scottish peer (the Earl of Galloway) was tried and acquitted on a criminal charge before a Sheriff and jury, suggests the inquiry whether the accused could have pleaded privilege of peerage. This turns, curiously enough, upon the construction of certain terms of English law. By statute (6 Geo. IV. c. 66)—repeating in great measure the language of the Act of Union—it is provided that it shall not be lawful for the Court of Justiciary or any other Court in Scotland to try certain crimes committed by peers in Scotland. These crimes are—treasons, misprisons (*i.e.*, concealment) of treason, murders, and other crimes which infer a capital punishment by the law of Scotland, and all felonies and other crimes for which, if committed in England, a peer of the United Kingdom would be tried by his peers. But in England the privilege does not extend to *misdemeanours*, a loose and general term for offences of a less serious character than felonies. The question is, then—Does the offence of lewd and indecent practices, which was the particular charge in the case of the Earl of Galloway, fall within the designation of misdemeanour? There seems to be no doubt that it does, and that

Lord Galloway could not, had he been disposed to do so, have effectually urged that the Court had no jurisdiction.

It may not be uninteresting in this connection to sketch in a very few words the history of the privilege. It rests on the elementary principle of the Constitution that, below the sovereign, there are only two classes or orders known to the law, lords and commons, and that both have the right of being tried by their equals. Blackstone says: "The great are always obnoxious to popular envy; were they to be judged by the people, they might be in danger from the prejudice of their judges, and would, moreover, be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by Magna Charta."

Whether the bishops, whose blood has not been "ennobled," are "of trial by nobility" is not yet settled, but privilege does not seem to have been pleaded by Bishop Fisher or Archbishop Cranmer, and both these prelates were tried by common juries.

All Scottish and Irish peers are entitled to the privilege (which is expressly secured to them by the Acts of Union) on the ground that they are not commoners, though they may have no seat in the Upper House. Their eligibility as representative peers distinguishes them from all other subjects. They are in their own right potential members of the House of Lords, whereas a commoner can get there only by the creation of a new peerage in his person or by his succession to an old one. The statute Hen. VI. c. 9, which was passed after the trial of Eleanor Duchess of Gloucester for witchcraft, declares probably the common law when it provides that all peeresses, in their own right or by marriage, are entitled to the privilege. It is, however, lost by the widow of a peer who marries a commoner.

The procedure on the trial of peers is regulated by the statute 6 Geo. IV. c. 66, already mentioned. A true bill must be found by a Grand Jury of twelve men, who may be commoners. The peers are then summoned to the trial, which is presided over by the Lord High Steward, who is, however, merely chairman and not a judge, being entitled to give his vote with the rest. The lords are, of course, entitled to the counsel and assistance of the judges, who receive a summons to the House of Lords at the beginning of each Parliament, though, not being peers, they are not entitled to vote. In the case of crimes committed by a peer in Scotland, it is provided that the law and procedure adopted shall be those of Scotland; and for this purpose the Lord President, or any other of the judges in Scotland, shall, when summoned, attend on the trial of such indictment in the Court of the Lord High Steward.

The verdict of a majority is received, the Lord High Steward putting the question separately to each peer, beginning with the junior baron and ending with the senior prince of the blood. Each peer replies "Guilty (or Not guilty), upon my honour."

The Publicity of Justice.—The opinion recently given by English counsel on the exclusion of Mr. Gould from the trial of *Malan* v. *Young* recalls attention to an important and interesting subject. The English case was one of slander of a teacher in a public school, and some disagreeable disclosures were expected. The Court was cleared, probably out of regard to the feelings of the parties immediately concerned, not because any difficulty was expected in eliciting the facts in consequence of the presence of the public. Sir Richard Webster says that in these circumstances the judge had no power to exclude; but there is apparently no remedy for the disappointed spectator. If he had been fined, he might have gone before a Court, but he has no action against the judge. There is little doubt that this opinion is well founded in the law of England. The principle upon which the common law power of exclusion has hitherto been exercised is either that evidence *coram publico* could not be got, or that to admit the public would totally defeat the object of the proceedings. To the former belongs the exclusion of women and children from cases involving grossly indecent evidence; to the latter belong such cases as *Andrew* v. *Raeburn*, 9 Ch. 522, and *Nagle Gillman* v. *Christopher*, 4 Ch. Div. 173, where the object of the proceeding was to stop publication. It may be contended, however, that the principle of exclusion should be extended. The manner in which the Divorce Courts of the country are crowded, especially by women, has often been remarked upon and condemned. In England, prior to the Divorce Act of 1857, the ecclesiastical courts had a praiseworthy practice of taking suits for nullity of marriage (where expedient) *in camera*. But this was held not to extend to the new jurisdiction in divorce *a vinculo*, which was created by the Act of 1857. Section 46 of that Act directs that witnesses are to be examined in open court; and the English judges have sometimes lamented their inability to do what a sense of decency requires. One judge was in the practice of explaining the case, and asking that all ladies should withdraw, and then proceeding, with the statement that *all ladies* had withdrawn! In Scotland the Act 1693. c. 26, made it essential to "advise" causes with open doors, but it reserved power "in some special cases" to remove the public even from the advising. The older practice in Scotland (including probably that of the Consistorial Court) was entirely and perniciously in favour of taking evidence privately. Section 13 of the Conjugal Rights Act, 1861, however, directs that the evidence in consistorial cases is to be taken before the Lord Ordinary in the ordinary way. The question is, Does this give the public a right to be present in all classes of cases, or has the Court no inherent power to regulate such matters in what is the true public interest? No one doubts the value of the principle that all judicial proceedings should take place in public. That is not merely a security against injustice, but it converts the Court into a theatre of moral instruction. But Bentham has pointed out in his "Rationale of Judicial Evidence" that there may be certain exceptions to the rule of publicity, and one of these he states to be "the prevention of needless violation to

the reputation of individuals and the peace of families." The reasoning by which he supports this position is well worthy of attention at the present time, when there are signs of a deplorable prurience in some sections of society. The Courts of this country have achieved such a magnificent reputation for purity and freedom that they can afford to make exceptions in their practice. The public can rely on their character.

Reviews of Books.

Theorie und Praxis des Internationalen Privatrechts Von L. v. Bar. 2 Vols. Hannover: 1889.

This work is described as a second and remodelled edition of the "International Privat-und Strafrecht," published by Dr. Bar in 1862. It is, however, to a large extent new, as may be inferred from the fact that the single volume of the old treatise is now expanded into two, each of which is larger than the original. In spite of this enlargement we regret to find that Dr. Bar has dropped out of this present edition his chapters on Criminal International Law. These were among the most interesting in the work, and were marked at least as strongly as the rest of it by the author's sound common sense, and appreciation of International Law as a practical matter.

Dr. Bar is careful to explain in his preface that this omission of criminal law does not arise from any faith on his part in the notion that that subject belongs to a different range of ideas (*Ideenkreis*). Like private international law it has to determine the position of the individual and his rights in the eye of a foreign legal system, as public law determines the relations of States to each other, and the author would gladly have included it in the plan of his work. But, he explains, since he wrote much has been written by others on the subject of international criminal law, especially on extradition. To have examined all that has been written, and the new usages that have been established, would have delayed the publication of the work as it stands; a publication which, in view of the many changes that have been wrought on the domain of private international law by the political transformations which have taken place since 1862, was certainly desirable.

In the preface to the former edition Dr. Bar explains that "the object he always tried to attain was to produce a work of practical value: to give the judge and the practitioner a review of the literature, an exposition and criticism of the various theories of the subject, and a list of analogous decisions applicable to any case that might come before them." We believe that Dr. Bar's work is much prized both in this country and in America for this very quality with which, as he tells us, he tried to invest it. It is because of the strong practical sense with which he approaches each head of

his subject, and the clear deliverances which he gives upon controverted points that practising lawyers rate his work so highly as they do.

An eminent judge of the Court of Session was in use to say of Story, "with a tinge of plausibility and something like a sneer," that he was a dangerous authority to quote, because the dictum found on one page was invariably contradicted a few pages farther on. There is no doubt that in Story's work it is often difficult to separate the argument, and instances advanced by the author in the discussion of the subject in hand from his own deliverances upon it. In Bar's case, however, the reader is not left in doubt what the author's view is upon any practical point. He selects his position distinctly, and, while he by no means omits to state and illustrate the opposing positions fairly and fully, you are not at any point in the discussion allowed to forget what the thesis was on which the discussion is founded.

In the preface to his new work, Dr. Bar excuses himself for not having appended to each division of his subject a comparative view of the rules of law on that subject, which are recognised in the most important States of the world. It seemed to him, he says, to be of no use to mix theory with practice, and any attempt to give a complete enumeration of the divergent rules of different systems, and mark their divergences, would have needed a constant revisal. It will be found, however, that there is very little need of the excuse which the author has put forward; for there is both in the text and the notes a constant series of references to decided cases in the courts of different countries, and to the theories of the writers of different nationalities.

In accordance with the scientific character of the work, there is in the introductory paragraphs a statement of the principle on which the author's theory of Private International Law is founded, and a defence of it. His principle is "the nature of the subject" (*die Natur der Sache*), which he explains to mean the necessities of a peaceful intercourse and trade among the nations of the world. This is the principle which is to determine the solution of vexed questions of International Law, and this or that theory is to be accepted or rejected according as it is likely to advance or to retard this object. He combats Savigny's theory, which directs the lawyer first to inquire what the seat of the legal relation in question is, and then to apply the law of that place. He had criticised this theory unfavourably in his former edition, but was hindered, by the respect which the modesty of youth entertained for a great name, from attacking it as he now ventures to do. He now points out that almost every legal relation which has to be considered in private international law, and certainly every such relation which is a subject of difficulty, may be said to have several seats, so that Savigny's principle is incapable of being worked out in practice. Again, to go deeper, if we start with the notion of a legal relation, that presupposes a system of law to recognise the facts which are in question as constituting a legal relation, and it is precisely the object of our inquiry to discover what

the system of law is to which the fact, or congeries of facts, is to be referred for their interpretation. We must start from much simpler ideas: the ideas with which the inquiry is to be set on foot are, the actual situation of the person, and the actual situation of the thing in a particular territory, to which falls to be added that relation, be it domicile or be it nationality, which the person, by public law, bears to some territory. The place in which the process is in dependence is the only other idea which our author takes into consideration. Given those materials, the nature of the subject in each case will, he asserts, enable him in each case to work out a solution. Whether this method is altogether free from the charge of caprice as regards its results, can be ascertained only from an examination of our author's chapters in detail. It is sufficient here to say that caprice is to his mind the danger to which the judgments of private international law are most readily exposed, and from which they will suffer most grievously.

In setting up his own theory, Dr. Bar reviews compendiously but thoroughly the literature of the subject, and combats in the most spirited fashion the various rival theories. He devotes most of his attention to the modern Italian school—a school which has been stimulated, if not created, by the unification of Italy, and rests on the principles of "freedom" and "nationality." Dr. Bar has much sympathy with the enthusiasm of this school, and with the work which it has done, but he attacks its theory in a trenchant style, pointing out that it is as elastic as gutta-percha, and that by it you can prove anything or nothing. That theory is that the individual with his "personal statutes," which are determined by his nationality, is to be allowed free course in all states, except in so far as measures of "public order" necessarily put a restraint upon him. But the pinch of this theory is felt when an attempt is made to define measures of "public order." In a sense all law is a part of public order; as Dr. Bar points out, the law of succession, of marriage, and of divorce may all easily be brought within any definition of measures of public order that has been attempted to be given. The individual would in this way find himself hemmed in at every turn, and his "personal statutes" would have a very cramped action indeed.

After establishing his general principle, the *Natur der Sache*, which we are assisted to recognise by such familiar traditional doctrines as the rule that foreigners as a general rule are of as full capacity as our own subjects, the propositions that *locus regit actum*, and that legal processes do not create rights but merely clear them—all doctrines which have worked their way into acceptance by virtue of their correspondence with the true principle of the subject, the *Natur der Sache*—the author proceeds to an interesting discussion on the question as to whether domicile or nationality is the more suitable idea to take as expressing the relation which the individual has to the state as the determinant of his personal rights. He inclines to nationality, pointing out that the law of family and succession will naturally, if the individual had the choice submitted to himself, follow the lines of national feelings, prejudices, and traditions. He also notices that in modern

times, with increased facilities for travel, homes are much more easily changed, and domicile has become a much more fleeting conception. Further, he argues, that if the law of any particular State is to determine the private law of any individual, that State must be consulted on the matter, and must agree to protect the individual's rights before he or any one else can appeal to that protection. If nationality—*i.e.*, political nationality, is the principle, that condition is purified, for no one can become a citizen without some act of adoption by the State; but if domicile is to be the principle, there is no such safeguard. This is the theory which is gaining ground, and even Dicey, as Bar points out in his work on Domicile, p. 364, so far approves of nationality as the principle, that he describes it as a "sounder criterion" where it is applicable, and expresses some hope that its application may be extended by legislation and treaties.

Bar recognises the position of England and of America on this question as, of course, of great importance. Domicile is the criterion selected by the systems of these countries, and for this our author ingeniously, and very probably correctly, accounts in this way. England has an enormous empire in which there is no difference of nationality—for by nationality we do not point at a racial, but at a political fact—but yet there is an infinite variety of law. To determine the question as to which of these varieties of law regulates the case of any individual, you have no other standard but domicile to which appeal can be made; there is no nationality in the question. Hence the law of England, so familiar with this solution of questions of international law within her own political system, applies it universally. It may, however, occur to the reader to doubt whether, as there will be within the limits of most political systems a greater or less variety of legal systems, or, at all events, of customary law, the English solution of the question is not, after all, the more universal and the truer.

We do not propose to follow Dr. Bar through all the chapters of his work; it is all written in a clear and pointed style, and is never dull. To one chapter, however, we may refer for a moment—viz., that on Bankruptcy. This chapter illustrates the advance which this edition has made upon the former edition; there the subject was disposed of in less than twenty pages, here it occupies about fifty. The main question discussed is whether bankruptcy ought to have a universal operation. The result at which the author arrives is that, apart from positive legislative enactment, there is no such thing as bankruptcy with a universal existence and operation, although a process of bankruptcy cannot by any means be said to be without indirect effects in foreign countries. That bankruptcy should not be universal he defends on grounds which are certainly plausible and forcible, for he points out that to refer all creditors for the payment of their debts to a Court which is at a distance, with whose processes they are unfamiliar, and whose proceedings they may not fully trust, when their debts were contracted in their own country, and credit was given on the faith of the property of the bankrupt which they saw there, and which

still, it may be, remains there, ready to be taken in execution, may cause great hardship. The difficulty, too, of regulating preferences so as to do justly to all must be very difficult. While he prefers, as we have said, the non-universality of bankruptcy, it will be found, however, that both sides of the question are fully and fairly stated.

It only remains to add that the reading of the book is made much easier by the fact that it is not printed in German characters.

G. R. GILLESPIE.

Introduction Historique au Droit Privé de Rome. Par JAMES MUIRHEAD, LL.D. (Glasgow), traduit et annoté avec l'autorisation de l'auteur par G. BOURCART, Agrégé près la Faculté de Droit de Nancy. Paris: A. DURAND ET PEDONE-LAURIEL, 1889.

This is a French translation of Professor Muirhead's admirable "Historical Introduction to the Private Law of Rome." It must be gratifying to all students of law in this country to observe that the last literary work of our much lamented professor has received such flattering recognition on the Continent. It is a proof that Scotsmen are still capable of performing some good work in the field of the Civil Law. In 1887 a translation of the book into Italian was made by Sr. Gaddi of Milan, and that translation is now being used—so high is the credit which the work has obtained—as a text-book in some of the public law schools of Italy.

The present translation is from the pen of M. Gabriel Bourcart, Professor of Law in the University of Nancy. Unhappily, owing to a variety of causes of delay in the publication, the author had not the satisfaction of seeing his work in its French dress (his death having occurred almost on the very day of publication), but there is little doubt that had he survived he would have been gratified with the way in which M. Bourcart has fulfilled his task. The translation is distinguished by that ease and grace of style which is generally characteristic of French literary writers, and the meaning of the author is, so far as we have observed, rendered with a fidelity which leaves nothing to be desired. In addition to the translation, M. Bourcart has given a number of annotations of his own, no doubt with the view of adding to the practical utility of the work for students in the French schools of law. These consist in great part of references to the most recent French authorities on the subject, and to the edition of Padelletti's History, by Professor Cogliolo ("*Storia del diritto romano*"), and the treatise of Professor Carle of Turin ("*Le origini del diritto romano*"), the last named work having been published after that of Professor Muirhead.

Some of the translator's notes are valuable from a critical point of view, and show a thoroughly competent knowledge of the subject. Commenting upon Prof. Muirhead's view of the early history of Rome (which is perhaps open to some objection on the ground that it indicates a too implicit, or not

sufficiently critical, acceptance of the accounts given by the classical writers, such as Livy), M. Bouteart, while admitting that in a historical sense there is nothing certain known about Rome during the regal period, truly observes—"On aura pu remarquer, dans tout cet exposé, que l'auteur ne craint pas de s'appuyer sur ce qu'on est convenu d'appeler la 'legende.' Mais, on l'a déjà remarque, les recits de la tradition contiennent presque toujours des indications précieuses. Pourquoi donc ne pas les respecter, quand on n'a rien de mieux à leur substituer? Ne sont ils pas préférables encore à des conceptions qui—c'est M. Carle qui le dit (*Le origini del diritto romano*, p 175),—ne se rattachent parfois a rien du tout." Yes! we are entitled to believe in the laws of Numa and Servius Tullius, just as we are in the individuality of Homer, until, at least, the iconoclasts have supplied us with something more worthy of credence.

On the whole, M. Bouteart is to be congratulated on the manner in which he has accomplished his task.

H. G.

Principles of the Law of Negligence. By THOMAS BEVEN, Barrister-at-law. London: STEVENS & HAYNES, 1889.

Books on torts have all been more or less unsatisfactory, because they have not shown a scientific or logical division of the subject. The arrangement has been made partly in accordance with forms of action, partly from a supposed practical convenience for reference, and very largely by selecting some leading words which denote different kinds of injuries, the appropriate cases being discussed under these heads; while nothing has been done to show the true relations of different cases under a general principle of liability. Writers like Holmes and Pollock have indicated scientific divisions of the subject; but those who have written practical works have never adopted any such thoroughgoing schemes of the arrangement of duties (all to all, and some to all, &c.), as would logically exhaust the whole field and avoid cross divisions. See *Holmes*, *7 Amer. Law Review*, 654.

Mr. Beven, in his book on Negligence, has followed on the whole a satisfactory division, in working down from the three principal heads of General Relations, Special Relations arising out of Contract, and Special Relations not arising out of Contract. This division is, indeed, copied from Wharton, but in the present work more attention is paid to the subdivision into groups under these heads. But it is disappointing to find the liability of a master *to* his servant discussed, along with that of a master *for* his servant, under the heading of "Liability of a master in respect of his servant," especially when the author shows a clear understanding that the liability to the servant is not due to the contract of employment, but is a particular example of the duty which any one possessing property owes to all persons lawfully in a position to be affected by it. This is an example

of the selection of a leading name, and of the treatment under it of all that it may cover, ignoring the fact that some of the components are more nearly related to other divisions of the subject than they are to each other.

In respect of the style of treatment of the subject, the book must be highly commended. It will be of service to every lawyer who wishes rather to get an intelligent understanding of the law of Negligence, than merely to find correct and reliable legal propositions for practical use and that whether he be a student or a practitioner. To the student the work is valuable for the searching and well-sustained discussion of the cases; and to the practitioner there are presented all the cases that bear on most points for which he may be in search of authority. One of the chief merits of the work is, that all the available authority on each point is collected and so arranged that it can be easily found. The wealth of case-law, indeed, which has been collected is, for a first edition, astonishing; and while it has the completeness of a digest in respect of matter, it has also the character to some extent of an institutional work. For when case-law is found insufficient for the solution of the problem under discussion, the author does not hesitate to fall back on principles, and to quote the French and Roman law on the point. The Roman law, in particular, is cited to an extent which is to say the least, unusual in English law books; but it is a feature which will at any rate not be disapproved of by Scottish lawyers. The citation of American authorities, however, is probably too preponderant for a book on English law.

The scheme of the book is the ambitious one of establishing principles by the citation and comparison of authorities from many systems of law—Roman, French, American, Scots, and English—and of discussing the authorities cited, with more regard to reason than to the recognition in any case of final authority, because a writer has so said, or a judge so decided; and, if the result is not altogether equal to the ideal, allowance must be made for the difficulty and complexity of the subject.

Mr. Beven, however, in some places attempts too much, and tries to reconcile decisions which are contradictory or different in kind, by supplying reasons not regarded by the judges concerned, but which he thinks will bring the cases into harmony. An instance of error thus resulting is found in the otherwise instructive discussion of the doctrine of liability in cases like *Heaven* v. *Pender*, p. 53, *et seq.* Thus in the case taken, in which A has supplied a faulty article under contract to B, and C, with whom A has no contractual relation, is injured by it, he lays down the principle that if between the agency setting at work the mischief, and the actual mischief done, there intervene a conscious agency, which might or should have averted the mischief, the person originally at fault is freed; and he explains *Heaven* v. *Pender*, in particular, on the footing that there was no duty on the shipowner to inspect the staging (whose defect occasioned the injury) on receiving it. This was certainly not the ground of decision, and the test is unsound, for it overlooks the consideration that both parties may be liable,

because both may be in fault. If this were not so it would mean that the purchaser of an article had a duty to the seller to inspect it to discover any defects that might be there by the seller's fault, and that the seller could plead that he was not liable for his negligence because he was entitled to rely on the purchaser's diligence, which is absurd. And no case is cited in which this "conscious volition" interferes to free the party originally at fault, for they all establish the liability of the original wrong-doer. The case founded on by the author in support of his view is one of fraud, and does not require his maxim to account for the decision that "liability for the consequences could be inferred back to" the vendor. *Winterbottom* v. *Wright*, cited in the same connection, was overruled as an authority on this point in *Heaven* v. *Pender*, and the effort to reconcile the two decisions is wasted. But on the whole the criticism of the authorities is correct and instructive. A good example is the chapter "On a Master's Liability for his Servant," where the history of the subject is fully set forth, and the different doctrines canvassed. The whole of the third portion of the book also appears to be well done in the same style.

There are some defects in the book, however, which even the fact of its being a first edition of nearly 1300 pages will not excuse. Bad grammar is frequent, the language is often so slipshod and loose as to be nearly unintelligible, and sometimes it passes that margin. For instance, to take two consecutive pages—on page 68 we read, "But where the nervous shock is produced, the terror is merely another expression for a direct effect on the nervous system—a portion of the physical organisation—which he inflicts injury on himself in his fright is an actionable wrong, and damage may be recovered;" and (p. 69) "If the effect had been what, in ordinary speech at least, is called a mental shock, in natural and ordinary sequences produces physical disorganisation or illness." Surely a better authority might be found than Hamilton's "Metaphysics" on the question whether a nervous shock is physical injury. References also are not invariably correct. On page 15, of two references to Holmes' "Common Law," the first is wrong; it should be p. 108; and the second does not give the page (110), and there is no reference after Brown and Collins to the Amer. Rep. (xvi. p. 372), the best known series here. Also *Hamilton* v. *Robinson* (p. 1074) is omitted from the index of cases; *Paradine* v. *Jane* is not referred to p. 1132; and, *Butterfield* v. *Forrester* (p. 1074), a case of contributory negligence, is cited under the respective liabilities of landlord and tenant. A book which discloses so many minor inaccuracies on a casual verification reflects no great credit on the gentleman mentioned in the preface as having waded through the proofs.

A. T. Gilegg.

Essays in the Constitutional History of the United States in the Formation Period, 1775-1789. By GRADUATES AND FORMER MEMBERS OF THE JOHN HOPKINS UNIVERSITY. Edited by J. FRANKLIN JAMESON, Ph.D., late Associate in the John Hopkins University, Professor of History in Brown University. Boston and New York: HOUGHTON, MIFFLIN & Co., 1889.

The authors of these Essays seem to have been prompted to their work, partly at least, by a desire to refute a statement made by Mr. Gladstone in an article contributed to the *North American Review*, in which he declared that "the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of man." Mr. Gladstone, no doubt, intended this as a compliment, but the essayists consider the statement as neither complimentary nor true. It is quoted with disapproval both by the editor in his preface and by Mr. Smith in his essay; they object to it as encouraging the popular idea "of our Constitution as having sprung full-armed from the heads of Olympian Conventioners," and as being unfavourable to historical investigation. "The words," we are told, "suggest unanimity: they give no hint of strenuous struggles to secure, or of unremitting efforts to change that Constitution: they ignore the fact of its speedy amendment."

So far from being "struck off at a given time," Mr. Smith tells us in his essay on "The Movement towards a Second Constitutional Convention in 1788," that the Constitution was an instrument "produced in a conflict of opinion, adopted with doubt, ratified with hesitation, and amended with difficulty." His article is rather a narrative of the incidents of its conception, adoption, and ratification, and of the time and labour spent upon the proceedings, than an essay on the instrument itself. He gives an account of the difficulty the Federal Convention had in passing it, of the danger it ran of rejection, first by Congress, and afterwards by each State; but there is very little reference to the substance of the Constitution itself, to the debates which took place upon it, or to its merits or demerits as finally settled. Indeed, a reader not acquainted with the document would have little or no idea of its contents from the essay. He proves that it was not "struck off at a given time," but on the contrary took considerable time and prolonged effort to make; and to trace its history in the process of formation and its gradual development is presumably the sole object of the essayist.

The other four essays treat of the formation of the Constitution of the United States, using the word in a wider sense—not as applicable merely to the written Constitution, but meaning by the term the American form of Government and the final results which the past history of the country has had upon its chief institutions. As the Editor well expresses it in his preface, he desires "to assist in broadening the current conception of American Constitutional history, and in making its treatment more inclusive. Those who live under a written Constitution are in danger of using the term

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'Constitution,' and by consequence the term 'Constitutional history' with a reference to that document only. They are likely to forget that the word 'Constitution' has also the wider sense of form of government, the sense in which we use it when we are speaking of all countries alike."

Accordingly, the remaining essays deal with the formation of other prominent institutions of the country. The Editor, Mr. Jameson, in the first essay on "The Predecessor of the Supreme Court," traces the origin of "the most august and powerful tribunal in the world" to a Maritime Court of Appeal established at the Revolution to deal with disputes as to ships captured from the enemy by privateers. "The Development of the Executive Department," by Mr. Guggenheimer, shows how the charge of the army, the navy, the treasury, and foreign affairs was at first intrusted to committees, who by degrees were superseded by Secretaries taking the entire responsibility as in most other civilised countries. The essay proves, in short, that "the departments of 1789, which are also the departments of 1889, evolved by a natural process from the germinal committees of 1775." The fourth essay on "The Period of Constitution-making in the American Churches," by Mr. Trent, seems at first sight not to have any very direct connection with the formation of the Constitution of the United States. In the case of the Episcopal Church, of course, the connection is obvious. America having broken its connection with England, the American Church necessarily ceased to be part of the English Communion, and the Church was driven in the first place to obtain a bishop—a difficulty, by the way, which was surmounted by coming to the Episcopal Church of Scotland. But in the case of the other Churches also, the separation from England had the effect of forcing a union of the different churches belonging to the same sect, throughout the different States. Their isolation from the mother country from which they had sprung, caused them to draw closer to each other, and thus members of the same Church, though dwelling far apart in different States, were anxious for union, and glad to form one Church of their own peculiar views, for the whole of the newly formed American nation. So each Church, according to its own peculiar methods, took means for joining together its members wherever scattered, and for forming one united constitution throughout the country. As Mr. Trent remarks, this no doubt checked the tendency to state autonomy in matters politic; and helped to stimulate that union of states which has now made a united and prosperous nation. The inference was obvious, that if religious union was good and practicable, political union was desirable also; and that if Baptists or Roman Catholics, or Wesleyans, of one State felt themselves stronger by uniting with their brethren of the other States, a union of all the State governments would also form a stronger defence and protection against the world. This essay indeed seems to us the most interesting of all, and to belong as much as any to the sphere of constitutional history in the strict sense of the term. The next and last article on "The Status of the Slave in 1775-1789," has the least connection with the primary

object of the book, and owing to the contempt and indifference with which slaves were at that time regarded by all classes, the institution of slavery does not seem to have had any perceptible effect on the formation of the American Constitution.

The book as a whole is one of much interest, and the essays contain a great deal of valuable information, which, however, might have been imparted in a more attractive style. They are somewhat open to the charge of dulness, and will be apt to repel the ordinary reader. But Mr. Jameson probably did not aim at being popular, and he has succeeded in producing excellent and useful work which, while finally disposing of the theory that the American Constitution was "struck off at a given time by the brain and purpose of man," will probably stimulate others to devote themselves to the constitutional history of their country.

J. Edward Graham.

Elements of International Law By Henry Wheaton, LL.D. Third English Edition. Edited, with Notes, &c., by A. C. Boyd, Esq., LL.B. (Camb.), J.P., Barrister-at-Law, &c.

This well-known work seems to have the destiny of most English law books, and to be now doomed to a fate of periodical expansion. In the hands of previous American Editors, indeed, the text disappeared in notes. Notwithstanding its popularity—and at the date of its publication it deservedly took a high place—we venture to think that Wheaton's "Elements" has now been superseded by more recent American work. The practising lawyer who wishes a precedent will turn more readily to Halleck or Field, while the student or the general reader will find the late Professor Woolsey's "Introduction" as accurate and more interesting. Wheaton's philosophical views are as useless to the practitioner as they are unsatisfactory to the philosopher. Thus it is simply irritating at this time of day to have the maxims of Huberus offered for the basis of Private International Law, as if they had ever been anything else than irrelevant truisms. And we observe that Mr. Boyd makes no reference in his notes to Savigny or Bar's criticism of these maxims, or to Professor Lorimer's very elaborate argument against their general position in his "Law of Nations."

For the somewhat thankless work of editing, Mr. Boyd deserves, on the whole, warm praise, and he has so far succeeded in supplying the deficiencies of Wheaton, that we venture to think his time would have been better occupied in giving us a new text-book of his own. The expanding of a discursive compilation has a tendency to make the original still more discursive. Thus, in the chapter on the Right of Self-Preservation and Independence, we have an elaborate note (12 pp.) bringing the history of the Eastern Question down to date. Wheaton's text is the Balance of Power, but this might have been well illustrated without going into such detail. In other directions, however,

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there is occasionally undue compression. For example, under the head of Rights of Civil and Criminal Legislation, we have some detail as to foreign judgments, divorces, the extradition of criminals, and other matters of municipal law, and a supplementary chapter on National Character and Domicile, which is one of the best in the book, but we cannot find any reference to the law of copyright and patents, as affecting foreigners, while at the end of the chapter on Rights of Negotiation and Treaties we find a small note referring the reader to Nelson's "Private International Law" for these subjects. Again, there is a note as to the Zollverein, but there is no reference to the Postal Union, the Latin and Scandinavian Monetary Unions, and other similar topics of International Administrative Law, which are more interesting to British and American lawyers. It would have been better to have said less about the "Sackville" incident, and to have given some outline of the law as to the powers of consuls over the executry estates of their fellow-countrymen, and such matters of stipulation in recent treaties. The last chapter in the book is very sparsely annotated, and at pp. 703 and 705 there are certain statements as to matters of French law allowed to stand, although these have been dealt with by the legislature since the establishment of the present Republic. The President cannot declare war without the consent of the two Chambers; and no cession, exchange, or addition of territory can take place without a legislative act (Loi, 16-18 July, 1875, §§ 8 and 9). Some recent examples of the treaty-making power in Great Britain might also have been noticed here.

There are several interesting questions raised or discussed by Mr. Boyd. For example, how far a Prize Court is bound to enforce a municipal law against foreigners, when that municipal law is contrary to the law of nations. With all deference to the authority of Lord Stowell, and also of Sir R. Phillimore, who thinks that "it has never been the doctrine of the British Prize Courts that because they sit under the authority of the Crown, the Crown has authority to prescribe to them rules which violate international law," we would suggest that the Prize Court should administer the law as it finds it laid down by the Crown or the Legislature, and leave the foreigner who feels aggrieved to seek redress through ordinary diplomatic channels. The proper legislative authority is just as likely to know and interpret the law of nations, as it is to know and interpret the law of nature or the law of God, and the judge, if the enactment is clear and unambiguous, must treat it as final: but, if it is not clear, the judge is bound to assume that it is in accordance with the law of nations, just as he assumes that it is in accordance with the moral law. Lord Neaves was nearer the truth when he said, "The Legislature has even the power to do what is wrong, and we are bound to obey it" (*M'Laren* v. *Menzies*, 3 Ret. 1159). If we regard International Law as the portion of Municipal Law which applies to foreigners, all difficulty disappears, for the judge administers this in the same way as he administers the other portions of the law. That this view is not out of the question is evident from the opinion of

Halleck, quoted on p. 650. It was the view taken by Lord Stair in his "Institutes."

We cannot avoid concurring in the judicious remarks of Mr. Boyd as to the Alabama Arbitration (p. 590). The "Three Rules" were a concession by Great Britain for the sake of peace. It is much to be regretted that a great nation like the United States of America, whose interests are, like our own, undoubtedly identified with peace, did not embrace the opportunity of submitting to arbitration the whole question of our conduct in the matter of the cruisers. The negotiation of the Treaty of Washington has been justified by the re-establishment of friendship between the two English-speaking nations, but it spoiled the effect of the arbitration as an example of two hostile nations settling their disputes without war. So far as history can guide us, arbitration seems to be possible only when one or both of the parties have made up their minds that the matter is not worth fighting about.

In connection with the subject of contraband, we should have wished some indication of opinion as to the meaning of that term in the Declaration of Paris (pp. 651 and 794). If, according to Field's definition, goods become contraband when "actually destined for the use of the hostile nation in war, but not otherwise," then a cargo of rifles and cartridges owned by a neutral in an enemy's ship, but destined for a neutral port: or such a cargo belonging to an enemy, in a neutral ship and destined for a neutral port, would not be liable to capture. We may affirm with confidence that if those questions ever arise, they will be keenly discussed, and notwithstanding the *dicta* of eminent judges in support of Field's definition, we incline to think that the declaration had in view "absolute contraband" in the sense used by Bluntschli (§ 803)—*i.e.*, munitions of war and such commodities, and that these were expressly exempted from the peaceful trade which the Declaration sought to protect.

W. G. M

Town Government in Rhode Island, by William E. Foster.

The Narragansett Planters, by Edward Channing.

Pennsylvania Boroughs, by William P. Holcomb. Baltimore, 1886: N. Murray, Publication Agent, John Hopkins, University.

In a quotation from Mr. Bryce's "American Commonwealth," prefixed to Sheriff Mackay's article on Politics in this Review (*supra*, p. 1), reference is made to the systematic revival of the study of politics in the United States. The short studies, of which the titles are given above, are illustrations of this valuable tendency. They are parts of a long series of studies in Historical and Political Science which have been organised in the great Baltimore University, under the editorship of Mr. Herbert Adams. Mr. Adams has adopted as his motto the saying of Freeman, that "History

is past Politics, and Politics present History." These papers apply the comparative method to the treatment of political questions, not in the spirit of antiquarian pedantry, but with the enthusiasm of citizens deciphering the life of their forefathers. It is unnecessary to point out the opportunities for such a line of investigation, which are afforded by the rapid and comparatively recent growth of constitutional forms in the United States. The list of papers is a long one, and their very names indicate how thorough is this phase of American thought. We are too apt to think of our transatlantic brethren as "bossing" a legislature, or "running" a corporation. It is refreshing to come into contact with the thoughtful and cultivated aspect of American politics. Thus, in the first series, published in 1883, besides Mr. Freeman's Introduction to American Institutional History, a lecture delivered during the author's visit to Baltimore, there are Mr. Adam's papers on the Germanic origin of New England Towns, and Saxon Tithing Men and Norman Constables. in America, Mr. Albert Shaw on Local Government in Illinois, and Mr. Inglis on the Parish Institutions of Maryland. In the second series there are Professor Adam's Papers on Taxation in the United States, Mr. Channing on Town and County Government in the English Colonies of North America, and Professor Macy on the Institutional Beginnings in a Western State. In the third series there occurs Mr. Dean's Paper on American Constitutions: the Relations of the Three Departments as adjusted by a Century. The fourth series contains special studies on the City Governments of Baltimore, Chicago, San Francisco, St. Louis, Philadelphia, New Orleans and New York, Mr. Jameson's Introduction to the Constitutional and Political History of the Individual States, and Mr. Eltery's study on the Dutch Village Communities on the Hudson River. These are only specimens of fifty three separate works. The fifth series also deals mainly with Municipal Government; the sixth with the History of Co-operation in the United States; the seventh includes a paper on Arnold Toynbee, with some account of the Neighbourhood Guild in New York, and an interesting sketch on English Culture in Virginia. Our object in mentioning them is to awaken interest at home in this important and interesting movement. Like the Political Science Quarterly, issued by the Faculty of Political Science in Columbia College, it shows the American mind reflecting profoundly on the connection between their great progressive civilisation and the great European past. Sooner or later the ideas suggested by such work will permeate the active politics of the day, and give enlightenment and sobriety to that vast Democracy. It is not our intention to notice in detail the books named above. They will all repay perusal. Rhode Island is remarkable for the gradual and grudging way in which the towns gave power to the General Assembly of the State. In Pennsylvania the leading distinction between a city and a borough is that the former has two councils, the latter only one.

W. C. S.

Hints on Advocacy. By Richard Harris, Q.C. Ninth Edition. London: Stevens & Sons, Limited, 1889.

When a book has already run into its ninth edition, there can be no question as to its having found favour with the public, or at any rate with that portion of the public to which it is more particularly addressed. It can no longer be treated as on the threshold of its existence, fresh from the publisher, and about to enter on the unknown possibilities of the future, but must be approached with consideration and respect, and discussed, not as a doubtful quantity, but as a creation which bears upon its back the stamp of "ninth edition"—an index of some measure of success. The question is no longer one of possible or probable success, but rather, since that has been so far assured, upon what grounds acceptance has been gained, and by what merits a favourable verdict has been won.

There being, as is explained in the preface to the first edition, "no school of advocacy, no lectures on advocacy, nor even any book on the subject," is not a remedy imperatively needed for a defect in the educational system so glaring, for a want so deeply felt? But as to many other desirable ends, so to advocacy there is no royal road: and one need hardly wonder at a paucity of schools, lectures, and books for the purpose of teaching a subject which, as a whole, is incapable of being taught by either books, lectures, or schools. In part, however, if not as a whole, much may be written to indicate, if not to teach, the course to be traversed by the aspirant to successful advocacy; much that may be read with profit by any save he who thinks of himself in the words of a certain sharp-witted epigram, "All that is knowable I know it." So thinking, the author compactly embodies in the form of "Hints upon Advocacy" for beginners in that profession the various experiences he has himself acquired from practice and observation, and sends them out into the world, in the hope, not of thereby turning out a ready-made advocate, but of assisting ever so slightly a young beginner in developing those powers and qualifications he may already possess.

That "the foundation of all good Advocacy is common sense, and is the one quality without which all others are useless, and with which almost all others are superfluous," is a proposition that will not be seriously disputed. Unfortunately, however, this same common sense is the gift of nature, given often with a sparing hand, and is neither acquired like a mannerism nor assumed at the bidding of a text-book. Whence it follows that this essential factor in forensic success can only be appreciated, but not acquired, by the student who cons Mr. Harris's pages. The next most important factor in successful Advocacy, says the author, is knowledge of humanity, inasmuch as the advocate is daily dealing with human nature, and generally with human nature when in process of upheaval. Now the knowledge of man—of human nature, of the motives, characteristics, passions, interests that actuate mankind—can only be attained by personal experience, by

personal contact, and by personal familiarity with mankind in all its phases and is of all studies the one pre-eminently to be pursued by each person "*per se pro se*." The man of experience, who has by personal labour—himself for himself—acquired it, may catalogue off his witnesses and label them, as the author has done, with the appropriate labels round their necks; each species and genus, distinct and defined, with an appended list of rules for the proper handling of these interesting animals when called upon to perform in the witness-box. The rules may be excellent, and the various methods of dealing with the "lying," the "nervous," the "stupid," the "cunning" witness may be marvels of subtlety, and admirably adapted to the ultimate attainment of any desired result—but then comes the difficulty! How is all this to be made of use to the student? How does the youth of inexperience discover what is of course obvious from very familiarity to the experienced practitioner — what exact specimen he has got in the box? Unless he knows under which category his witness falls to be classed, he will be unable to apply the corresponding method of treatment required; and unless he knows what rules to apply, of what use at all are the rules themselves? This is, without doubt, another part of the profession that is untaught, because unteachable—which must be learnt only from actual practice, or personal observation and experience, and in which a text-book proves but a blind guide. Remembering then that two essential components of successful advocacy are unteachable and outwith the province of any book, there yet remains much that is teachable, and that is taught, and well taught, in the pages of this little volume.

In the chapters on "Opening," "Examination-in-Chief," and "Cross Examination," there are principles laid down and hints given which will be of great benefit to the beginner, and which might be read with advantage by many no longer in their novitiate. Styles of addressing juries are commented on—the "temperate," the "conversational," the "foaming and furious;" the folly of the fulsome flattery so often smeared over a jury is condemned; the evils of "fine talking" and affectation are indicated; tricks of expression or facial contortion, and the kindred tricks of gesture are decried; *et hoc genus omne* of objectionable acts of omission and commission have the finger of warning solemnly shaken at them. Trifles, all of them! barely worth abusing, some may say; but just because so seemingly petty, yet so really powerful, is there the more need to lay them bare!

Cross-examination and re-examination are viewed roughly speaking from two points: "How to do it," and, not less important, "How *not* to do it;" and under these two heads are ranged numerous useful suggestions. The chapter on "Tactics," too, is well worth perusal, even if no more of it be laid to heart than the closing words:—

"In conclusion, it should be remembered that amid all the difficulties that beset the advocate, he will find Good Temper the best companion, and Common Sense the surest guide."

Illustrative of some of the hints scattered through its pages, a consider-

able portion of the book is devoted to sketches of typical witnesses likely to be met with in ordinary practice, rendered with such fidelity that no one can fail to recognise among them some familiar bug-bear. Who has not suffered from the policeman, puffed up with a good deal of knowledge and a great deal of *belief*, or can fail to recall some "fishing" question that only caught a very wrong answer? Here is the scene; somehow it seems familiar!—

"What did you say when you apprehended the prisoner?" asks Jones, eager for the display of his severe ability in cross-examination.

"Oh!" says the active and intelligent, "I forgot that, my lord!" (always taking my lord into his confidence); "I beg your lordship's pardon; I said, 'Now, Sykes, when you come out from doin' the last seven years, you told me you meant to turn over a new leaf, and 'ere you are agin!'"

And there the learned counsel was again!

There are also two excellent chapters on the conduct, both of the prosecution and the defence in a criminal trial. But as a review should not become a *resumé*, it will be well to reveal no more. Enough has been said to sketch in roughly the outline of the work; for further information inquiries must be addressed to the book itself.

R. Stanser M'Nair.

Procedure in the Court of Session. By John P. Coldstream, W.S., &c. Fourth Edition, Enlarged and Revised. Edinburgh: T. & T. Clark, 1889.

That this work has already reached its fourth edition is good evidence that there is a considerable demand for a concise treatise on Court of Session practice. His long experience as a Clerk of Court, first in the Outer House and afterwards in the First Division, enables the author to speak with confidence on all points of practice. It has also enabled him now and again to cite cases in which incidental points of procedure were decided, and which have been either overlooked or ignored by the reporters. Mr. Coldstream aims at being practical rather than scientific or philosophical, and his treatise can, of course, in no way be looked on as a rival of the larger and more important one of Mr. Mackay. The law of procedure is boiled down and condensed into the compactest proportions—too much so, one would be inclined to say, were it not that this conciseness gives room for the admission (in the form of an appendix) of the various Statutes and Acts of Sederunt affecting Procedure; and this, many will think, is not the least valuable part of the work. It is not always an easy thing to be concise and at the same time precise; and in his efforts to avoid diffuseness the author has not always avoided obscurity, as, for instance, where he tells us, on page 3, that a summons is served on a defender by a messenger-at-arms, "and in a county or district of a county, or any of the islands of Scotland where there is not one resident at the time, by a sheriff-officer

of the county or sheriffdom where such island is situated:" and in support of this somewhat cloudy statement he cites the wrong section of the Act 31 & 32 Vict. c. 100—viz., sec. 14, instead of sec. 19. Then, as in former editions, he adheres to the expression, "box-week in vacation," meaning thereby the week in which box-day occurs; and in this connection it may be noticed that the indexing is not invariably accurate—for, under the head of "Act of Sederunt anent Boxing," one is referred to page 32, and on turning to page 32, one finds it devoted exclusively to the subject of curators. It goes without saying that in a work which is chiefly a compilation, accuracy should be a *sine qua non*. There are also a number of errors of style scattered about here and there, which, with a little trouble, and with some advantage to the book, might have been avoided.

But, after all, fault-finding is an ungracious task, and the faults themselves not glaring. The work, as a whole, evinces very considerable knowledge of the subject on the part of the author; and if it is not uniformly successful in imparting information, that it is useful, and fills, so far as it goes, a gap in our legal literature, is sufficiently guaranteed by the ready acceptance it has met with in the profession.

Procedure and Appeal in Summary Criminal Cases in Scotland: with Appendix containing Forms of Complaints and Appeals, and Statutes. By R. W. Renton, S.S.C., Procurator-Fiscal of Fifeshire. Edinburgh: T. & T. Clark, 1890.

Exclusive of its exhaustive index and a table of cases, the volume before us extends to 178 pages only, and of these 67 are occupied by the appendix. From this analysis an accurate indication is obtained of the natural place of the work in legal literature. Essentially it is a *handbook*, in the best sense of the word, and has been constructed by the author from a large official experience, with a special view to the practical needs of those concerned with the administration of the Summary Acts in the Sheriff-Courts. The idea, as set forth in the preface, was to present within the limits prescribed "a concise statement of the law," and Mr. Renton is to be congratulated upon the literal accomplishment of his intention in point of brevity, and also upon the fulness of information which pervades the text. The book is a new departure, and supplies a want in the profession. It is twelve years since Moncreiff "On Review in Criminal Cases" appeared, and much has happened since then. The Summary Jurisdiction Acts of 1881, and the Criminal Procedure Act of 1887 have occasioned a revolution in the methods of the Summary Courts, as elsewhere. But apart from this, the treatment of Summary Procedure in Lord Wellwood's work, ancillary merely as it was to the central topic of *review*, was not calculated to suit the require-

ments of the Sheriff-Court practitioners whom Mr. Renton specially addresses, and for whom nobody else has prepared a "separate treatise," such as the present Lord Justice-Clerk hinted at in 1877. Mr. Renton's work accordingly "holds the field." We heartily recommend it for its clearness, point, and practical usefulness—these merits are the author's; while the publishers deserve commendation for a handsome binding and excellent type, which add to the pleasure of reading an entirely creditable volume.

A. L. M.

A Handbook of Conveyancing, for the Use of Students. By John Burns, B.L. Edinburgh: William Green & Sons, 1889.

While the truth of the old adage that "there is no royal road to learning" remains unshaken, it must be admitted at all events that modern ingenuity has provided a short and easy method of passing most examinations—popularly supposed to be the test of learning. It is probably too late in the day to rail at the cram system, or at books which have as their object its perfection and perpetuation, but the natural impulse engendered by a perusal of Mr. Burns's Handbook is unquestionably one of protest. It has been prepared, as the writer candidly confesses, in view of "the system of articulate marking on conveyancing examinations," and its main object is apparently to provide the student with a set of ready-made answers to the questions he is most likely to find in his examination papers. It contains the bones of the subject without the flesh and blood, which are necessary to vitalise them: it is simply a collection of what are known in the language of the class-room as "points." But a man may bristle with "points" and yet be a most incapable conveyancer; and the student who enters upon the practice of his profession—as only too many are likely to do—relying for his knowledge upon the assortment of "points" so obligingly provided by Mr. Burns, is likely to rue it. It will be his own fault, however, if he does so—not the fault of Mr. Burns, who, though he may be blamed for his conception, deserves nothing but credit for the manner in which he has carried it out. The statements of law in the Handbook are clear, concise, and accurate; the arrangement is good, and there is a serviceable index. It might be suggested that in future editions of the work, employment be made of a variety of type; in books written to be crammed, such mechanical aids to memory are not without value. The book does not contain a single reference to authority; and while the insertion of references would probably be felt to be superfluous by the majority of those for whom it is intended, the want of them seriously impairs the value of the Handbook to any who might be disposed to use it for purposes of general consultation.

J. J. C.

XUM

The Acts of 1889 in so far as affecting the Education Acts for Scotland: being a Supplement to Sellar's "Manual of the Education Acts." By J. Edward Graham, Advocate. Blackwood & Sons, Edinburgh and London, 1889.

The public law of education in Scotland is directly affected by no less than fifteen sections of the Local Government Act, 1889; and Mr. Graham, the accurate and experienced editor of Sellar's "Manual," has done right in explaining by this little book how far the law is changed. The book should at once be in the hands of every school-board clerk in the country. The members of school boards themselves should also consider carefully how their position as administrators is altered by the provisions of the Act. The remission of school fees, the new application of endowments formerly applied to that remission, the abolition of payments by the Parochial Board, the changes made possible in the area and jurisdiction of school boards, the probable transfer of large powers from the Education Department to the new County Councils, all those are subjects on which the members of school boards should at once thoroughly inform their minds. Mr. Graham prints the minute and circular of 26th August, 1889. The only regret we feel in seeing such a book is that it should still be necessary to have separate books for educational administration. Education should, and before long will, take its place as a part of the general system of local administration. Mr. Graham has also printed the Prosecution of Cruelty to Children Act, 1889. We have elsewhere expressed the opinion that this is a useful Act, if wisely and temperately administered. We are glad to see that local fanaticism has not succeeded in destroying Christmas pantomimes.

Notes on Decided Cases.

Donatio mortis causa.—*Recovery of Donor-Deliverer—M'Nicol v. M'Dougal*, 25th October, 1889, 17 Rot. p. 25, deserves some notice in connection with the doctrine of *mortis causa* donation. The facts of the case are unimportant. The gift alleged was of money standing on deposit-receipt in name of deceased, and the person in whose custody the deposit-receipt was found failed to prove a gift of the money. But it is necessary to call attention to the grounds of decision in the leading opinion of Lord Young, because these are at variance with the law laid down in some recent cases. A donation *mortis causa* "is made," he says, "in contemplation of death, and in my opinion, whatever may have been said to the contrary, in immediate contemplation of death. Then, if that apprehension is not realised, and death does not follow, but the apprehensive donor recovers, I think the donation is revoked by that very fact, and that it will not survive the donor's recovery. Here the alleged donation was made a long while before death. The donor survived about a year. I doubt, and indeed I am individually of opinion, that no donation *mortis causa* will endure for a year. I do not think that it is of the nature of a donation *mortis causa* to last anything approaching a year." He then goes on to say that it is essential to a gift, whether *inter vivos* or *mortis causa*, that the donor must divest himself and invest the donee, and that such divestiture and investiture could not in the case of donation *inter vivos* be made by indorsation of the deposit receipt, and that "until the donee got the money everything might be undone, although after he had got the money the gift would be irrevocable;" and that a donation *mortis causa* required the same investiture and divestiture, otherwise it would be a mere verbal legacy and of no effect.

Now, in the case, once regarded as leading, of *Morris* v. *Riddick* (5 Macp. 1036), three propositions were laid down by Lord Deas as expressing the characteristics of *donatio mortis causa*. These are—(1.) It must be made in the prospect of death; (2.) It takes effect only in the event of death occurring in the existing illness, otherwise the gift must be returned. (3.) There must be delivery.

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In *Crosbie's Trs.* v. *Wright* (7 R. 823), the last of these propositions was, with some slight qualification, recalled by Lord Deas himself, and expressly repudiated by the other judges. In this case the names of the donees stood on the deposit-receipt, which was payable to survivors or survivor. The Lord President said—"I do not think delivery is absolutely necessary, . . . the question is, Was there a previous *animus donandi* in regard to the money? . . . I think the deceased . . . had an *animus donandi de presenti*, and, if that is conclusively proved, I am not prepared to say that more is required to constitute donation *mortis causa*, provided the elements of such donation be present." Divestiture of donor and investiture of donee here, then, consists in the expression of an *animus donandi de presenti*. Prove that and you make out your case for donation.

The second of Lord Deas's propositions in *Morris* v. *Riddick*, was displaced five years later in *Blyth* v. *Curle* (12 R. 674). This was a case of a bank pass-book in joint-names of donor, donee, and survivor. Lord Deas's second proposition was pleaded against the donation. The Lord President, after reviewing the texts in the Digest, and the whole cases in the Scottish books, puts it aside as untenable, saying—"The fair implication [from the Roman texts] seems to me to be that, while the donor's power of revocation subsists till his death, if he die without revoking, the gift will become absolute by his death, though that may occur after many years, and not as the result of the peril, the apprehension of which was the immediate motive of the gift." And again, "I cannot find in any of our authorities, with the exception of the *dicta* relied on by the appellants, a recognition of the necessity of a present imminent peril to life, as a condition of the right or power to make a donation *mortis causa*." The other judges agree in this opinion; and the decision as to delivery given in *Crosbie* is also reviewed and unanimously affirmed. In *Lord Advocate* v. *Galloway*, 11 Ret. 541, the same bench had in the previous year sustained a donation *mortis causa* where the donor, though aged, was in good health, and went about his business for three years after he made the gift. In his opinion in *M'Nicoll* v. *Macdougall*, therefore, Lord Young virtually goes back to the old proposition of *Morris* v. *Riddick*. He says his view is that of the law of England. That the laws of the two countries should be assimilated is no doubt desirable, but the process should not and cannot be by judicial decision. It must be by legislation proceeding on a view of public utility, which judges are seldom well qualified to form. Nor should it be by the Scots law adopting the rule of the law of England in cases where, in the opinion of Scots lawyers, their own law possesses the better principle.

R. B.

Reparation—Limits of Liability.—*Scott's Trustees* v. *Moss*, 17 R. p. 32; 27 S.L.R. 30.—Moss advertised a descent in a parachute from a balloon, which was to ascend from a recreation ground in the outskirts of Edinburgh, seventeen acres in extent. Admission thereto being by payment, a large crowd collected in the neighbourhood outside, and the parachutist descending in a field close to, but outside the enclosure, this crowd rushed into the field to see the descent and the performer. The pursuers sued for damages thus done by the trampling crowd to the field. The Court sent the question to a jury on the issue whether this descent into the pursuers' field might readily have been foreseen by defender, and whether, as a consequence of the descent, and as the natural and probable effect thereof, the crowd entered the field. Now this decides the liability of the defender in law, but the ground of the defender's liability is one that is not easily expressed in terms of any of the usual legal maxims, and neither the Lord President nor Lord Shand attempted so to formulate their opinions. Lord Adam, indeed, said that the ground of the defender's liability in law was that a person was not entitled to do anything on his own property which was likely to cause damage to his neighbours. But this does not satisfactorily meet the case, for neighbourhood is not apparently essential, and it would, probably, in the view of the Court, have made no difference to the case that the balloonist had ascended from North Berwick with a southerly wind, intending to alight on the foreshore at Elie, and had there alighted on private property, and damage had been caused by a crowd. It is not what is done on the defender's ground that causes the damage, but what is done on the pursuers'. Besides, this maxim quoted by Lord Adam has no bearing at all on the principal point in the case, which was that the damage was not done by the parachutist (who for the purpose of the argument may be assumed to be the defender), but by outside individuals, from whom the defender was obtaining no benefit, and who might be acting *illo invito*, and who were certainly committing a *delict* in breaking into the pursuers' field. This, therefore, is a liability which cannot be well explained on any theory of employment, agency, or identification, and it disregards the usually valid defence that the damage was caused by the wilful *delict* of a third party. The Lord President and Lord Shand hold that the defender was liable for the natural and probable consequence of his action—a consequence which he ought to have foreseen; but they did not show how the liability could arise, and to that extent the judgment is not satisfactory. For a man is not in every case liable for the natural and probable consequence of his action. For instance, it is the natural and probable consequence of giving the next Lord Mayor's Show that some of the crowd of spectators will be hurt; and if a man makes a triumphal entry into a town by a highway lined with trees, it is natural and probable that a crowd will climb them and damage them, but in neither case will the principal actor be liable.

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And he will escape liability, because he has been engaged in an act lawful in itself, and he has not been negligent or faulty in performing it. This explains the case of *Fairbanks* v. *Kerr*, 10 Amer. Rep. 664, where individuals in listening to an orator in a public place climbed on heaps of paving stones, and broke them, and in which the defender (the orator) was held not liable. Negligence alone, though damage result, will not create liability, because the damage may be too consequential, or, in other words, not necessarily foreseen, and this is the case of *Sevoles* v. *North London Railway Company*, 21 L.T.R. 835. In this case an engine left the rails through the fault of the Company, and fell into a private garden, the flowers in which were injured by people going to look at the wreck (*Cf. Hay* v. *North British Railway Company*, 4 S.L.R. 136). Two elements are required to create liability; and they are—(1) that the primary act must be unlawful or negligent; and (2) that the consequences must be the natural and probable consequences of the act, or consequences which ought to have been foreseen. Both these elements are present in *Moss's* case. See also as to joint negligence, *Burrows* v. *March Gas Company*, L.R., 5 Ex., p. 67.

A. T. G.

The Game of Speculation.—*Mollison* v. *Noltie*, Jan. 24, 1889, 16 R. 350. To those who have read the cases of *Foulds* v. *Thomson*, 1857, 19 D. 803, and *Thacker* v. *Hardy*, 1878, 4 Q.B.D. 685, this decision can present no difficulty. In *Foulds* the *species facti* was this. A person employed a broker to sell stocks which he did not possess, and to buy stocks which he did not intend to take up. His expectation was that the broker would so arrange matters that a mere payment of "differences" would settle the account. But in this he was mistaken—the broker entered into real contracts with buyers and sellers of stocks, which he became personally bound to implement, and did ultimately implement by advancing the money himself. Having done so, he sued his constituent for repayment of his advances, and also for commission. *Thacker's* case was a repetition of the same story, with this one addition, that it was there held to be clearly proved (what was not so clear in *Foulds*) that the broker knew his constituent to be a mere speculator, and also knew that, unless matters were arranged for him as he expected, he would be unable to meet his engagements. In both cases the Court reached the same conclusion—namely, that the broker was entitled to recover his advances and commission, and that the constituent could not repudiate liability on the pretext that the transaction involved gaming or wagering. The contract between the broker and the speculator the Scottish and English Courts alike held to be a *bonâ fide* onerous undertaking, in respect of which the broker incurred obligations for his principal. Assuming

the principal's object to have been "sheer speculation, in which he hoped to gain by the rise of stocks bought, or by the fall of stocks sold," and characterising the proceeding as "gambling in the popular sense of the term," they drew the distinction that "a party may gamble in speculations without either gaming or wagering" (L. J.-C. Hope, 19 D. 812). In Lord Wood's terse language, "To wagering or gaming there must be two parties. . . . The parties must come together directly or through their brokers. . . . There must be opposite parties, and there can be no innocent ignorant parties." In the cases referred to, the opposite parties—the buyers or sellers of the stocks—were not shown to be gaming against the broker's constituent; and the course of dealing was, as expressed by Brett, L.J., in *Thacker's* case, that "the plaintiff (broker) did not agree to buy from or sell to the defendant, but that he was only bound to buy or sell for him; but that agreement made it necessary that the plaintiff should, as principal, enter into real contracts for the purchase and sale of stocks with the jobbers. The plaintiff carried out these instructions and incurred obligations, in respect of which actions might now be brought against him. The plaintiff sued the defendant for commission upon the sale of stock, and for indemnity against the liability which he has incurred through the defendant desiring to speculate. I think that the plaintiff is entitled to recover in respect of both claims."

The step from these decisions to the decision in *Mollison's* case is an easy one. In *Mollison* there were two speculators who employed a broker to negotiate a joint-speculation, and the transaction having resulted in loss, one of the speculators paid the broker in full, and then sued the other for contribution of his share. The Court sustained the action. From the former cases it was plain that both principals were liable to the broker, and the liability being joint and several, he could in his option have recovered a share from each, or the whole from either. That being so, it would have been irrational to hold that through the accident of the broker demanding and recovering his whole debt from the one, the other should escape altogether. The Lord Justice-Clerk expressly based his judgment on *Fould's* case, and Lord Young his on *Thacker's* case, though the direct bearing of the passage he quotes from *Thacker* is somewhat difficult to appreciate.

The case of *Mollison* v. *Noltie* is interesting, not so much from what it decides, as from what it suggests as remaining for decision. The judges there indulge in no surmises, but Lord Wood in *Foulds* and L. J. Lindley in *Thacker* raise incidentally some very interesting speculations regarding the limits of the doctrine affirmed in these cases. It is decided law that where two opposite parties speculate against one another in "differences," neither can recover against the other, *Grizewood* v. *Blane*, 1851, 11 C.B. (Scott), 538; *Heiman* v. *Hardie & Co.*, 1885, 12 R. 406. The contract then is pure wagering. Suppose such a contract conducted through brokers alive to its true nature and employed to conduct it as wagering. Would

they be entitled to recover from their constituents their commission and advances? And again, suppose the party on one side consisted of two individuals, and that one of them paid the broker, could he then recover from the other what would substantially be a share of a betting stake? These may be, as regards advances, impossible questions. It would require an experienced speculator to say whether a case can possibly arise where a broker could be in advance without there being a real transaction enforceable against him. But brokers and joint-speculators who play at "differences" may at least be cautioned not to rely too implicitly on the cases above discussed as governing legal liability in all the emergencies and vicissitudes of the Stock Exchange. The disastrous results to the individual of commercial gambling have led to many proposals for legislative interference: the most drastic being that nobody should sell what he does not possess. This principle would effect an extraordinary revolution in modern life; and it may be doubted whether, under the law as stated above, it will not be more prudent to leave business to business men. The cognate question of the American Trusts and their relation to the old laws against forestalling and regrating will be dealt with afterwards.

J. F. M'L.

Contract Construction.—"Hard cases make bad law," is a familiar maxim. It would seem to be illustrated by the judgment of the Second Division in the case of *Shiells* v. *Scottish Assurance Corporation*, 1889, 16 Ret. 1014, which was an action on a policy of insurance to recover the insured value of a horse. It was a condition of the policy—specially declared to be a *condition precedent* to the owner's right to recover—that in the event of the animal insured receiving any injury, the owner should—(1) have it attended to at once by a qualified veterinary surgeon, and (2) forward to the principal office of the company, within twelve hours of the injury being brought to his knowledge, full particulars of the same, accompanied by a *written report* of the veterinary surgeon attending; (3) similar notice should be given in the event of the death of the animal injured; and (4) notice to *an agent* of the company should not be sufficient compliance with the condition. In the case before us, the horse had sustained a compound fracture of one of its legs, and the owner, on the advice of a veterinary surgeon, who was not registered, had it killed, and by telegraph notified an agent of the company that the horse had broken its leg, and been condemned by a surgeon. This intimation was next day given to the manager of the company by the agent, and almost immediately thereafter liability was repudiated by the manager by telegraph to the owner. No report by a veterinary surgeon was ever sent to the Company. It was

held on the evidence that, as the horse was fatally injured, the proper course was to kill it at once, and that the case was therefore to be taken as one of death and not of injury, in the sense of the above condition; 2nd, that although notice of the injury had been sent to an agent, yet, as *de facto*, it had reached the head office timeously, it was sufficient; and 3rd, that the immediate repudiation of liability by the Company rendered it unnecessary for the owner thereafter to send the report required by the policy. In reversing the judgment of the Lord Ordinary (who had decided on the strict and literal construction of the policy), the Court were evidently swayed by the unreasonably harsh position taken up by the Company. It was observed by one of the judges: "It is undoubtedly the case that the pursuer sent the notice only to the agent, and, in so doing, he took the risk of the notice not reaching the secretary of the Company; but in point of fact the notice reached the secretary of the Company that night, and was passed on to the manager on the following Monday. That being so, I think there was sufficient compliance with the requirements of the condition regarding the giving of notice." But, with much deference, this is a proposition open to criticism. Surely where contract prescribes that certain things must be done in a specific way in order to create a right under it, the only inquiry for the Court is whether they have been so done. It is dangerous to admit equivalents. In a consensual contract, if a condition is reasonable and unambiguous, it should, it is humbly thought, be enforced, no matter how harsh the result to one of the parties.

Jurisdiction of the English Courts in Scotland.—This sore question is again stirred by the report of the proceedings in *Drummond's Patent*, Nov. 9, 1889, 43 Ch. Div., p. 80. The patentee was a domiciled Scotsman resident in Dundee. These petitioners, being domiciled Englishmen, brought a petition for revocation of the patent in the Chancery Division of the High Court of Justice. There had been no service of the petition on the Scottish patentee, it being explained that the rules of Court make no provision for service of petitions out of the jurisdiction. A copy of the petition and of the petitioners' particulars of objections had, however, been delivered to the patentee personally, and he had replied by letter to the petitioners' solicitors to the effect that he did not intend to appear, as he was not under the jurisdiction of the English Courts. Mr. Justice North ordered the case for trial on the merits unless the patentee should before a certain day appear and show cause why the action should not proceed. The learned judge does not, as reported, decide the question of jurisdiction, and the report says that the patentee (perhaps remembering the fate of the

invited duck), did not appear to show cause within the time limited. The further procedure in this petition will be of interest. The principle adopted in Scotland as to jurisdiction over persons, that, as a general rule, the petitioner or plaintiff must sue the respondent or defender in the courts of his domicile, is one which strangely enough seems to be little understood in England. No doubt in this case it is the revocation of a public grant which is in question, and there may be reason for saying that a foreign patentee should be liable, as in a real action, to answer in a British Court to a petition for revocation. But the consideration stated in argument for the petitioners in this case has no force as against a domiciled Scotsman. It is not an English grant which is in question; it is a patent under the Great Seal of the United Kingdom, or its equivalent, and all the Queen's Courts in the three divisions of the kingdom, having jurisdiction at all in the revocation or reduction (to use the Scottish phrase) of patents, have one of equal authority. But the choice of the forum should, according to Scottish ideas, be determined by the residence of the patentee exclusively, the *res* in dispute being Scottish as well as English. If Mr. Justice North is to assume jurisdiction in this case over a domiciled Scotsman, he can only do so on the strange assumption that the English Judicature has some peculiar and preferential right, before any other of the Queen's Courts, to deal with the patents granted by the British Crown.

R. V. C.

Superior and Vassal—Composition.—The case of *Stuart* v. *Hamilton*, 18th July, 1890, 16 R. 1030, has arisen, like many others, from the difficulty of determining the precise import of the provisions of section 4 of the Conveyancing Act, 1874. The material facts of the case are these:—

Mr. John Hamilton, an entered vassal, disponed, in 1860, certain lands to his brother and heir-presumptive, Mr. James D. Hamilton, who took base infeftment therein, and was implicitly entered with the superior of the lands on the passing of the Conveyancing Act, 1874. John died in 1877, and James died in May, 1886; leaving a general disposition and settlement in favour of his brother and heir-at-law, Mr. William Hamilton, who completed, in August, 1886, a feudal title to the lands in question, by recording a notarial instrument in his favour. Thereafter, the superior claimed, in consequence of the death of John Hamilton, a year's rent of the lands from Mr. William Hamilton, who, in answer, pleaded that the superior was not entitled to claim a casualty of composition from him, in respect that he was the heir-at-law not only of James, but also of John Hamilton, and that he, as such, was liable only in the casualty of relief. Founding chiefly on the

authority of the case of *Macintosh* v. *Macintosh*, 5th March, 1886, 13 R. 692, the Lord Ordinary (Kinnear) sustained this plea. The Lord Ordinary's judgment was reclaimed against, and the case was sent to the whole Court. Seven judges—the Lord President, Lord Justice-Clerk, Lords Mure, Shand, Rutherfurd Clark, Wellwood, and Kyllachy—held that a casualty of composition was payable by the defender; and six judges—Lords Young, Adam, Lee, M'Laren, Kinnear, and Trayner—held that the defender was liable only in a casualty of relief. At advising, the Lord President pointed out that between 1860 and 1874, there were three estates in the lands—the superior's estate of superiority, John Hamilton's estate of mid-superiority, and James Hamilton's *dominium utile*; that after the passing of the Conveyancing Act, 1874, there were but two estates—the pursuer's estate of superiority, and James Hamilton's estate of *dominium utile*, John Hamilton's estate of mid-superiority having been extinguished *in statuti*; and that until the death of John Hamilton, who was the last expressly entered vassal, no casualty could be competently claimed by the superior. He also observed that the investiture existing prior to 1874, was made by an entry obtained by the defender's grandfather in favour of himself and his heirs-general; that John Hamilton, who died in 1877, was the last heir who held under that investiture, because he had been deprived of the estate before his death by the operation of the statute, so that nobody could take up the succession as heir to him, or consequently as heir of investiture: and that a new investiture accordingly was created by the implied entry of James Hamilton in 1874, requiring to be enfranchised, and that that could only be due on payment of composition. Dealing with the Lord Ordinary's application to the case of the judgment in *Macintosh* v. *Macintosh*, the Lord President observed that it was settled before the operation of the Conveyancing Act, 1874, that if a person entering with the superior was the heir of the existing investiture he was entitled to be entered on payment of relief-duty, although he had made up his title in a form applicable to a singular successor, and that the same rule was, in the case of *Macintosh*, held to be applicable in implied entries made under the Conveyancing Act, 1874. The rule laid down in *Macintosh* v. *Macintosh* was not applicable, in his opinion, to the circumstances of the case under consideration; for the heir in *Macintosh* was the heir of an existing investiture, and might have served heir in special under the investiture, whereas the defender Hamilton instead of being the heir of the last and still subsisting investiture, held under an entirely new investiture. With the reasoning of the Lord President, the other judges in the majority concurred. Of the minority, Lords Adam, Lee, M'Laren, and Kinnear concurred in holding that, in determining whether composition or relief was due by defender, the implied entries were to be disregarded, and that, as the defender was heir-at-law of John Hamilton, he was liable only in relief to the superior. Lord Trayner, in arriving at the same result as the other judges in the minority, did so on different grounds. He was of opinion that by James Hamilton's implied

entry with the superior, a new investiture was created, and that as James was duly entered by force of statute with the superior, who had failed to exact a casualty from James as he might have done in 1877, and as the defender was the heir-at-law of James, the superior was entitled only to relief-duty from the defender. The division of the majority in the case of *Stuart* v. *Hamilton* shows, as previous cases have shown already very clearly, that the Conveyancing Act, 1874, has extended the rights of superiors.

J. C.

XUM



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XUM

PROFESSOR LORIMER.

THE death of Professor Lorimer is a loss which will be long and widely felt, alike on account of his excellence as a man, his eminence as a teacher, and his merits as a juridical philosopher.

He had a large circle of warmly attached friends, owing even more to his remarkably lovable and attractive character than to his rare intellectual gifts. His nature was constitutionally elevated and refined, aspiring towards things pure and high, as the flower seeks air and sunshine. Its culture was not superficial and taken on from without, but essential and grown from within; from the good seed in a good heart. He was a man of wide sympathies, gentle and kindly feelings; uniformly courteous and genial; quick to perceive and enjoy wit or humour, artistic or literary excellence; delighting to converse on almost any worthy theme, and fertile in ingenious suggestions; zealous for the improvement and reputation of the University to which he was proud to belong; and warmly patriotic, while generously appreciative of the good qualities and achievements of foreign nations. In ordinary conversation or business discussion, as in his writings, the views which he expressed might, at times, be felt to be somewhat unpractical, but the reason could always easily be seen to be some ideal too good for realisation in the circumstances. His proposals never missed their mark from being aimed too low; they might occasionally do so from being aimed too high. Better friend or colleague could not be desired. It was impossible to know him without respecting and loving him.

His appointment in 1862 to the Chair of Public Law in Edinburgh, was a most fortunate event for the University and for the credit of Scottish juridical science. Previous to his appointment he had by several publications amply shown his fitness for the office, and even had he not been appointed he would doubtless have continued to make occasional not unimportant contributions to political philosophy and jurisprudence. But it is not to be supposed that he would have written a treatise like that on which his fame will chiefly rest if he had not had the duties and the leisure which his professorship gave him. In all probability unless he had become Professor of Public Law, Scotland would have been unable to claim the honour of having produced during the present century a single philosophical jurist of European distinction. For he stands alone in his century so far as the Philosophy of Law in Scotland is concerned. The history of that department of thought is between him and Millar an entire blank in this country; and Millar died in 1801. Indeed, strictly speaking, even Millar has little right to be named in this connection, as neither of his works dealt directly with the philosophy of law, but with the evolution of society and Government. Weakness of voice, and in late years general physical feebleness, must have injured Professor Lorimer's effectiveness in the reading or delivery of his lectures. But to worthy pupils he could not be other than an inspiring and influential teacher, communicating to them broad and attractive views of ethical and juridical truth, leading them into new regions of inquiry and speculation, and revealing to them the high significance and real ends of the profession to which they (or most of them) looked forward, by showing them its proper place in the social organism and its relations to the universal and Divine life. He had in an altogether exceptional measure these qualities of the successful lecturer,—a moral enthusiasm which could not conceal itself, originality, elevation, and ingenuity of conception, and naturalness and elegance, not infrequently even raciness and eloquence, of expression.

It was as a philosophical jurist that Professor Lorimer occupied the high place which he held among European thinkers. It may not be irrelevant to indicate the chief influences which may be safely deemed to have formed and moulded his character as a thinker and his system as a jurist.(*a*) Heredity, doubtless, counted for much in his disposition and genius. His ancestors were of good position and good repute; his father and grandfather were land-factors and land-lawyers, as also land-proprietors. The surroundings of his early youth were admirably fitted to foster and elicit all delicate sensibilities and healthy tastes. The charms of Aberdalgie produced ineffaceable impressions on his memory and heart. "During sleepless nights in after years he used in imagination to fish down the burn which ran past his father's house from the deep pool below the waterfall to its junction with the Earn." At Perth Grammar School and in his first year at Edinburgh University he showed no special studiousness; but a short apprenticeship in a merchant's office in Glasgow "opened his eyes to his own likes and dislikes, and gradually there grew up in him a passion for knowledge of all kinds." When he returned to Edinburgh University it was with a mind thoroughly awake. Sir W. Hamilton made a powerful and permanent impression upon him. "To him," he says, "I probably owed more intellectually than to any other man." For some of Sir W. Hamilton's theories he cared little. He wished that he had "let the quantification of the predicate alone." But in him he first came into contact with a vast intellectual force and a really great scholar. Through him he became convinced of the insufficiency of a Sensationalist Philosophy and of a Utilitarian Ethics. And while he derived from him, of course, no notions of law (Sir W. Hamilton, although a lawyer, being of all the Scottish philosophers the one who theorised least on law), yet he learned from him to appreciate

(*a*) In this paragraph I have followed the guidance in extracts, kindly made for my information, from a MS. of my deceased friend. The sentences within quotation marks are from these extracts.

Hutcheson, Ferguson, Reid, and others of the Scottish school who had dealt with the fundamental principles of jural science in a truly philosophic spirit, and had awakened by him the desire to become acquainted with the doctrines of the chief Continental thinkers. The teaching of Hamilton could not have been more appropriately followed up than it was,—namely, by three years of travel and study abroad. These years, from 1840 to 1843, greatly enlarged young Lorimer's knowledge, experience and sympathies. In no case would he have been, like so many of his countrymen, an insular man; but his residence abroad made him a fully international man—a most important qualification for one who was to be an expositor of international law. Both at the Academy of Geneva and the University of Berlin, the courses of instruction from which he felt that he derived most benefit were on physical science—at Geneva that of Pictet de la Rive on Zoology, and at Berlin that of Mitscherlich on Chemistry. The clearness with which Mitscherlich exhibited "the dependence of physical phenomena, amidst all the changes which they underwent, on unchangeable and inflexible laws" led him to conclude that it must be equally so with social phenomena, and caused him to be disappointed with the way in which Puchta, Savigny's successor, applied the historical method to the study of Roman Law. "I learned more law from the chemist than from the jurist, and my own ultimate theory of scientific jurisprudence was more influenced by the former than by the latter." He attended Trendelenburg's lectures on *Rechtsphilosophie*, but without sufficiently understanding them to be influenced by them. It was only after he had independently reached and propounded the same general results as those which were set forth in the *Naturrecht auf dem Grunde der Ethik*, first published in 1860, that Trendelenburg came to be regarded by him as an authority. His relation to Trendelenburg was, like his relation to Krause and the jurists of the Krausan school, one of admiration founded on agreement as to essential principles independently reached. At Bonn he entered more

deeply into German philosophy, and the spirit of German science and life than he had been able to do at Berlin; and there he came under the influence of Dahlmann, to whom of all his German teachers he owed most. The strong, manly personality, the large and accurate science, the political independence, the practical earnestness, and the clear and pointed style of Dahlmann, greatly attracted him. "After Sir W. Hamilton, I believe that I owe more to Dahlmann, intellectually, than to any other man. These two, and Aristotle, stand out quite apart as the sources of my philosophical and political inspiration. But it was Dahlmann who first brought me face to face with my special calling, and I shall never forget the impression he made upon me by the opening words in which he set his own problem and ours before us:—*Man muss die menschlichen Dinge weder beweinen noch belachen, sondern sie zu verstehen trachten*—we must neither weep over human affairs, nor laugh at them, but try to understand them."

After returning to Edinburgh, Mr. Lorimer passed through the necessary law-classes in the University, and, in the spring of 1845, was called to the Bar. Not succeeding in the practice of his profession, he continued to extend his acquaintance with its theory, and took to writing in the Reviews. The energy with which he applied himself to literary work as soon as he saw it to be the only kind of work immediately obtainable, betokens a resoluteness of spirit which remained conspicuous in him to the last. He early became an earnest advocate of the reform of our higher educational institutions. He applied himself, in particular, to the examination of the fundamental principles of politics. He read the chief ancient and modern treatises on the subject, and found that of Aristotle to be the wisest and most instructive of them all. His merits as a political thinker were brilliantly attested by his "Political Progress not necessarily Democratic," published in 1857. It is a wise, original, ingenious book.—one not unworthy to be placed by the side of J. S. Mill's "Considerations of Representative Government." It had a

particular practical aim, but it also implied a carefully and independently thought out general theory of government and of society, and clear and decided views as to the methods by which political truths are to be ascertained and verified. It is probably the best treatise on the principle of equality extant; the one which shows most accurately the sense in which the principle is true and the senses in which it is false, and how the true and false interpretations of it most affect social and political life. The mode in which Mr. Lorimer proposed to give practical realisation to proportional or relative equality in the election of representative legislators is not one which has commended itself to statesmen or the community, and the book has, perhaps, somewhat suffered in popular esteem in consequence. The practical application, however, is almost the only thing reasonably disputable in it, and the value of the work is largely independent of the acceptance or rejection of that portion of it. "The Constitutionalism of the Future," published nine years later, if less original in thought, is even more vigorous in style. The sketches of "the Whig" and "the Conservative" are masterpieces of verbal portraiture.

The most important of Professor Lorimer's publications are "The Institutes of Law" and "The Institutes of the Law of Nations." They are constituent parts of a self-consistent scientific whole. The first treats of the law of nature, and of positive law in general, of their sources, and of their relations to each other; or, in other words, of the universal principles of jurisprudence. The second treats of the law of nature as realised in the relations, both normal and abnormal, of separate political communities; it consequently implies the principles exhibited in the former treatise, while setting forth international law as derived from, and declaratory of, natural law. Together they present a comprehensive view of jurisprudence as a whole, and a developed view of a most important and difficult department of it. Only the merest indication can here be given of some of the more general characteristics of the system of thought exhibited in them. Its philosophi-

cal spirit is the most conspicuous. Professor Lorimer constantly shows himself not less of a philosopher than a lawyer. He never dissociates law from philosophy; never so emphasises what is specific in the kinds of law as to obscure the unity of all law; always keeps clearly before his own and his readers' minds the dependence of the various forms of law on its essential nature, and the organic connections between jurisprudence and the other branches of science. He has left us, accordingly, what can be designated with perfect appropriateness a *philosophy of law*, and has removed from the Scottish school of philosophy the reproach of having produced no thinker who had investigated systematically so important a province of inquiry. He may fairly be claimed as belonging to the Scottish school, and his theory of universal and international law as a genuinely native product, although he certainly cannot be charged with standing in a servile relationship to any Scottish predecessor, or with being unwilling to receive the truths taught by foreign contemporaries. While not blind to the real services of Bentham and Austin, he saw clearly the shallowness and arbitrariness of their general ethical and jural doctrine. He opposed it in the best and most effective manner—viz., by substituting for it one far more solid and satisfactory. I can hardly suppose that any pupil of his has lapsed into the Austinian superstition long so dominant to the south of the Tweed. The religious spirit which manifests itself in Lorimer's system of jurisprudence is another of its characteristics. Tracing law back, not to enactment, but to nature, he referred it ultimately to the nature of God. The primary source of law, he holds, is God; the author of all existence must be the postulate of all science; whatever views of society, of politics, or of history, are inconsistent with belief in the being, government, and goodness of God must be erroneous. Although his religious faith, however, impressed itself on his scientific system, he is not to be numbered among the adherents of the Theological School of Jurists. He had no sympathy with their dogmatic narrowness; maintained none

of their exclusive pretensions; derived none of the propositions of his jurisprudence from a *priori* knowledge of the Divine nature or special revelation of the Divine will; received as laws of nature and jural relations only what he believed to be rationally and inductively established. Accurate and comprehensive insight into the connections and distinctions between ethics and jurisprudence is another feature of the thought embodied in his philosophy of law. This feature strikingly differentiates his system from that of Austin; it constitutes its chief resemblance to that of Trendelenburg. The chapters on the distinction between perfect and imperfect obligation, the identity of justice and charity, and the relation of equality to liberality, and the chapters on the sources and objects of positive law, fully show the vast advantage possessed by a jurist who has a large and firm grasp of ethical principles. The method of investigation followed in the Institutes is another characteristic to be noted. It gives its due place to deduction, of which most ingenious use is made in the derivation of the various essential natural rights of man from the right to existence given in the fact of existence. It places chief reliance, however, on induction, and recognises its legitimacy alike as psychological or subjective, and as historical or objective. The historical form of induction is subordinated to the psychological, but it is largely applied. It may, perhaps, be justly held that the inseparability of the psychological and historical methods is not fully recognised; but even if so, the scientific breadth, truthfulness, and completeness of the method exemplified in the Institutes, must be held to be one of their distinguishing merits. I must add that Professor Lorimer's teaching as a jurist was not less marked by its practical than by its philosophical character. There may be an impression among some to the contrary. But among whom? Only among the vulgar-minded, for whom all earnest thought about ethical and jural principles is visionary, all wide sympathies and general aims unpractical, and who degrade the noble profession of law by carrying into the practice of it ignoble motives and methods. Not among

any of the late Professor's compeers, among any of his associates of the Institute of International Law, among any jurists of real eminence, or even among any intelligent readers of his works. All such will acknowledge that, if he sometimes put forward plans incapable of being realised, this arose not from unpracticalness or visionariness, but from the very intensity of his practical tendencies, or, as M. Rivier ably says, from "*le besoin de donner aux idées un corps, de les traduire en choses concrètes et tangibles.*"

His treatment of many of the questions connected with international law will be felt to be extremely interesting even by non-professional readers, but, of course, an international jurist alone can do justice to it. I must refrain, indeed, from touching even on his activity in the advocacy of political and educational reform, his share in the foundation and labours of the Institute of International Law, or his literary work in general. The mere amount of his literary work is very remarkable, considering that his health was never very robust.(a) The explanation of it is partly his brave and indomitable spirit, and partly the freedom from all avoidable care secured to him, and the sympathetic and effective aid given, by those whose lives were closely bound to his.

His name is honoured among the thinkers and jurists of Europe. Scotland may well keep his memory fresh and green, and feel grateful for the services which he has rendered her. Posterity will be able fully to realise the appearance of his outward man, for that has been portrayed with a rare truthfulness and beauty which tell alike of the skill of the artist and the affection of the son. It is to be hoped that there may also be given to the world an adequate record of his life in its whole development.

R. Flint.

(a) From a list of his publications on which I can rely, it appears that they comprise 7 treatises, 9 articles in the *Edinburgh Review*, 15 in the *North British Review*, 3 in the *Journal of Agriculture*, 5 in the *Journal of Jurisprudence*, 19 lectures, and 14 pamphlets.

THE SUPREME COURT OF THE UNITED STATES. (a)

BUT few words remain to be added to those so well spoken by my distinguished brethren, in concluding, on the part of the Bar, the expression which this occasion calls for.

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In its origin the Federal Court was an experiment, untried and uncertain. Judicial history has not furnished another example of a Court created by an authority superior to legislation and beyond the reach of executive power, clothed with a jurisdiction above the law it was appointed to administer, and charged not merely with the general course of public justice, but with the limitation of the powers of political government, and the adjustment of the conflicting claims of sovereign states. The hundred years that now terminate have tested the value of all American institutions. Fortunate as they have been for the most part, it will yet be the judgment of dispassionate history that no other has so completely justified the faith of its authors, or fulfilled with such signal success the purpose of its foundation.

What was that purpose? Not the limited original jurisdiction of the Court, dignified and important, but rarely invoked. Not chiefly even, its ordinary appellate jurisdiction, extensive and beneficent as it is, most desirable, yet,

(a) [This article is in substance—omitting a few passages of purely local interest—the address delivered by Mr. Phelps on behalf of the Bar of the United States, on the occasion of the Centennial Anniversary of the foundation of the Supreme Federal Court. The author has been good enough to send it to this Review for publication.—Ed. *Jurid. Rev.*]

perhaps, not indispensable. Not for these objects, great though they are, was it placed, nor did it need to be placed, on the singular eminence it occupies. Its principal and largest function was designed to be, as it has been, the defence and preservation of the Constitution that created it, as the permanent fundamental law on which our system of government depends.

Had that instrument been left only directory to the legislature, to be construed and given effect to as the exigencies of party or the purposes of the hour might demand; had it been referred to the conflicting determination of various Courts, with no supreme arbiter to correct their mistakes, or to harmonise their disagreements, so that its meaning might depend upon the State or the tribunal in which the question happened to arise, it would speedily have become but the shadow of an authority that had no real existence, fruitful in a discord it was powerless to allay. American experience has made it an axiom in political science, that no written constitution of government can hope to stand, without a paramount and independent tribunal to determine its construction and to enforce its precepts in the last resort. This is the great and foremost duty cast by the Constitution, for the sake of the Constitution, upon the Supreme Court of the United States.

The jurisdiction of the Court over questions of this sort, and the dual sovereignty so skilfully divided between the States and the Federation, as they are the most striking, are likewise the only entirely original features in the Constitution. All else found a precedent, or, at least, a prototype in previous institutions. In its other branches it is mainly the combination and adaptation of machinery that was known before. It was to be expected, therefore, that the earliest and most critical exercise of the new power conferred upon the Court would be displayed in dealing with the new form of sovereignty at the same time devised, and bringing into harmony those opposite forces that might so easily have resulted in conflict and

disaster. The questions that have arisen in this field have been usually the most delicate, often the most difficult, always the most conspicuous of all that have engaged the attention of the Court. While it has been charged with the limitation of many other departments of governmental authority, here have been found hitherto its most prominent employment and the most dangerful emergencies it has had to confront. Here have taken place its most celebrated judgments, the most signal triumphs of its wisdom, its foresight, as well as its moral courage—rarest of human virtues. It is to this sagacious judicial administration of the Constitution that we are principally indebted for the harmonious operation that has attended the Federal system, each party to it made supreme in its own sphere, and at the same time strictly confined within it, neither transgressing nor transgressed. Looking back now upon this long series of determinations, it is easy to see how different American history might have been, had they proved less salutary, less wise, and less firm. The Court did not make the Constitution, but has saved it from destruction. Only in one great conflict, generated by the single inherent weakness of the Constitution, and unhappily beyond judicial reach, has the Court failed to maintain inviolate all the borders and marches of contiguous jurisdiction, and to keep unbroken the peace of the Union.

But it still remains to be observed, that the service of preserving through the Constitution the Union of the States, great and distinguished as it is, and vital as it is, has been wrought upon the machinery of government, not upon its essence. Beyond and above the question how a political system shall be maintained, lies the far larger question, why should it be maintained at all? The forms of free government are valuable only as they effect its purpose. They may defend liberty, but they do not constitute it nor necessarily produce it. Their ultimate permanence, therefore, among the men of our race must depend not on themselves but on their results.

The true analysis of the function of the Supreme Court as

the conservator of the Constitution, involves consequently the further inquiry, What is the value of the Constitution to those who dwell under the shadow of its protection?

It rests upon the foundation-stone of popular sovereignty. The true definition of that familar and much abused phrase is not always kept in view. The sovereignty of the people is not the arbitrary power or blind caprice of the multitude, any more than of an aristocracy or a despot. It is not the right of any class, small or great, high or low, to wrong or oppress another. It is not a struggle between classes at all. It is simply the recognition of the natural and equal rights of man as the basis of a government formed for their protection by its people, and regulated by law. A system under which every citizen, in the peace of God and of the State, shall be assured by indefeasible right and not by favour or sufferance, in the enjoyment of his life, his liberty, his property in all its forms, his home, his family relations, his freedom of conscience and of speech. The powers of government, in all their extent and elaboration, come down at last to this ultimate purpose. For this they exist, and on this foundation is raised all that renders social life desirable. "In my mind," says Lord Brougham, "he was guilty of no error, he was chargeable with no exaggeration, he was betrayed by his fancy into no metaphor, who once said that all we see about us, King, Lords, and Commons, the whole machinery of the State, all the apparatus of the system and its varied workings, end in simply bringing twelve good men into a box."

The world has seen empires and dynasties without number, based upon arbitrary power. But for the most part it has seen them perish. They have illuminated the page of history, but with the light of the comet and the meteor, not of the stars. The civilisation they have brought forth has been as transient as themselves. Neither government nor civilisation contained any element of permanence, until they came to be founded upon the principles of civil and religious liberty. Magna Charta was therefore the starting-point not merely of free institutions, but of the only civilisation that

ever did or ever could survive political systems, and pass on unimpaired from the ruins of one to the construction of another. Its striking and memorable language no rhetoric has been able to improve, no casuistry to obscure. When it broke upon the world it proclaimed a new era, the dawning of a better day for humanity, in which the rights of man became superior to government, and their protection the condition of allegiance. The great thought matured with a slow but certain growth. Battles enough were fought for it, but never in vain. Until at last it came to be established for ever upon English soil, and among the English race on every soil. And the highest eulogy upon the British Constitution was spoken when Chatham said: "The poorest man may in his cottage bid defiance to all the force of the crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter; but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." But the great orator could go no further; he could not say that the British Parliament might not enter the home of the subject, for all the judges of England are powerless in the face of an Act of Parliament, whatever it may be. It was reserved for the American Constitution to extend the judicial protection of personal rights, not only against the rulers of the people, but against the representatives of the people.

The history of the Saxon race exhibits few changes more striking than the succession of power. First, in the king; then, when royal supremacy became intolerable, in the hands of the barons, who struck the earliest blow for freedom, and long stood between the throne and the people, the supporters of one, the protectors of the other. When in the course of time that oligarchy had in its turn abused its authority, it passed to the Parliament chosen by the people. And when at last the founders of our Constitution, driven to revolution by a parliamentary oppression, had learned that even representative government cannot always be depended upon by those it represents, they placed the protection of personal

rights beyond the reach of the popular will, and found in a constitutional judiciary the true and final custodian of the liberty of the subject.

The maintenance of these rights against all Federal interference was conferred upon the Court by amendment almost immediately after the adoption of the Constitution, and as soon as it was perceived that the power ought to be expressed, because it might fail to be implied. The protection of them against State invasion in one important particular—the inviolability of contracts—was provided in the original Constitution. And when, twenty-two years ago, the interference of the States with the rights of life, liberty, and property was forbidden by the Fourteenth Amendment, the jurisdiction of the Court over this great subject became complete, and will, beyond doubt, always remain so. But one exception still exists, in the power of Congress, within the limited scope of its authority, to pass a law, though it may impair the obligation of a pre-existing contract.

Other topics of constitutional interpretation will always remain. The time will never come when questions of conflicting authority between the States and the Nation will cease to arise. But that field must gradually grow smaller, and its inquiries less critical. The main landmarks have now been planted, the boundary lines traced, the cardinal rules strongly and clearly established. Future labour in that direction, though constant, will be easier and plainer than in the century that has passed away.

But new attacks upon individual rights, in many forms and under many pretexts, are beginning to be heard of, and are to be looked for in an increasing measure. The accursed warfare of classes is the danger that appears chiefly to threaten the future. It requires little prescience to perceive that the burden of constitutional administration by the Court is to shift hereafter in a considerable degree from the preservation of the machinery of government to the enforcement of its ultimate object; from conflicts between the States and the Federation, to those between the State and the citizen,

involving the protection of property, of contracts, of personal rights. But the best assurance that the Court will be found equal to the emergencies that are to come, whatever they may prove to be, is seen in the success with which it has encountered those of the past. And that success is most clearly shown by the public confidence it has inspired. The people of this country have learned to have faith in the Court and pride in it. Elevated and in a measure isolated as it is, they still feel it to be their own. Many a plain man may never have seen it, nor ever expect to see it. He cannot discriminate its jurisdiction, nor understand its procedure. The principles of its jurisprudence are not for his comprehension. But he reposes with a more confident security under the roof his industry has raised, and enjoys with a better assurance the liberty that has made him free, because he knows there is a limit which oppression cannot transgress; that he can never be disseized nor outlawed, nor otherwise destroyed; that no agency of power can go upon him or send upon him, but by the judgment of his peers and the law of the land; and he believes that if the worst should come to the worst, and wrong and outrage should be found intolerable, and yet without other redress, there is still laid up for him a remedy under the constitution of his country, to be compassed in some way or other, in the Supreme Court of the United States.

Long and late may it be before that confidence is shaken. If it is sometimes childlike in its simplicity, it is always noble in its origin. Long and late may it be before even the suggestion shall penetrate the faith of common men, that the highest American justice is not for them. May no consideration of convenience, no pressure of business ever find its relief in any limitation, which shall carry the idea to the body of the people that there is reserved in this country for the powerful corporation, the millionaire, and the great financier an ultimate justice that the humbler citizen cannot reach; that a ruinous cause may be decided against him without redress; and yet the same judgment in the case of

another man, whose dealings are larger in amount, though smaller in relative consequence, may be reversed and set aside as unlawful and unjust. Lawyers know that purely constitutional questions are not measured by figures. But that discrimination between the special and the general jurisdiction can neither be made nor understood by the mass of men. And such questions form but a small part of the administration of justice. Public confidence is a sensitive plant. No institution in a free government can afford to endanger it.

And thus, by the inexorable logic of sound constitutional principles, it has been brought to pass that the rights of the people find their last and best security, not in the popular assembly, nor in any agency of its creation, but in that institution of government which is farthest of all beyond the popular reach, which is made, as far as any institution can be, independent of public feeling, and invulnerable to the attack of majorities. Having its origin in the sovereignty of the people, it is the bulwark of the people against their own unadvised action, their own uninstructed will. It saves them, not merely from their enemies, it saves them from themselves. And so it perpetuates the sovereignty from which it sprang; and which has best provided for its own supremacy by the surrender of a power it was dangerous to retain. For this purpose alone, apart from those necessary to its own maintenance, does the National Government cross the line of the States. All merely legal rights of the citizen, outside of Federal affairs, are left dependent upon the authority of the State in which he is found. Only the cardinal personal rights are taken in charge by the Nation, as between the Government and the individual, because only through that protection can be assured either the value or the permanence of a Constitution, which is itself the Government, and itself the Union.

The experience of American free government has shown that it is the tendency of its legislative branches to decrease, and of its judicial power to rise in public estimation. It has

added a fresh demonstration to the truth that is as old as the history of freedom, that it must find its safety where it found its origin, in the exertions of those to whom truth is better than popularity, and right superior to gain. It has proved again what has been proved so often, that the only liberty that humanity can tolerate is the liberty that is under the law.

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Judges will be appointed and will pass away. But whoever comes and whoever goes, the Court remains. The king may die, but still the king survives. Strong in its traditions, consecrated by its memories, fortified with the steadfast support of the profession that surrounds it, anchored in the abiding trust of its countrymen, the great Court will go on —and still go on, keeping alive through many another century that has yet to come, the light that burns with a constant radiance upon the high altar of American constitutional justice.

EDWARD J. PHELPS.

THE FEDERAL CONSTITUTION OF CANADA.

THE British North America Act,(*a*) which received the assent of the Queen on the 29th of March, 1867, and came into force by royal proclamation on the 1st of July in the same year, gave a constitutional existence to the dominion of Canada, which, at that time, comprised only the four provinces of Quebec and Ontario—previously known as Upper and Lower Canada—and Nova Scotia and New Brunswick. In the course of the succeeding six years, the provinces of British Columbia (*b*) and Prince Edward Island (*c*) were added to the Union, and a new province, under the name of Manitoba,(*d*) carved out of the North-West Territory. This vast North-West Territory was, after the purchase of the rights of the Hudson's Bay Company in Rupert's Land, formally transferred to the Dominion by an imperial order in Council, on the 15th of July, 1870, and it is now divided into five provisional districts for the purposes of government, known as Keewatin, Assiniboia, Alberta, Saskatchewan, and Athabasca.(*e*)

Previous to the passage of the British North America Act, all these provinces (with the exception of Manitoba—which, as just stated, was a subsequent creation—and the old

(*a*) Imp. Stat., 30 & 31 Vict. c. 3.
(*b*) Can. Stat., 1873, p. ix.
(*c*) *Ibid.* 1872, p. xxxiv.
(*d*) *Ibid.* 33 Vict. c. 3.
(*e*) See Imp. Stat., 31 & 32 Vict. c. 105; *Ibid.* 34 & 35 Vict. c. 28; Imp. Orders in Council, 1870, 1880 (Can. Stat., 1872 and 1881); Bourinot's "Manual of the Constitutional History of Canada," pp. 58-60, 105.

colony of British Columbia,(*a*) on the Pacific Coast), were in the possession of a complete system of parliamentary government, in all essential respects a transcript of the British system. Each province was governed by a Lieutenant-Governor, a Legislature of two Houses, and an Executive Council, whose members continued in office only so long as they possessed the support of the majority in the People's House. They had for years possessed complete control of their local and provincial affairs, subject only to the sovereignty of the Imperial State. In all the provinces the criminal law and the judicial system of England prevailed. The common law of England was also the basis of the jurisprudence of all the provinces, except Quebec, where a million and a-quarter of French-Canadian people were and are still speaking the French language, professing the Roman Catholic religion, and adhering to the *Coutume de Paris* and the general principles of the civil law, as they obtained it from their ancestors, who first settled the province of Canada. Accordingly, when the terms of Union came to be arranged in 1864 by delegates from the several provinces of British North America, it was found necessary to establish a federation bearing many analogies to that of the United States, in order to meet the wishes of the people of these provinces, especially of French Canada, and to preserve all those local institutions with which the people had long been familiar, and which they could not be induced, under any circumstances, to hand over to the sole control of one central Parliament. The British North America Act simply sets forth, in its preamble, that the provinces "have expressed their desire to be federally united into one Dominion." It is to the resolutions passed by the Quebec Conference as the basis of union, that we must look for the positive assertion of those principles of Federal Union which can be seen in the distribution of powers between the Dominion

(*a*) This province, previous to its union with Canada, was governed by a Lieutenant-Governor and a nominated legislative Council; responsible government was one of the results of the Union. Bourinot's "Manual," p. 102.

and the Provincial Governments, as set forth in the federal constitution of the Dominion. These resolutions commence with the declaration that, "in a federation of the British American provinces, the system of Government best adapted, under existing circumstances, to protect the diversified interests of the several provinces, and to secure harmony and permanency in the working of the Union, would be a general Government charged with matters of common interest to the whole country, and Local Governments for each of the Canadas, and for the provinces of Nova Scotia, New Brunswick, and Prince Edward Island, charged with the control of local matters in their respective sections." The resolutions of the Quebec conference were embodied in addresses of the several Legislatures of the provinces to the Imperial Parliament. These resulted in the passing of the British North America Act of 1867, now the fundamental law of the whole Dominion, setting forth the territorial divisions, defining the nature of the executive authority, regulating the division of powers, directing to what authorities these powers are to be confided, and providing generally for the administration and management of all those matters which fall within the respective jurisdictions of the Dominion and the provinces. In accordance with this constitution, Canada has now control of the government of the vast territory stretching from the Atlantic to the Pacific to the north of the United States, and is subject only to the sovereignty of the Queen and the Parliament of Great Britain in such matters as naturally fall under the jurisdiction of the supreme and absolute authority of the sovereign State. In all matters of purely Canadian concern and interest, over which the Canadian Parliament has been given jurisdiction by the constitution of 1867, she has powers as plenary and absolute as are those possessed by the Imperial Parliament.

If we come to recapitulate the various constitutional authorities which now govern the Dominion in its external and internal relations as a dependency of the Crown, we

find that they may be divided for general purposes as follows:—

The Queen.

The Parliament of Great Britain.

The Judicial Committee of the Privy Council.

The Government of the Dominion.

The Governments of the Provinces.

The Courts of Canada.

While Canada can legislate practically without limitation in all those matters which do not affect Imperial interests, yet sovereign power, in the legal sense of the phrase, rests with the Government of Great Britain. Canada cannot of her own motion negotiate treaties with a foreign State, as that is a power only to be exercised by the sovereign authority of the empire. In accordance, however, with the policy pursued for many years towards self-governing dependencies —a policy now practically among the "conventions" of the constitution—it is usual for the Imperial Government to give all the necessary authority to distinguished Canadian statesmen to represent the Dominion interest in any conference or negotiations affecting its commercial or territorial interests. The control over peace and war still necessarily remains under the direct and absolute direction of the Queen and her great Council. The appointment of the Governor-General, without any interference on the part of the Canadian Government, rests absolutely with the Queen's Government. The same sovereign authority may "disallow" any Act passed by the Parliament of Canada which may be repugnant to any Imperial legislation (*a*) on the same subject applying directly to the Dominion, or which may touch the relations of Great Britain with foreign Powers, or otherwise seriously affect the interests of the Imperial State. The Judicial Committee of the Queen's Privy Council is the Court of last resort for Canada as for all other parts of the external empire, although that jurisdiction is only exercised

(*a*) Imp. Stat., 30 & 31 Vict. c. 3.

within certain limitations consistent with the large measure of legal independence granted to the Dominion. As it is from the Parliament of Great Britain that Canada has derived her constitution, so it is only through the agency of the same sovereign authority that any amendment can be made upon that instrument. But, while that Parliament has the constitutional and legal authority to amend, or even destroy that instrument to-morrow,(*a*) it does not move in the direction of amendment except when formally addressed through the Queen by the Dominion Legislature. Having given a complete system of local self-government to the united provinces, the Imperial Parliament is restrained, practically if not theoretically, not only by the grant of powers formally made in the British North America Act, but by those principles, "conventions," and understandings which have been since 1839 laid down with respect to the internal administration of Colonial affairs, and which have now as much force as if they were incorporated in a statutory enactment. The sovereignty of Great Britain over her Colonies may then be considered latent, but liable to be called into action any moment the vital interests of the Empire are affected.

The preamble of the British North America Act, 1867, sets forth that the provinces are "federally united," with a constitution "similar in principle to that of the United Kingdom." Mr. Dicey has said with some truth in his excellent treatise on the "Law of the Constitution,"(*b*) that this statement is in a measure erroneous, since the constitution of Canada is modelled on that of the United States. No doubt the preamble is open to misconstruction since it ignores in words the fact that the federation of Canada in its general structure bears obvious resemblance to the main features of the federal system of the United States. The model taken by Canadian statesmen was almost necessarily

(*a*) See Dicey's "Law of the Constitution," 3rd ed., pp. 106, 107.

(*b*) Third ed., p. 155; he uses the strong words "official mendacity" in this connection.

that of the most perfect example of federation that the world has yet seen, though they endeavoured to avoid its weaknesses in certain essential respects. At the same time, in addition to the general character of the provincial organisations and distribution of powers, and other important features of a federal system, there are the *methods of government*, which are copies, exact copies in some respects, of the Parliamentary government in England. We see this in the clauses of the British North America Act referring to the executive authority, the establishment of a Privy Council, and the constitution of the two Houses of the Dominion Parliament. More than that, we have, in conjunction with the legal provisions of the British North America Act, a great body of unwritten law; that is to say, that mass of "conventions," understandings, and usages (*a*) which have been long in practical operation in England and govern the relations between the Crown and its advisers, the position of the Ministry and its dependence on the Legislature, and otherwise control and modify the conditions of a system of English Parliamentary government.

Before I proceed to enumerate the legislative powers of the Dominion and the provincial Governments respectively, as these are set forth in the fundamental law [and defined by the Courts so far as cases of conflict have arisen,] it will probably give greater clearness to this review, if I state the nature of the various authorities under which the government of the country is carried on. These may be defined as follows:—

1. The Queen, in whom is legally vested the executive authority; in whose name all commissions to office run; by whose authority parliament is called together and dissolved; and in whose name bills are assented to or reserved. She is represented for all purposes of government by a Governor-General; appointed by Her Majesty in Council and holding office during pleasure; responsible to the Imperial Govern-

(*a*) See Freeman, "Growth of the English Constitution" (4th ed.), p. 114 *et seq.*

ment as an Imperial Officer; having the right of pardon for all offences, but exercising this and all executive powers under the advice and consent of a responsible ministry.(*a*)

2. A Ministry composed of thirteen or more members of a Privy Council;(*b*) having seats in the two Houses of Parliament; holding office only whilst in a majority in the popular branch; acting as a Council of advice to the Governor-General; responsible to parliament for all legislation and adminstration.

3. A Senate composed of seventy-eight members appointed by the Crown for life, though removable by the House itself for bankruptcy or crime: having co-ordinate powers of Legislation with the House of Commons, except in the case of money or tax bills which it can neither initiate nor amend; having no power to try impeachments; having the same privileges, immunities, and powers as the English House of Commons when defined by law.(*c*)

4. A House of Commons of two hundred and fifteen members, elected for five years on a very liberal Dominion Franchise in electoral districts fixed by law in each province; liable to be prorogued and dissolved at any time by the Governor-General on the advice of the Council; having alone the right to initiate money or tax bills; having the same privileges, immunities, and powers as the English House of Commons when defined by law.(*d*)

5. A Dominion Judiciary composed of a Supreme Court of five judges, acting as a Court of Appeal for all the Provincial Courts; subject to have its decisions reviewed on appeal by the Judicial Committee of the Queen's Privy Council in England; its judges being irremovable except for cause, on the address of the two Houses to the Governor-General.(*e*)

The several authorities of government in the provinces may be briefly described as follows:—

1. A Lieutenant-Governor appointed by the Governor-

(*a*) B.N.A. Act, 1867, §§ 9, 10-12, 13, 14, 15.
(*b*) *Ibid.* § 11.
(*c*) B.N.A. Act, 1867, §§ 21-36.
(*d*) B.N.A. Act, 1867, §§ 37-39, 44-52.
(*e*) *Ibid.* §§ 96-101. Can. Stat., 38 Vict. c. 11.

General in Council, practically for five years; removable by the same authority for cause; exercising all the powers and responsibilities of the head of an executive, under a system of parliamentary government; having no right to reprieve or pardon criminals.(*a*)

2. An Executive Council in each province, composed of certain heads of departments, varying from five to twelve in number; called to office by the Lieutenant-Governor; having seats in either branch of the local legislature; holding their positions as long as they retain the confidence of the majority of the people's representatives; responsible for and directing legislation; conducting generally the administration of public affairs in accordance with the law and the conventions of the constitution.(*b*)

3. A Legislature composed of two Houses—a Legislative Council and an Assembly—in four provinces, and of only an Assembly or elected House in the other three provinces. The Legislative Councillors are appointed for life by the Lieutenant-Governor in Council, and are removable for the same reasons as Senators; must have a property qualification, except in Prince Edward Island (where the Upper House is elective); cannot initiate money or tax bills, but otherwise have all powers of legislation; cannot sit as Courts of Impeachment. The Legislative Assemblies are elected for four years in all cases, except in Quebec, where the term is five; liable to be dissolved at any time by the Lieutenant-Governor, acting under the advice of his Council; elected on manhood suffrage in Ontario and Prince Edward Island, and on a scarcely less liberal franchise in the other sections.(*c*)

4. A Judiciary in each of the provinces, appointed by the Governor-General in Council; only removable on the address of the two Houses of the Dominion Parliament.(*d*)

As regards the territories of the North-West, it is

(*a*) B.N.A. Act, 1867, §§ 58-62, 66, 67.
(*b*) B.N.A. Act, 1867, §§ 63-66.
(*c*) B.N.A. Act, §§ 69-90. (*d*) *Ibid.* §§ 96-100.

provided by the British North America Act that the Dominion is to exercise complete Legislative control. As previously stated, they have been divided into five districts for purposes of government. Keewatin is under the control of the Government of Manitoba, but will only be continued in this position until the question of boundaries is finally settled. The other districts are governed by a Lieutenant-Governor and an Assembly elected by the people in accordance with the statutes passed by the Dominion Parliament. The Lieutenant-Governor is appointed by the Governor in Council, and holds office on the same tenure as the same officials in the provinces; but responsible government in the complete sense of the term does not yet exist in the territories. They are represented, however, both in the Senate and House of Commons of Canada.(*a*)

Coming now to the distribution of powers between the Dominion and the Provincial authorities, we find that they are enumerated in sections 91, 92, 93, and 95 of the fundamental law. The 91st section gives exclusive jurisdiction to the Parliament of the Dominion over all matters of a general or Dominion character, and section 92 sets forth the exclusive powers of the provincial organisations. The classes of subjects to which the exclusive authority of the Dominion Parliament extends are enumerated as follows in the Act:—

The public debt and property.

The regulation of trade and commerce.

The raising of money by any mode or system of taxation.

The borrowing of money on public credit.

Postal service.

The census and statistics.

Militia, military, and naval service and defence.

The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.

Beacons, buoys, lighthouses, and Sable Island.

Navigation and shipping.

(*a*) Rev. Stat. of Canada, c. 50.

Quarantine and the establishment and maintenance of marine hospitals.

Sea-coast and inland fisheries.

Ferries between a province and a British or foreign country, or between two provinces.

Currency and coinage.

Banking, incorporation of banks, and the issue of paper money.

Savings banks.

Weights and measures.

Bills of exchange and promissory notes.

Interest.

Legal tender.

Bankruptcy and insolvency.

Patents of invention and discovery copyrights.

Indians and lands reserved for the Indians.

Naturalisation and aliens.

Marriage and divorce.

The criminal law, except the constitution of the Courts of Criminal Jurisdiction, but including the procedure in criminal matters.

The establishment, maintenance, and management of penitentiaries; and lastly,

Such classes of subjects as are expressly excepted in the enumeration of the subjects assigned by the Act exclusively to the Legislatures of the provinces.

On the other hand, the exclusive powers of the provincial Legislatures extend to the following classes of subjects:—

The amendment from time to time, notwithstanding anything in the Act, of the constitution of the province, except as regards the office of Lieutenant-Governor.

Direct taxation within the province in order to the raising of a revenue for provincial purposes.

The borrowing of money on the sole credit of the province.

The establishment and tenure of provincial offices, and the appointment and payment of provincial officers.

The management and sale of the public lands belonging to the province, and of the timber and wood thereon.

The establishment, maintenance, and management of public and reformatory prisons in and for the province.

The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the provinces other than marine hospitals.

Municipal institutions in the province.

Shop, saloon, tavern, and auctioneer and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes.

Local works and undertakings *other than* such as are of the following classes:—

(*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other of the provinces, or extending beyond the limits of the province;

(*b*) Lines of steamships between the province and any British or foreign country;

(*c*) Such works as, though wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

The incorporation of companies with provincial objects.

Solemnisation of marriage in the province.

Property and civil rights in the province.

The administration of justice in the province, including the constitution, maintenance, and organisation of provincial courts, both of civil and criminal jurisdiction, and including procedure in civil matters in those courts.

The imposition of punishment by fine, penalty, or imprisonment, for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects above enumerated.

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Generally all matters of a merely local or private nature in the province.

Then, in addition to the classes of subjects enumerated in the sections just cited, it is provided by section 93 that the Legislatures of the provinces may exclusively legislate on the subject of education, subject only to the power of the Dominion Parliament to make remedial laws in case of the infringement of any legal rights enjoyed by any minority in any province at the time of the Union—a provision intended to protect the separate schools of the Roman Catholics and the Protestants in the provinces. The Dominion and the provinces may also concurrently make laws in relation to immigration and agriculture, provided that the Act of the province is not repugnant to any Act of the Dominion Parliament; and under section 94 the Dominion Parliament may provide for the uniformity of laws relative to property and civil rights in Ontario, Nova Scotia, and New Brunswick.

Having thus described the Federal machine, I shall in a subsequent paper call attention to some of the difficulties which have arisen in working it, and to the interpretations placed by the Courts upon the Constitution.

J. G. Bourinot.

DIVORCE IN FRANCE.

DIVORCE was re-introduced into France by the law of 27th July, 1884. (*a*) From the date of that law coming into operation down to 31st December, 1887—*i.e.*, in three years and a-half—the Courts have pronounced 14,582 divorces, distributed as follows :—

In the year	1884,	1657
„	1885,	4123
„	1886,	3005
„	1887,	5797

The official statistics do not come further down than 1887 ; but it is certain that the number of divorces pronounced tends constantly to increase, and that the years 1888 and 1889 will yield higher figures than the preceding years. If the numbers above stated are compared with those of the marriages celebrated during the same period a general average is obtained of 16·5 divorces for every 1000 marriages.

As might be expected, this proportion is not the same in all parts of French territory. While in the Department of the Seine (Paris and its suburbs) there are 63 divorces for every 1000 marriages contracted, there are instances of Departments (notably in Brittany and in the centre of France) where the proportion is only 1 or 2 divorces for 1000 marriages. Various causes contribute to these results. The principal cause is the extent and degree of fidelity to the

[(*a*) Divorce *a vinculo matrimonii*, which had been legalised during the revolutionary period and in the Code Napoleon, was abolished after the Bourbon Restoration on 8th May, 1816. The first effects of French divorce are described by Burke in his "Letters on a Regicide Peace."—Ed. *Jurid. Rev.*]

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Catholic religion. Where that faith is deeply rooted in the mind and heart of the population the number of divorces is insignificant. On the other hand, in the large towns, the greater looseness of moral conduct has a fatal effect in breaking up the conjugal relation; and, reciprocally, the custom of divorce, by destroying the domestic spirit and conscience, diminishes the number of marriages, and lowers the standard of morality.

Many intelligent people, therefore, think that the reintroduction of divorce has already, since 1884, produced disastrous consequences from the point of view of public morality, and that these are likely to increase as time goes on.

The Law of 27th July, 1884, does not sanction divorce by the mere consent of the spouses.(*a*) The Courts must be satisfied in each case that a legal ground for divorce exists as matter of fact. There are three grounds recognised by the law—(1) adultery of either husband or wife; (2) excessive debauchery, cruelty, and gross injuries; (3) previous conviction of a serious crime, followed by a sentence of degrading punishment. The third ground is, of course, very rare; it constitutes only 3 per cent. of the divorces actually pronounced. The ground of adultery is also comparatively seldom appealed to, only in 21 per cent. of the total cases. The great majority of divorces, 76 per cent., are therefore pronounced on the ground of excessive debauchery, cruelty, and grave injuries. It is, in fact, this category that includes all those acts, unhappily too common, which indicate the incompatibility of the spouses and the impossibility of continuing cohabitation. It must also be kept in view that, for reasons easy to understand, there is a sort of tacit agreement among the parties to make public only the less disgraceful facts. Especially as regards the adultery of the wife, the

(*a*) In the Code Napoleon, tit. 6, c. 3, there was a divorce by consent expressed under certain conditions, but in substance the law resembled that of 1884. During the Revolution divorce was practically free, as an allegation of incompatibility of temper was accepted as sufficient.

husband prefers not to publish on the housetops the secret of her dishonour, and in the interest of his children as well as of himself, he leads evidence only with respect to the less serious facts which are sufficient to justify a decree of divorce. Very often the Court assists these little arrangements by the use of language which does not disclose the whole truth to the public. Accordingly, it will be understood that too great practical importance should not be attached in this matter of statistics to the distinction between adultery and gross injuries.

Out of 6605 actions of divorce raised in 1887, the husband was pursuer in 2507 cases, and the wife in 4098. In fact, women need more than men to have recourse to the protection of justice in order to escape from the dangers of an ill-assorted union. The fact becomes more striking, if the figures just given are compared with those of the actions for judicial separation during the same year, of which only 309 were brought by the husband, and 2240 by the wife. Combining these statistics, we find that 6338 actions of divorce and separation were brought by women, and only 2816 by men.

The statistics of 1887 also give very interesting information with regard to the professions of the husbands who are divorced.

Landed proprietors, persons with fixed incomes, and those belonging to the learned professions,	10	per cent.
The commercial classes generally, wholesale and retail,	20	,,
Peasants,	9	,,
Artisans and labourers of all classes,	53	,,
Domestic servants,	8	,,

It is therefore in the country districts that divorce is most rare. On the other hand, it is very frequent in towns, especially among the rich or well-to-do classes. In fact, among the middle classes, when the peace of the home is broken up by anything of a really serious character, they go

to Court quite readily to dissolve the marriage (or to loosen its obligations, for the same observation applies to actions for separation). The common people, on the other hand, most frequently just separate *de facto*, without any noise about it, or legal proceeding. The proportion given above—viz., 53 *per cent.*, will appear low, if the large artisan population is compared in number with the other classes mentioned. Still it must be observed that divorce gains ground among the common people, and that the number of cases conducted gratuitously (in terms of the Law of 22nd January, 1851, *Sur l'assistance judiciaire*), constantly increases. Thus, in 1887, the Courts have pronounced 3719 gratuitous decrees of divorce, nearly two-thirds of the total number. In Paris especially, where the "*Bureaux d'assistance judiciaire*" are very popular, the files of the Court are encumbered by divorce actions raised by poor litigants to such an extent that the progress of other business is most seriously interfered with.

JULES CHALLAMEL.

THE QUESTION OF FUSION IN THE LEGAL PROFESSION.

THE question whether the division of the legal profession into two branches should be abolished in the interest of the members of the profession and their clients, can hardly be called a burning question, but it comes up for discussion at more or less regular intervals. A short time ago special attention was drawn to it by a speech of the Solicitor-General advocating the fusion of the two branches, and by a series of articles in the *Saturday Review* on "The Bar as a Profession." Those articles were written with the laudable object of warning people, without "solicitorial connections," against sending their sons to the bar; and, as might have been expected, they deal with the subject almost exclusively from the briefless junior's point of view. It is unnecessary for the present purpose to discuss the writer's arguments and conclusions, inasmuch as he does not advocate fusion as a remedy for the evils of which he complains; on the contrary, he looks upon such a step as "a measure that would be fraught with great danger, that is pregnant with difficulties, and one that has failed to commend itself to the best men in either branch."

Two arguments are commonly used in support of the proposal to fuse the professions of barrister and solicitor. One is the layman's argument. "Why," asks the layman, "should I be compelled to employ (and pay) two men to do the work of one, and to have the responsible part of my business done by a man who knows nothing of it except at second hand?" The other is the briefless junior's argument.

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If a friend or a relative wishes to employ him to draw a will or defend an action in the County Court, he does not see why the client should not instruct him directly, without going to a solicitor. I confess I do not see any answer to the junior barrister's argument, except that the system was not invented and is not maintained for his benefit. The question is really whether the system is, on the whole, beneficial to the layman. It is essentially a practical question, not to be settled by *à priori* arguments or *ad captandum* sarcasm, and the most satisfactory way of seeing whether our existing system is good or not, is to examine the working of the fusion system in other countries.

I believe the fusion system is in operation in most, if not all, of our colonies. It is also in operation in the United States of America. From what I have seen of the Canadian system, it appears not to differ materially from that in use in the United States. In India, I believe, the profession consists to a great extent of men who have practised, or at least been educated, in England, so that it is probably difficult to ascertain how far the working of the system is affected by association and tradition. In America, on the other hand, the system has been in operation for over a century without being perceptibly influenced by the importation of foreign lawyers. Having had some practical experience of legal business in the United States, I venture to think that English and Scottish lawyers may draw some useful conclusions from the working of the fusion system in that country.

The first thing which strikes the foreigner on going to consult an American lawyer, whether he is a struggling beginner in a country village or one of the leaders of the New York bar, is the facility of access. If the visitor has been to the "office" before, the chances are that he walks straight into the lawyer's private room without being announced. Another client may be already there, engaged in consultation, and then the new comer waits in the same room, unless the consultation is of a peculiarly confidential

nature, in which case he may be asked to wait in another room. The second thing which surprises him, is the variety of business which every lawyer attends to. The ordinary American lawyer may be called upon to advise on a question of commercial law, to conduct a case before a jury, to draw a will, to advise a trustee on his responsibilities, to arrest a ship in an admiralty suit, or to prosecute a forger. As his familiarity with the business arrangements of the country increases, the visitor will observe that the "fusion" principle is carried beyond the limits of the legal profession. It is not uncommon, for example, to find an American counsel filling the position of president of a company, thus combining the functions of general manager and legal adviser.

This free-and-easy system of dispensing law is not the outcome of any *à priori* theories; it is simply a case of necessity. In a newly settled and sparsely inhabited country, the division of labour is a plant of slow growth. The keeper of a "general store" in a country village will sell you anything from a piece of soap to a watch; the village doctor (if there is one) is physician, family practitioner, and druggist all in one. When the business of the place demands a lawyer, he must be content to unite in himself the functions of counsellor-at-law, attorney, and notary. As his business grows he probably takes to himself a partner, and then a division of labour may follow, but not to any great extent, for, as a rule, in small offices, each partner attends to the business of his own particular clients, whether it takes the form of office work or work in Court. In important places, where there is a State Court, and possibly a branch of the United States Supreme Court, the division of labour goes much further. Every lawyer who has taken a position as an advocate in the higher Courts has at least one junior partner to attend to the "attorney" work in the office; and if he is one of the leaders of the local bar, the chances are that he does a good deal of work in conducting cases in Court, which is sent to him by other firms, just as with us solicitors send briefs to counsel. In large cities, like

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New York, this practice is carried to such an extent, that a counsel of the first rank occupies almost exactly the same position as a Q.C. at the English bar. It is true that he is always a member of a firm, but the chances are that a third, or a half, or even more of his cases, come to him from firms with which he has no connection. Even where a case originates in his own office, he probably sees little or nothing of it until it is ready for trial or argument, all the preliminary work having been done by others.

The separation of the legal profession into two branches, therefore, is not a relic of barbarism, or a form of trades unionism, but an example of the tendency to differentiation and division of labour which generally accompanies a high state of development.

The reformer will no doubt point out, in answer to this view, that the American system is free from the objections which he makes to the English system, in so far as in America the division between the two branches is voluntary and elastic, permitting every man to choose that kind of work for which he feels himself fitted, and not making it an inflexible rule that all legal business shall pass through a solicitor's hands before it reaches counsel. If this were the whole difference between the two systems in their working and results, the reformer would have the best of the argument. But there are other things to be taken into account.

The most important question, from the layman's point of view is, Which system enables the work to be best done? The system of division, unquestionably, and for reasons which are not far to seek. In England, and to some slight extent in Scotland and Ireland, a barrister in fair practice devotes himself to a special department of law: common law, equity, conveyancing, admiralty, parliamentary work, &c.; sometimes he confines himself to an even narrower field. The result is that he knows that particular subject thoroughly. In America, the young practitioner who sets up for himself, begins by being a legal maid-of-all-work; he has to do conveyancing, court work, common law, equity,

admiralty, and divorce work, just as it comes, and unless he acquires a special practice, or joins a large firm, this kind of thing goes on all his life. Even if he takes rank as a leader of the bar in a large city like New York, he will have to conduct a most miscellaneous assortment of cases: one day a jury case, the next day an equity case, the third an admiralty suit, and so on. The inevitable result is that the average American lawyer, though he possesses great shrewdness and versatility, is not thoroughly trained in any branch of the law.

Secondly,—Which system is, in the long run, cheaper to the client? It is difficult to give a positive answer to this question, partly because the mode of making professional charges in America is quite different from the English mode, and partly because the scale of charges in all occupations is much higher in America than in England. In such simple matters as drawing wills and other legal documents, obtaining formal opinions on purely legal questions, enforcing mortgage securities, and suing for contract debts, I should say that the charge of a New York lawyer would be from two to three times as high as that of an English solicitor, including fees to counsel. On the other hand, an American lawyer in a small way of business, will often undertake a case on a "contingent fee;" if he succeeds he will take from 25 to 50 per cent. of the amount recovered; if he loses, he will charge a very small fee.

Thirdly,—Which system tends to a higher standard of professional honour? Here there can be no doubt that the advantage is with our system. The division of the profession into two branches, and the sub-division of the bar into members of the various Inns of Court, produce a feeling of *esprit de corps* in each branch and sub-division, not unaccompanied by a certain amount of healthy jealousy and mutual criticism, which are lamentably absent from the legal profession in America. There the touting attorney, who infests the lower courts, and the counsellor-at-law, who advertises in the daily newspapers that he is prepared to procure divorces at

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very reasonable rates, cannot, from the nature of things, be regarded as professional brethren by the leaders of the bar. Some cases which came under my observation in America will make this more clear. In one case, an American lawyer was employed by an English client to represent him in a transaction with an American company. A week or two after the transaction was completed, the lawyer accepted a large fee from the company, without the knowledge of his client. The fact came to light in litigation which ensued a few years afterwards, and was commented on in open Court, but the lawyer remained until his death, several years later, a member of the bar and a partner in a firm with a large practice. In another case, a lawyer pledged some securities belonging to his clients to raise money for his own purposes. This man is still, so far as I know, a member of the bar, and entitled to practise. In the third case, a firm of lawyers appeared as counsel before a legislative body to oppose, on behalf of some landowners, the grant of a franchise for building a railway; in the course of the discussion they announced that their clients were satisfied that the railway would benefit the neighbouring landowners, and they thenceforward supported the application, ostensibly on behalf of their clients. It afterwards appeared in the course of legal proceedings that these lawyers, in supporting the application, had really acted in the interest of the railway company, and received a very large fee for doing so. It must not be supposed that these malpractices were regarded with approval or indifference by the respectable members of the profession in America, but it was not considered anybody's duty to vindicate the honour of the bar, and so they went unpunished.

Lastly,—And this is, perhaps, the most important point of all, when it is a question of ultimate results—we have to consider the effect of the fusion system on the judiciary. I think there can be no doubt that on the whole, notwithstanding conspicuous exceptions at Washington, and in some of the State Courts, the American judges are inferior to ours

in ability, dignity, and impartiality. Due allowance must be made, in seeking the causes of this difference, for the advantages possessed by our judges in the traditions of their office, the mode of their appointment, and the liberal salaries which they receive. In the last respect the American people are singularly short-sighted. But, even after making these allowances, there remains a balance in favour of the system of division. That system not only tends, as has been already pointed out, to produce competent and learned lawyers, it also develops the judicial faculty. The lawyer who is constantly brought in contact with his client must be more or less of a partisan. He knows his client's history, his character, his misfortunes, and his weaknesses: he can hardly help taking a personal interest in him; not unfrequently he is bound to him by friendship, or by a common pecuniary interest, and the more zeal he shows in dealing with his client's affairs, the better is the client pleased. The barrister, on the other hand, is most useful when he takes no personal interest in his client. He is accustomed to deal with a succession of cases, resembling one another in their main features; each case comes to him with the facts already sifted, and he is thus able to regard it as if it were an abstract problem, calling, indeed, for the exercise of his skill and ingenuity, or possibly, of his worldly wisdom and experience, but without any bias of personal interest in the client or the business. This judicial faculty is valuable in the counsel; it is invaluable in the judge. Its effects are felt not only in the decision of particular cases, but in the rules of law and practice. Anyone who has watched an important American trial must have been struck by the time which is wasted discussing technical objections and points of form which can hardly arise under our system. Not unfrequently, indeed, justice is defeated in the American Courts by slips in pleadings or in the joinder of parties, or by bringing a suit in equity when it ought to have been brought at common law; it is almost impossible (since the passing of the Judicature Act) for such a thing to happen

with us. The reason of these differences certainly does not lie in any superiority on our part in intelligence; it lies in the fact that our system, by enforcing a division of labour, encourages every lawyer to devote himself to a particular branch, and trains the barrister in taking what may be called a scientific view of the cases which come before him. Its effect on the bench is equally marked. If the high standard of our judges in point of ability, integrity, and impartiality is largely due, as I believe it to be, to the division of the legal profession into two branches, the system is worth preserving, even at the cost of occasional inconvenience.

CHARLES SWEET.

THE WORK OF THE WEST INDIAN COMMISSIONERS.

I.

THE ADMINISTRATION OF JUSTICE IN THE WEST INDIES PRIOR TO 1825.

IN the following pages I propose to give an account of the substantive and adjective law of the British West Indian Islands about the year 1825, before the invaluable "Reports of the Commissioners appointed to inquire into the administration of Civil and Commercial Justice" in those colonies had been completed, or any of the reforms which they suggested had been carried into effect.

1. *The Sources of the Substantive Law.*—These were five in number:

(*a.*) The common law of England.

(*b.*) Such of the general Acts of Parliament passed before the settlement of the several colonies as were applicable to their respective conditions. Intricate and complex laws, which would be out of place in the code of an infant state such as the laws of Bankruptcy, Tithes, Mortmain (*a*), &c., and penal acts (*b*) inflicting forfeitures and disabilities, were excluded.

(*c.*) Acts passed subsequently to the various settlements, but in which the West Indian Colonies were expressly or by necessary implication included.

(*a*) *A. G.* v. *Stuart* (2 Merivale Rep. 143).
(*b*) *Dawes* v. *Painter* (Freeman, 175).

(*d.*) Navigation Acts, acts of revenue and trade, and acts respecting shipping, whether the colonies were named in them or not.

(*e.*) Acts of the local legislatures, which were both reasonable in themselves and not repugnant to the law of England. (*a*)

2. *Editions of the West Indian Laws.*—It may be said, with sufficient general accuracy, that the local Acts in force in the West Indian Colonies were either—(*a*) published in unauthorised editions, to which subsequent enactments of the legislatures gave an official character, or (*b*) merely deposited in manuscript in the office of the Colonial Secretary.

The island of Barbadoes offers a forcible and by no means singular instance of the condition in which the West Indian Commissioners found the *fontes juris* of the principal Crown Colonies of Great Britain. There were two printed editions of the Acts of the Legislature of Barbadoes—"Hall's Laws," published in one volume, folio, in 1764, and "Moore's Laws," edited and published in 1800, in one volume octavo. Both were incomplete, and the former especially was inaccurate and defective. These laws were "made evidence" by local Acts, and the copyright was reserved to the respective compilers, under penalties recoverable like servants' wages before a single justice, on the testimony of one witness or the confession of the parties. There was no later edition of the

(*a*) In the First Report of the West Indian Commissioners there is an interesting account of the procedure at the then Colonial Department with reference to the allowance or disallowance of Colonial laws (pp. 8-10). The proceedings of the Legislature of British Honduras are curiously suggestive of the voluntary character of the settlement. An individual, desirous of introducing a new enactment, "caused a public notice or requisition to be posted in the courthouse at Belize calling a meeting of the magistrates and inhabitants of the place on the particular day expressed in the notice (which, it is understood, must be stuck up twenty-one days before the day named for the meeting). On the arrival of the day appointed for the purpose the magistrates and inhabitants assemble, when the proposition contained in the notice is discussed, and the majority of those present on the occasion determine the question; after which, if the measure agreed to at the meeting receive the consent of the Superintendent, it is considered a law of the settlement, but not otherwise."—*Third Report West Indian Commissioners*, p. 4.

laws, and Acts passed since the year 1800 remained in manuscript! The Chief Justice of the island informed the Commissioners that sixty-seven such laws were in existence; but further inquiry and a painful scrutiny of all the statutes of Barbadoes elicited the fact that the manuscript Acts, of which *ignorantia neminem excusat*, amounted not to 67, as the Chief Justice had asserted, but to 247. They were deposited in the Colonial Secretary's Office, and copies were directed to be kept in the parish churches. The absurdity of the situation, however, did not end here. "Have the public a legal right," asked the Commissioners, "to consult or to make transcripts of the unprinted laws, which every one is bound to know?" Upon this point the chief law officers hesitated and differed. "They may apply at the Secretary's Office," said the Attorney-General, "but I do not think he is bound to let them consult the Acts." The Solicitor-General observed, "I doubt whether you can insist, as a right, upon seeing those kept in the parish church." The Attorney-General believed that "the vestry-clerk must give a copy on payment of 5s." Then a second question suggested itself. "How are such manuscript laws given in evidence?" Here again the legal functionaries of the colony disagreed. According to the Attorney-General, the Colonial Secretary must produce the original Act, and no other evidence would be allowed. The Chief Justice and the Solicitor-General, on the other hand, maintained that an attested copy was admissible.

"Such," add the Commissioners, "is the obscurity, uncertainty, contradiction, confusion, and error, occasioned by neglecting the ordinary and most obvious method of notifying the commands of the legislature."(*a*)

3. *The Adjective Law—its Defects.*

(*a.*) *Multiplicity of Courts.*—The island of Barbadoes, for example, is about thirty miles long and sixteen miles broad, and is thus smaller than any county in England, except Rutland, Huntingdon, and Middlesex. Yet it was

(*a*) First Report, pp. 6, 7.

endowed with a Court of Chancery, a Court of Error, *five* Courts of Common Pleas, exercising concurrent jurisdiction, a Court of Admiralty, a Court of Escheat, a mixed Court of merchants and mariners,(*a*) a Court to take cognisance of persons about to leave the island in debt,(*a*) a Court for the trial of *warrant actions*, which apparently were claims for service, work, and labour, &c., summarily decided by a single justice, and a Court of Ordinaries. Besides these, there were Courts for the administration of criminal justice—viz., Grand Sessions, held twice a-year, Quarter Sessions, a Slave Court, and the Admiralty Sessions, which were held *pro re natâ*.

Tobago and Nevis—the latter of which is simply a rock, rising a few thousand feet above the sea,—had, in proportion to their size, equally complicated and superfluous judicial machinery.

(*b.*) *The unsatisfactory position of the Judges and the Law Officers of the Crown.*

In the first place, the Colonial Governor was also head of the Colonial Court of Chancery, in which he sat, without any professional assessor, together with a number of the members of his Council, who were appointed on his recommendation, liable to be suspended, and, to all intents and purposes, removable by him at his instance.

The evils of such an arrangement are sufficiently obvious. It involved not merely that confusion of executive with judicial functions, which is so distasteful to modern English lawyers, but the discharge of duties the most delicate and conflicting by an administrative officer who was without that legal training which alone would have enabled him to discharge them with tolerable impartiality, and the subordination to his judgment of the opinions of his colleagues who held office during his pleasure.

The proceedings of the West Indian Court of Chancery were such as might have been expected from its constitution. The Governor, sitting alone as Chancellor, granted injunc-

(*a*) These Courts rarely sat.

tions *ex parte*, not merely to prevent irreparable mischief, but to stay proceedings at law! Jurisdiction—which derived no authority from English practice, at least since the re-establishment of the Courts Christian,—to entertain a petition by a wife for separate maintenance, not founded upon any articles of agreement, but on alleged ill-treatment by the husband, was assumed and exercised; the prevailing conception of equity was that of informal and substantial justice, not capable of being expressed in precise and accurate rules.

The First Report of the West Indian Commissioners contains a sketch of a Court-day in Barbadoes, shortly after their arrival in the island.(*a*) "The Court [*i.e.*, the Court of Chancery] was employed from eleven to half-past three in reading the bill, the answers, and the depositions. On inquiry we learnt, with surprise, that the Judges of this Court *never have before them*, and *never take home* any papers, so that they affect to remember accurately a detail of important facts, which required four and a-half hours to read; and in most cases, after hearing counsel, decide immediately! . . . At four o'clock the Court adjourned, till next day, to hear the arguments. The Commissioners again attended. The speeches were long and eloquent. At the close of every hour, the counsel were refreshed with a fee,(*b*) charged 'for hearing and addressing the Court,' and then the cause proceeded with increased vigour and animation. The cases cited were numerous, involving nice points, and turning upon subtle distinctions, a little, it is to be feared, beyond the comprehension of the best informed country gentlemen, not qualified by previous education and habits for the discharge of judicial duties. The Governor candidly stated his regret that it was part of his duty to act as Chancellor; it being the most disagreeable part of his office."

(*a*) Pp. 28, 29.

(*b*) By Hall's Laws, Nos. 6, 44, and 53, the fees of barristers and solicitors of the Court of Chancery were paid in pounds of sugar, which could be commuted for money at 12*s.* 6*d.* a cwt. (First Report, p. 26).

"It remains to be stated," the Commissioners proceed,(*a*) "that none of the present members of Council, except Mr. Beckles, son of the Attorney-General, and to the extent afterwards mentioned, have received a regular legal education, or have been admitted to the bar. Mr. Lucas, the chief judge of the island, was a surgeon by profession. Mr. J. A. Beckles was entered at one of the Inns of Court in England, and resided there a few years, but was not called to the bar, and, on coming to Barbadoes, he acted as a licentiate barrister for a short time previous to his being made a judge."

What has here been said of the Governor and the Judges of the Court of Chancery in Barbadoes is true of the judicial staff of the West Indian Colonies as a whole. In Tobago, the Governor sat in the Court of Chancery—alone; the assistant judges in the Court of Common Pleas were planters or merchants.(*b*) In the Bahama Islands, the Chief-Justice of the General Court was required to be a barrister, but this regulation had only taken effect in 1797, and did not extend to the Assistant-Judges.(*c*) "I think it essential," said the Attorney-General of Tobago,(*d*) as if emphasising a point which would probably give rise to considerable difference of opinion, "that the Chief Justice, at least, should have been admitted to the bar of England." "Such a judge," added the Chief Justice,(*e*) with a creditable belief, no longer common, in the professional acquirements of newly fledged barristers, "would know the laws, usages, and practice that govern the criminal courts in England, and which ought to govern them here."

A luxuriant crop of judicial eccentricities was naturally produced by the almost total absence of legal qualifications in the occupants of the Colonial Bench. I have mentioned how the Governor stayed proceedings at law by *ex parte* injunctions, and how the honourable Court of Chancery,

(*a*) First Report, p. 29.
(*b*) First Report, pp. 76 and 79.
(*c*) Third Report (2nd Ser.), p. 59.
(*d*) First Report, p. 82.
(*e*) *Ibid.* p. 84.

apparently unconscious that the practice of the English Courts had altered since the days of Oliver Cromwell, calmly continued to entertain petitions for separate maintenance presented by a wife on the ground of her husband's misconduct. But the richest portion of the field has still to be explored.

"During the February sitting,(*a*) the Commissioners attended the Court of Common Pleas, for Saint Michael's Precinct, held in Bridge Town (Barbadoes). The first morning was wholly spent in hearing two undefended causes. The judge had no abstract of, and never referred to, the record. Depositions were admitted in evidence stating facts which the parties making them had 'heard and believed.' The judges did not take down notes, or sum up the evidence to the jury, or make any inquiries or observations, or speak or stir the whole day. Though the evidence was only on one side, the jury—which was very respectable, and seemed impressed with the importance of the duties they were called upon to discharge without any assistance from the Bench—left the Court to deliberate. The verdict was written for them upon the record after their return to Court. On another day a nice and doubtful question arose upon the statute of frauds; a great number of cases were cited with appropriate observations, and these were all addressed to the *jury*. Upon the whole, though very distinguished talent was displayed at the *bar*, the proceedings were extremely irregular; there was a great loss of time and want of order; and the judges were manifestly impeded in the execution of the duties of their trust by the want of judicial knowledge."

The proceedings in criminal trials before the Court of Grand Sessions were equally curious:—

"The presiding judge (*b*) makes a complimentary speech to the Governor, the Council, his own friends, and the island in general; but says nothing about the proper business of the day. The duty of addressing the Grand Jury on the

(*a*) First Report, pp. 42, 43. (*b*) First Report, p. 46 (Barbadoes).

nature of the charges presented to them, that 'which,' the Attorney-General observed, 'the Court ought to do but cannot,' it is the practice of the Attorney-General himself to execute, and it is done publicly when he presents the bills to the Grand Jury, or when information is required on any points of law in the progress of the bill before them.

"In a way pointed out by certain statutes of the island, sixty-six persons are returned to serve on juries. Out of these the grand and petit juries are selected by the judge, who also nominates the foreman, called 'the judge's foreman.'

"The judge takes no notes, and delivers no opinion. The Attorney-General says, 'I have always thought it my duty to sum up the evidence as impartially as if I were chief justice: but I do not say anything as to the weight of evidence: *that* I leave to the jury.'

"In capital cases (only) the judge delivers the sentence. In other cases the votes(*a*) are collected, and the sense of the Court being ascertained, the judgment is pronounced by the Clerk of the Crown."

Many of the judges received no salary, but were paid by fees; as, for example, for proving deeds, taking the acknowledgments of married women as to the transfer of property.(*b*) The result was that their emoluments depended upon the attorneys, whose bills it was their duty to tax! In the last place, the members of council, from whose ranks the Colonial Courts of Chancery were recruited, were usually the owners of landed property, and connected by birth, marriage and other local circumstances more or less intimately with the colonial society in which they lived. It was probable, therefore, that some of their number would be interested in every suit which came before them.

(*a*) Justices of the peace were included in the commission under which the Court of Grand Sessions was held. (First Report, p. 45.)

(*b*) The ordinary judicial fee was £1, but when a judge went to the party's house, he expected to be paid more liberally and then usually received a fee of £5. (*Ibid.* p. 32.)

The Law Officers of the Crown appear to have been duly qualified members of the legal profession; but the incompetence of the judges made their position at once unsatisfactory and disagreeable. The Colonial Attorney-General had far too extensive powers. In the Court of Grand Sessions, he drew the indictment, charged the jury, expounded the law, prosecuted and summed up, destroying of course all distinction between the duties of the judge and the public prosecutor. When the execution or reprieve of a convicted prisoner was under consideration, the Attorney-General represented the circumstances to the Governor from his own notes or recollection of the trial, and sometimes the Court was relieved from hearing a case by the entry of a *nolle prosequi*, for which, instead of a *fine* to the public, a *fee* was paid to the public prosecutor. The natural consequences were a jealousy of his power, and a leaning to acquit every person whom he placed in the dock. It is due to these early servants of the Colonial Office to state that personal corruption was seldom imputed to them, and in no case which came before the West Indian Commissioners was so imputed successfully. But the condition of affairs, which I have endeavoured to describe, must have tended to create and to perpetuate very grave abuses—in the law of the West Indian Colonies; and the most cursory study of the Commissioners' Reports will show that tendency in active operation. Delays, irregularities, and expense are almost necessary accompaniments of litigation, and awaken neither indignation nor surprise. But the charges which must be brought against the judicatures of the West Indian Islands are more serious. We find the legislative judicial and executive functions of the state confused, the most delicate questions of legal right or liability disposed of by laymen, and the Colonial Law Officers acting at once as prosecutors and judges.

How could it be expected that the taxation of legal costs should be rigorous or according to definite rules, while the taxing-master's salary depended on the favour of the attorney.

whose possible extortion it was his duty to prevent. How were consistent decisions to be pronounced by a Bench of clergymen, physicians, planters and law students? What was to be gained by publishing the manuscript Acts when the persons called upon to administer them were ignorant of the alphabet of legal interpretation? How was trial by jury to have an educational influence, how was the law to be respected, when the presiding judge sat mute in his own Court under the prelections of the Attorney-General?

These painful interrogatories might be increased indefinitely. They suggest the conclusion, which the Attorney-General of Barbadoes pressed upon the West Indian Commissioners, that the desideratum of that colony and of other colonies, was not the enactment of new laws, or the introduction of revised procedure, but the equipment of the Colonial Bench with "regular bred lawyers," from the ranks of the English Bar, strangers to local interests and prejudices, and raised by adequate emolument above the temptation to acts of meanness and petty dishonesty.

A. Wood Renton.

Current Topics.

Howard Association—Capital Punishment.—The Howard Association, which was instituted under the patronage of Lord Brougham for the furtherance of reforms in the treatment and prevention of crime, continues to do good work. It has just issued, *inter alia*, a short pamphlet, giving official statistics and reports on capital punishment, showing the operation during recent years of the penalty of death, and its abolition, in some of the principal countries of Europe and in America. Very curious is the information given. We are told that, according to the "Judicial Statistics" for England and Wales, there were, during the decade from 1879 to 1888 inclusive, 672 persons committed for trial for "wilful murder," and that of these 299 were convicted and sentenced to death, while 373 were either acquitted or found insane. Of the 299 condemned to death there were 145—*nearly one-half*—whose sentences were commuted, whilst 154 were executed. Of those condemned to death 50 were women, but only 9 of them were hanged. As illustrating the low percentage of convictions as against acquittals in capital charges, it is pointed out that while there were 77 per cent. of convictions in the case of ordinary (indictable) crimes, there were only 45 per cent. of convictions in capital crimes, and barely 23 per cent. of executions. Further, it appears that while there were 672 persons committed for trial for wilful murder, no less than 1766 verdicts of wilful murder were returned by coroners' juries.

As regards foreign countries, the statistics obtained from the "Compte Général de la Justice Criminelle" in France may be mentioned. 683 persons were charged with capital crimes before French tribunals, and of these 431 were acquitted, whilst 270 or 39 per cent. were convicted. Of the latter 240 had verdicts of "extenuating circumstances" recorded. The remaining 28 were condemned to death, but of these only 6 were executed

In nearly all the other leading States of Europe the death penalty has been either absolutely abolished, or is inflicted so rarely as to be practically non-existent. Thus, in Italy, Holland, Portugal, and most of the Cantons of Switzerland, it has been *de jure* abolished; in Belgium, there have been no executions since 1867; in Austria, the executions do not exceed four per cent. of the convictions; in Denmark, Sweden, and Norway, five per

cent.; and in Prussia, eight per cent. Moreover, according to the official information, it would rather appear that in all these States in which capital punishment has thus practically been abolished, the crime of murder has decreased, instead of increased. No information is given about Spain and Turkey, and it may probably be assumed that they are as backward as ourselves in the matter of death punishment.

It does not require much prescience to foretell that in a few years Great Britain will follow the example set by the progressive States and reforming statesmen of the Continent, and substitute perpetual imprisonment for capital punishment. Our present system is barbarous and ineffective. It has been said there is no worse use you can put a man to than hanging him. When a State is weak and unable to protect the community from lawless violence, death punishments for even less offences than murder may be justifiable. They are sanctioned by the fundamental right of self-defence. But when the community does not require protection, the solitary ground upon which capital punishment can be supported is that it is the only certain deterrent. But the evidence of other countries proves that there are other deterrents quite as efficacious. Our present system is also open to the reproach that both conviction of capital offences and the infliction of the penalty upon conviction are most uncertain. The statistics we have given above speak for themselves. As regards infliction of the sentence, no candid person can shut his eyes to the fact that the criminal, who can excite popular interest, and thereby bring influence to bear upon the Government or the official Secretary, in whose hands for the time being lies the power of commutation, has a tenfold better chance of escaping the gallows than the criminal who is friendless, or whose crime is devoid of interest sufficient to attract wide public attention. A couple of years ago, a woman named Jessie King was executed in Edinburgh for smothering two illegitimate children who had been committed to her charge. Scarcely any one stirred on her behalf, unless it were one or two earnest souled men, who saw that she was driven to her crime by the direst poverty. Last year Mrs. Maybrick was convicted of murdering her husband upon clear evidence, and with the full approval of probably the ablest criminal judge in England. Yet she is reprieved. Who will venture to say that she would have been reprieved had she been poor and friendless like her Edinburgh sister? Was she not reprieved because strong influence was brought to bear upon the Government—in the same way that Laurie, who murdered his friend in the Isle of Arran last autumn, was reprieved? What a satire, too, upon our system it is—this frequent interference of the executive with the solemn adjudications of the tribunals—the black cap!—the admonition to prepare for eternity! And how arbitrary the interference! As we have indicated, and as any one connected with the working of our judicial system could prove, some of the worst criminals have been reprieved; some of the least culpable have been hanged. Those who were present at Glasgow Circuit a few years ago, when a

young man called Docherty was sentenced to death, will bear witness that if ever there was a case deserving of reprieve, it was his. The son of respectable parents—himself a well-doing youth—he was walking with some companions one evening in the neighbourhood of Glasgow, a quarrel took place, and he struck a single but fatal blow with a suddenly snatched-up hoe or paling stob. Premeditation seemed to be more constructive than actual. Yet though efforts were made by those familiar with the case to obtain a mitigation, he was hanged. So too, the other day, one of the two wretched lads at Knutsford, who killed their father, is, despite the unanimous recommendation to mercy of the jury, refused a reprieve. The crime was shocking, but a lad of eighteen has not the control of his passions or the knowledge of crime that we expect from those who have reached manhood's stage. When a youth is still in his teens we must look to his education and his inherited instincts to keep him from crime—for experience of the world he has had but little. But in this case the victim of the crime was the educator—was indeed the transmitter of instincts towards evil—and he goaded his children to madness by his brutal and abominable treatment.

Does not all this show that our present system is thoroughly bad? It would be, perhaps, unfair to blame the Home Secretary; he has to act under difficult conditions. But public sentiment will not much longer tolerate the system; and there is good reason to think that the triumph of those efforts which such noble reformers as the Members of the Howard Association are making will soon culminate in the legislative abolition of Death Penalties.

Improvement of the Law.—Where is the Scottish Department?—Happily the country is not always engaged in constitutional reforms or changes. Less happily, matters of public law, whether relating to imperial or local government, are discussed generally as purely partisan questions, and their scientific treatment as falling within the sphere of jurisprudence is impossible amid the din of parties, and the contests between "ins" and "outs." Even schemes which would naturally fall solely to the jurist, such for instance as the present Land Purchase Bill for Ireland, will not improbably be determined by partisan considerations, and not in the light of principle, or of the experience furnished by the history of tenures, even in dual ownership as in the Scottish feus. But apart from all these subjects, which partisan politicians have marked for their own, there is the whole wide field of private law both in England and Scotland, on which improvements might be made without taint or bias from the infectious fever of political parties. There is, unfortunately, no field in which Scotland has more justly reason to complain that its interests are neglected. The curse of party spirit, and of attention only to those things which make for partisan success or defeat, has hindered and will hinder

many quiet improvements which bring no political glory, but yet do permanent good. There appears to be no officially organised or settled plan for dealing with reform in Scottish private law; the Secretary for Scotland knows nothing about it; the Lord Advocate is busy with political measures; and the Solicitor-General, since it has become the fashion for that law officer to be a Member of Parliament, is absorbed by his parliamentary and other duties in London. The Bills of Exchange Act of 1882 has shown how reformers in private law can best proceed. They can take up from time to time a substantive branch of the law, such as Partnership, Sale, Agency, or Carriers, digest or codify its contents, accept here an English there a Scottish rule, or where assimilation is too difficult insert Scottish clauses, and then get the result enacted as a British statute. It is hopeless to get *per saltum* a British code containing the best of both English and Scottish law; it is easy bit by bit and subject by subject to provide in time a body of statutes, which together will amount to a tolerably complete code for both countries, say in the department of mercantile law. This very session English law reformers present to Parliament a Bill practically for codifying the law of Partnership in the same way in which the law of Bills of Exchange was treated. In this session also a Sale of Goods Bill has been, or is about to be, presented as it was last year. Both Bills are on the right lines, and might, when adapted with proper care and skill to Scotland, be as beneficial as the Bills of Exchange Act. Where is there any provision in the Scottish department for giving the necessary consideration to such Bills? To leave them to private enterprise, and to the unpaid labours of private lawyers, who may find their toil misspent because not attended to, is not satisfactory. It should surely be a distinct function of a department which has so many distinguished heads to see officially to the proper treatment of such measures. Moreover, it is unsatisfactory to find Bills becoming Acts for England alone in which Scotland has equal concern and need. Instances may be found in large number. Almost at random, the Trustees' Act of 1888, and the Factors' Act of 1889 may be taken. The former deals with the liability of trustees for bad investments and for other failures often innocent in the performance of their trust. Undoubtedly the Act bears in its provisions references to the somewhat complicated trust law of England; but undoubtedly also, with more or less difficulty, and with as great reason, the law as to the personal liability of trustees in Scotland might have been improved at the same time, and in the same Act. So, too, as to the Factors' Act. This consolidates into a few clauses the whole working law on the subject for England: Scotland remains affected by the four older Acts now repealed for England. No doubt the Factors' Acts have never been much used in Scotland, the vigour of the native common law being found sufficient; but they have been repeatedly held to apply to Scotland, and it is mere neglect of Scottish interests which does not place this branch of legislation for Scotland on an equality of improvement with that found suitable

for England last session. It is probable that so long as our Scottish department is on its legal side steeped in politics, and on its administrative side absorbed in education codes, fishery regulations, and other engrossing matters, there is little hope of attention to the reform and improvement of Scots law, as well by purely Scotch measures as by seizing every opportunity of adapting good English measures to Scotland. It is manifest, nevertheless, that whatever may be the *certaminis gaudia* of politics and government, this is a duty for which the Scottish department ought adequately to provide. We ask then the question with which we head this note, Where is the Scottish department in regard to the progressive improvement of Scots law?

International Copyright.—It used to be the fashion among lawyers and politicians in this country to sneer at International Conferences, and all other machinery for the international exchange of legal and political ideas. Those who took part in such things were regarded as harmless and amiable visionaries, whose transcendental speculations had no relation to the actualities of legislation. But that view has become very old-fashioned indeed. Only perfect ignorance of the whole subject would, now-a-days, permit a man to believe that such methods do not contribute powerfully to the improvement of municipal law, and the extension of friendly arrangements between different States. One of the best examples of this may be found in the International Copyright Act of 1886, 49 & 50 Vict. c. 33, which, so far as British interests are concerned, established a powerful European Union for the purpose of protecting literary and artistic property. That Act was due to the Berne Conference of 1885. But the Berne Conference would never have met, had it not been for the patient labour of the men who organised the original Literary Congress at Paris in 1878, and who, since then, at London, Lisbon, Vienna, Rome, and Brussels, have steadily kept their important objects before the eyes of Europe, and have matured the schemes which the politicians (with the exception of the American, Russian, and Austrian representatives) ultimately adopted in 1885. In October 1889 another Conference was held in Berne, at which England was represented by the Association for the Reform and Codification of the Law of Nations, and several resolutions of a practical character were passed for the improvement of the existing system. The first point was that, assuming the impossibility of getting identically the same arrangement for the whole countries in the Union, it is in the meantime desirable to maintain particular treaties which are more favourable to the parties than the Berne Convention itself. This has not been done. For instance, England by an Order in Council dated 28th November 1887 has cancelled most of her then existing European treaties, particularly those of 1851 and 1875 with France. The next point was, that in litigations between the subjects of different States arising out of the

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provisions of the Convention, the *cautio judicatum solvi* should be abolished, but that the decree pronounced should have extra territorial effect within the Union. The third point was that the production of a dramatic representation or musical performance within the Union should be regarded as equivalent to publication, and therefore entitled to the benefits of the Convention. The fourth point was that the author's exclusive right to translate his book should be internationally recognised, provided he produces a translation in the country concerned within ten years from the original publication. A great many other matters were considered by the Conference; the position of novels and scientific articles published in newspapers, of novels dramatised, of music in manuscript, the appropriation of the name and imitation of the signature of an author, the question whether photographs should have the full right of protection generally accorded to artistic works, the piracy of melodies by musical boxes and mechanical organs. But we have sufficiently indicated the practical nature of the last Berne Conference.

Australia.—The mother of free Parliaments is about to give birth to a constitution for Western Australia. Here is the method of this interesting event. As contemplated in the Australian Colonies Government Act of 1850, the Governor and Legislative Council of Western Australia have passed a Bill framing a Constitution for the free representative government of that colony, and it is reserved for the signification of Her Majesty's pleasure. Accordingly, the Imperial Bill is introduced to authorise Her Majesty to assent to the Australian Bill, which is scheduled. The Imperial Bill expressly reserves all existing powers as to the giving or withholding the Queen's assent to Bills, the reservation of Bills for the signification of the Queen's pleasure, the instructions to be conveyed to Governors for their guidance in such matters, and the disallowance of Bills. It expressly gives to the new Legislature the management and control of waste lands south of 26° latitude, including minerals. Waste lands farther north remain under the control of the Colonial Secretary, the proceeds going to a fund for assisting the settlement of these regions. Power is expressly given to the colonial Legislature to alter their constitution in terms of the Australian Bill—viz., when an absolute majority of both Legislative Council and Legislative Assembly has been secured. Power is reserved to the Queen to divide the colony, and erect separate Legislatures, as may be necessary. Every Act of the Western Australian Parliament relating to the immigration of British subjects must be sent up for the signification of the Queen's approval. These points are ably discussed in Sir Charles Dilke's recent work, "Problems of Greater Britain."

India.—There is also now depending before Parliament another important proposal affecting the Government of the Empire. This is a Bill by the Chief Secretary for India, Lord Cross, to amend

the Indian Councils Act of 1861. The Legislative Council of the Governor-General of India consists, in the first place, of five Ordinary Members, appointed by the Secretary of State in Council, with the Commander-in-Chief as an Extraordinary Member, and also the Governor of each Presidency, and the Lieutenant-Governor of each Province or Territory in which the Council happens to meet. Under the Act, passed in 1861, the Governor-General has power to nominate not less than six, nor more than twelve, additional Members, half of whom must be persons not in the Civil or Military Service of the Crown. In the same way, each Governor of a Presidency is, under the same Act, entitled to appoint to his own Council the Advocate-General of the Presidency, and not less than four, nor more than eight, other persons, maintaining the same non-official element. The present Bill proposes to increase these numbers to ten and sixteen in the case of the Governor-General, and eight and ten in the case of the Governor. Power is also proposed to be given to the Governor-General to increase by proclamation the number of Councillors whom the Lieutenant-Governor of the Bengal Division, North-West Provinces, and Oudh, may respectively nominate for their assistance in legislation. The Bill also proposes that the Governor-General may authorise in each Council the *discussion* of the annual financial statement, and the asking of questions about it, but subject to the proviso that no resolution shall be submitted, and no division shall take place. It will be seen that the Bill contains no recognition of the representative principle

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Law of Succession.—Among the minor Bills presented to Parliament this year, of special interest to the legal profession, is the Devolution of Estates Bill, which is backed by Sir Horace Davey, Mr. Fowler, and Mr. Haldane. Its main proposals are that—(1) the real estate of an intestate should be distributed among the same persons as are entitled to the personalty under the Statute of Distributions; (2) where the intestate was a married woman, the husband should take one half if there are no issue, and otherwise, one-third; (3) subject to a temporary exception, the estates of dower and curtesy should be abolished. As to the first, in spite of Dr. Johnson's argument that primogeniture made "only one fool in the family," there will be general agreement. The common law of succession should be based on the presumed intention, gathered from actual practice, of the existing generation. The second proposal places a just and fair restriction on the excessive rights at present enjoyed under English law by the husband in case of his wife's intestacy. It seems to be similar in scope to section 6 of the Married Women's Property (Scotland) Act, 1881. The third point is obviously involved in the first.

The Intestates Estates Bill, which is backed by Sir Henry James among others, further proposes that, in the case of small estates not

exceeding £500, the widow, where there are no issue, should take the whole to the exclusion of the husband's next-of-kin, who are often remote enough.

The Companies' Winding-up Bill, 1890.—This Bill has been introduced by the Government, and its leading objects are—(1) to give to the general body of creditors of insolvent companies a more efficient voice in the appointment and control of the liquidator; (2), to compel the prompt disclosure of the state of the company's affairs, including the circumstances attending its formation and failure; and (3), to impose liability on promoters, directors, and others, for misconduct resulting in loss to the company.

1. *Creditors' voice in appointment and control of Liquidator.*—At present, one or more creditors in a winding-up petition, propose a liquidator for appointment by the Court, leaving other creditors to appear and support him, or suggest some one else, the Court making the selection, or (which is not very common) remitting the matter for the opinion of a meeting of creditors.

The Bill provides that, a winding-up order being pronounced, an officer of Court (prescribed under the Bill) shall by virtue of his office become liquidator, and continue such till some one else be appointed; that this officer shall at once summon a meeting of creditors, to be held within fourteen days after the winding-up order, for the purpose of determining—(1), whether an application should be made to the Court for the appointment of a different liquidator; and (2), whether a creditors' committee of inspection should be appointed to act along with the liquidator, and, if so, to nominate a committee of not more than five, nor less than three members.

This appears a simple way of at once recognising the paramount rights of the creditors of an insolvent company; but it does not appear why they should not, at that meeting, nominate a liquidator, whose appointment should be reported and approved of by the Court, unless cause be shown to the contrary.

2. *Disclosure of state of Company's affairs.*—Irrespective of the creditors' action, a duty is imposed upon the directors and chief officers of the company to make up and submit to the *ex officio* liquidator, within three weeks after the winding-up order, a statement (verified by affidavit) of the company's affairs, showing particulars of the assets, debts, and liabilities, and a list of creditors and securities. This statement is to be open to the inspection of creditors. But the *ex officio* liquidator's duties do not cease on the appointment of another liquidator, for the former is required, after receipt of the statement of affairs, to make a report to the Court, and particularly upon four specified points—viz., (1) the manner in which the company was formed; (2) the causes of its failure; (3) whether, and by

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whom, fraud has been committed in its formation or since; and (4) whether further inquiry on these points is desirable. The Court may thereupon direct the public examination of any persons who have taken part in the promotion of the company, and who have been directors or officers thereof. The *ex officio* liquidator is directed to take part in the examination, and creditors and contributories may also intervene.

3. *Liability of Promoters, Directors, or others guilty of misconduct resulting in loss to the Company.*—If the above report or public examination shall disclose misconduct resulting in loss, the Court may order those concerned to contribute in respect thereof towards the assets of the company such sum as the Court thinks just. The points of dittay are enumerated under six heads—(1) signing or issuing false or misleading prospectuses, reports, or balance-sheets; (2) misapplication of company's funds; (3) fraud, misfeasance, or breach of trust in the promotion of the company; (4) "being a party or privy to carrying on the business of the company after having reason to believe that it was insolvent;" (5) "being party or privy to any rash or hazardous speculations by which the insolvency of the company has been brought about, in whole or in part;" and (6) giving undue preference to creditors after insolvency.

The (4) and (5) heads as stated are open to obvious objection, for insolvency may be a passing condition, and carrying on business during insolvency the wisest, if not the only, course open. Again, what is a "rash or hazardous speculation" is a matter of opinion on which views vary widely, particularly after the transaction has proved unsuccessful.

The other provisions in the Bill are not unimportant, but relate to matters of detail—*e.g.*, the exercise by liquidators (now to be supported by a creditors' committee) of certain powers without, as hitherto, the intervention of the Court; the duty imposed on liquidators of reporting to the registrar what progress has been made with liquidations lasting longer than a year; the payment of money into bank and other regulations in bankruptcy. Again, the power given in the Companies' Act, 1867 of remitting liquidations to the County Courts is altered to the effect of allowing winding-up petitions to be presented in these Courts, but directing that, where the nominal capital exceeds £5000, the liquidation shall be transferred to the High Court; and where it does not exceed £5000, it shall be transferred from the High Court to a County Court—with power to the judge in both cases to order otherwise.

We observe that the Bill is intended to apply only to companies registered in England and Wales, but there seems no reason why its leading provisions should not be extended to Scotland: and indeed changes so extensive point to the desirability of a consolidating statute.

J. C. L.

Income-Tax on Life Assurance Funds.—The great Life Assurance Corporations are by no means inclined to acquiesce in the exactions recently made by the Inland Revenue Officials. The whole subject was ably discussed at a meeting of the Institute of Actuaries, held in London on 27th January, 1890, when a complimentary reference was made to the paper by Mr. J. M. M'Candlish, published in the *Juridical Review* (vol. i. p. 259). Mr. Newbatt, in the course of an elaborate speech, referred to the two important decisions in the House of Lords, which have been fully reported since the date of Mr. M'Candlish's paper—viz., *The New York Life Insurance Company* v. *Styles*, 1st July, 1889, 14 App. Ca. 381, and *Colquhoun* v. *Brooks*, 9th August, 1889, 14 App. Ca. 493, the latter of which has already been criticised in the *Juridical Review* (vol. i. p. 427). In the first of these cases it was decided that the premium income received under the participating policies of a Mutual Society was not liable to be assessed as profits or gains under Schedule D. As Lord Watson said, "the policy-holders are not outsiders, because they and they alone are members of the company." The case was therefore distinguished from *Last's*, 10 App. Ca. 438, which was the case of a proprietary company. Mr. Newbatt points out that the decision was given by three Law Lords differing from five Judges in the Court below, and from two of their own body. He further observes that even if this judgment remain "undisturbed by legislation, it rather adds a new inconsistency to the income-tax decisions than ameliorates the position of assurance companies." The position is certainly not improved by the most recent decisions—viz., that of *Gresham Life Assurance Company* v. *Styles*, 22nd January, 1890 (6 *Times Law Rep.* 157), in which the company were held by a Divisional Court to be liable to assessment on annuities sold by them, and that of *Colquhoun* v. *Heddon*, 20th January, 1890 (6 *Times Law Rep.* 147), in which the right to deduct assurance premiums from the assessment was held not to apply to premiums paid to foreign companies, which could not be registered in this country. Very naturally neither of these decisions gives satisfaction to the assurance profession. It is unsatisfactory to find men of high business position describing the action of the Inland Revenue Department as "disingenuous and unworthy. I do no one wrong when I say that the business of the State is carried on on principles which would destroy the repute and deservedly wreck the business of any body of traders." There is some trace of personal irritation in these words, but we entirely agree that the claims recently made against life assurance companies have been ill-founded, inconsistent, and oppressive. The companies should unite in the endeavour to promote a bill for the purpose of defining their liability.

Betterment.—There has recently been much discussion in the political world upon the word "betterment," and the idea involved in it. It seems desirable to state what "betterment" really is. Betterment is an improvement which an adverse claimant has made in good faith on land or buildings, and the general doctrine of American law, agreeing so far with the principle of recompense recognised in Scots law, is that the original owner shall pay the fair value of these improvements before he recovers the premises in an action of ejectment. The question has most frequently arisen in the case of land sold for payment of taxes, where the Court had to consider the equities affecting what in the United States is called a tax title. All this, of course, has nothing to do with the interesting point about municipal assessment, which has been raised in connection with the proposed improvement in the Strand, London, but which has persistently been discussed under the name of "betterment." There, in the case of a special assessment, it is proposed to lay on the assessment in some rough proportion, according to the benefit presumably received by the properties within the district. There is absolutely nothing novel in this suggestion. The rule of equality and uniformity, which obtains in the case of general assessments, has never been applied, either in England or in America, to the case of special assessments. The distinction is well stated by Professor Cooley, of Michigan, in his learned work on Taxation (p. 416):—"The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefited, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds, and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure of an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies." It is surprising that any novelty should be seen in such proposals. The English sewer cases show that a great latitude was allowed to the Commissioners in the assessment of benefits. These cases are summed up by Lord Denman, C.J., in *Soady* v. *Wilson*, 3 Ad. & Ell., 248. If the definition of the assessment district, or the liability to assessment within a district otherwise defined, depends on the fact of benefit received, it is not a long step further to the system of assessing in proportion to the benefit received. To this system American lawyers have urged various constitutional objections—viz., that it takes property, with-

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out due process of law and without compensation, and in violation of express laws securing uniformity of taxation. Professor Cooley has made an interesting collection of the clauses of the various State constitutions and of the case law in America bearing on this matter. The objections have in almost every case been overruled. The real difficulty is always the method of apportionment. The greater part of the cost of a local work may be collected by a general tax, or the greater part may be assessed on estates benefited, or the whole cost may be levied on lands in the immediate vicinity of the work. The benefit assessment may be intrusted to local assessors, or the Legislature may assess according to some general measure of benefit, such as foot-front, acreage, &c. Of course, bad mistakes may be made in working out such a system, but it is not creditable to political intelligence in this country that it should be received with cries of "socialism" and "confiscation."

The late Aurelio Saffi.—Just as we are going to press we grieve to hear of the death of the Conte Aurelio Saffi, one of Italy's most famous men. The late Signor Saffi, who died at his country residence at Forlì, was an Honorary Professor of International Law in the University of Bologna, and is more widely known as one of the Triumvirate of the Roman Republic in 1849. He was one of the most prominent figures and chief speakers at the Tercentenary Festival of the University of Edinburgh in 1884, and also took part in the great Bologna Festival of 1888. A stern Republican in politics, he was in private life one of the most scholarly and, at the same time, most genial and amiable of men.

J. K.

Reviews of Books.

Studi di Diritto Privato. Giovanni Pacchioni. Cesena: G. Vignuzzi, 1889.

From the pen of Professor Pacchioni, of the University of Modena, comes this interesting little volume of five studies in Roman Law, treating of a number of knotty points which have for centuries exercised the ingenuity of civilians. The first and perhaps most noteworthy of the studies relates to the doctrine of "Risk in case of a Double Sale of the same object." One of the most firmly established rules in the highly elaborated Roman contract *emptio venditio* is that, on the completion of the contract, the risk passes to the purchaser—*res perit emptori*. Another equally fixed rule is that the property in the object does not pass till delivery. Hence, if a man sell the same object to two or more successive purchasers, may he not demand payment of the price from each, and yet may, if the object perishes, be relieved from delivering either the object or its value to any one of the purchasers? The passage which has given rise to the difficulty is Dig. xviii. 4. 21 (Paulus), where the question that naturally arises—ought not the seller in equity to hand over to the first buyer the price he has received from the second?—seems to be answered in the negative: *nihil debet ex empto*. This passage has puzzled many of the most learned commentators. Ihering at one time held that both sales would be valid, and that the seller might pocket the price twice over without liability for any counter-prestation. Accursius thought that the seller should, *ex aequitate*, though not *ex empto*, hand over the price received from the second buyer to the first: but by what process of law could this be enforced? Cujas flatly condemned the text as unjust. Like Accursius, Vangerow and Windscheid have had recourse for a solution to the general doctrine of *bona fides*. Both held that the risk had passed to the first purchaser; but Windscheid afterwards changed his mind and thought that it passed to the second. Other commentators have conjectured that the risk would fall to be divided equally between the two buyers; others again that the seller might elect which buyer to sue for the price, but that he could not sue both. "In order to vindicate Roman Law

from the double reproach of injustice and incongruity," Ihering has set up a later theory to the effect that, as the object of the price is "to compensate, not to enrich the seller," payment by one of the buyers extinguishes the obligation of the other. To Professor Pacchioni, however, belongs the merit of having discovered what seems obviously the true solution; and it is curious that no one thought of it before, as it is afforded by the very text in question. Paul lays it down that, if I sell a whole *hereditas* to one man, and afterwards a *singula res* belonging to it to another, I act as a *negotiorum gestor* for the purchaser of the *hereditas*, to whom therefore I must hand over the price received from the buyer of the single object. Our author accordingly argues with great force and ingenuity that the same rule would apply to the case in hand—so that, when the seller of a *res singula* sells it a second time, he must be held to act as a *negotiorum gestor* for the first buyer, and to be bound to hand over to him the price he receives from the second buyer.

Space permits a glance at only one other of these essays. The last, one of the most interesting of the series, traces the history of "Promise of Marriage" from the earliest Roman period down to modern times. Much controversy in this case has arisen from an apparent inconsistency between a passage in Aulus Gellius (iv. 4) and one in Varro (Ling. Lat. vi. 71, 72). Did the Roman Law give an *actio ex sponsu* against a father who had broken his solemn promise—*spondeo* (*filiam tibi uxorem dare*)? The balance of authority is in favour of the existence of such an action during the period of the *legis actiones*, but Puchta, Voigt, Ihering, and others, deny its existence, chiefly on the ground that, while the *condictio* may conclude for *certam pecuniam dare*, or *certam rem dare*, or *incertum dare* or *facere*, it never was known to conclude for *filiam uxorem dare*. Suffice it here to say that, under the ancient or pontifical law, such a remedy most probably existed, and this seems to be borne out by several passages from Plautus and Terence. At a later period, the defaulting father seems to have been mulcted in a stipulated penalty; afterwards, during the classical period, it came to be regarded as *inhonestum vinculo pœnæ matrimonia obstringi* (Dig. xlv. 1. 134); later still, *arrhæ sponsalitiæ* were given to the man by the father of the woman, to be forfeited in case of the father's default; and lastly, in A.D. 336, it was enacted by Constantine (Cod. v. 3, 16), that donations between affianced persons should be revocable before formal betrothal, but that after formal betrothal (*osculo interveniente*), the man's presents to the woman should be irrevocable to the extent of one-half, while the presents made by the woman to the man (*quod raro accidit*), should in every case be revocable. Thus far it is most interesting to trace the evolution of the law of marriage from the early days of "primitive capture" and the period of *coemptio*, when the wife was little more than a chattel in the eye of the law, down to the year A.D. 336, when she is expressly recognised as an independent contracting party. With the imperial recognition of Christianity dawns a still more civilised era:

betrothal becomes a sacred ceremony, not to be violated without serious consequences; marriage ceases to be "free," and becomes indissoluble. After reviewing the more modern history of the subject in different parts of Europe, the author points with regret to the Italian law as laid down in the Civil Code, §§ 53, 54, which shabbily restricts the damages recoverable for breach of promise of marriage to "the expenses incurred on account of the promise;" and he shows how ingeniously the Italian Courts have evaded this enactment. Above all, however, he deplores the fact that none of the codes give special redress to the woman who has been seduced under promise of marriage. Apparently the learned author has overlooked the law of Scotland. Our adherence to the rule of the Canon Law that marriage may be constituted by promise, *subsequente copula*, provided the promise be proved by the man's writ or oath, is to some extent a safeguard to female honour.

Although the book unfortunately contains a great many misprints, especially in the German quotations, it deserves high commendation as a most valuable and interesting contribution to scientific jurisprudence.

J. KIRKPATRICK.

Etude sur la Procédure Criminelle en Angleterre et en Ecosse
Par M. LUCIEN GUERIN. Paris, 1890.

M. Guérin is Secretary to the English section of the Société de Législation Comparée, the programme of which has already been favourably noticed in the *Review* (vol. i. p. 384). This is an excellent instalment of its labours. In very brief compass it presents a clear and readable sketch of criminal procedure in England and Scotland. For a stranger, M. Guérin threads the maze of technical language with very few slips, and thus proves at once his own care and the excellence of the clues furnished by the native guides he has chiefly followed, Stephen and Macdonald. He has not overlooked the changes introduced by recent legislation. At the same time he has noted, with an eye for the picturesque, the departed glories of circuit journeys in Scotland, "the mediæval ceremonies, the white gloves, and the dinner to the principal inhabitants." Both the English style of indictments and the Scottish forms, old and new, are incorporated.

Unfortunately for English readers, the limits of the work did not allow of detailed criticism. The author has duly signalised the well-known contrasts between Scottish and English criminal procedure, and on most points he gives the palm to the former. He remarks quaintly that the French student of Scots criminal law experiences a feeling akin to that of the exile who hears the accents of his mother tongue in a strange land. He leaves it an open question whether the striking resemblance between French procedure and our own is to be explained by the long historical

intercourse between the two countries, or by the common development of their legal institutions on the lines of the Roman law. But on the important matter of the preliminary investigation of crime, he distinctly prefers the English practice, according to which the prisoner is present when the magistrate takes the depositions of the witnesses, and is allowed to cross-examine them personally or through his solicitor or counsel, and is supplied before the trial with a written copy of the depositions for a trifling payment (1½d. per sheet). In Scotland the accused is not present, and cannot claim to be represented at the preliminary investigation, and must rely for his protection on the fairness of the officials. Probably M. Guerin is right in holding that our practice errs on the side of secrecy and suspicion. In serious cases the Crown precognitions are generally shown to counsel for the defence by the courtesy of the advocate-depute; and again, where there is an ample fund for his defence, the interests of the accused may be sufficiently consulted. Why should counsel and agents for the poor in the ordinary run of criminal cases not be furnished with some adequate information as to the nature of the charge, and the evidence to be brought in support of it? A further improvement in this direction, for which we believe there is English precedent, would be the provision of a fund out of which the necessary expenses incurred by the poors' agent in properly preparing the case for the defence might be defrayed.

J. MACKINTOSH.

Bell's Dictionary and Digest of the Law of Scotland—the Seventh Edition. By GEORGE WATSON, M.A., Advocate, and of the Inner Temple, Barrister-at-Law. Edinburgh: BELL & BRADFUTE, 1890.

In the preface to the first edition of this now well-known work, Mr. Robert Bell, W.S., the original projector of it, enumerated the classes of persons who in his expectation would derive benefit from a Dictionary of the Law of Scotland. He fixed his eye first upon the merchant and the country gentleman, and insisted on the propriety of "disseminating amongst the great body of the people that knowledge of the law, which in general is so proper, and in particular cases so peculiarly necessary." We are thankful that the merchant and the country gentleman have not realised Mr. Robert Bell's expectations. Of very slight assistance would this seventh edition with its copious technical details be to such people, who doubtless find it much safer, when occasion arises, to consult a lawyer than to consult a law dictionary. Perhaps indeed in the recesses of many a country manse, copies of the original work might still be unearthed,—copies whose simple-minded possessors revere them as containing the latest exposition of the law even as it at present exists. In that original work there is no heading of "Joint Stock Companies;" "Ship" occupies five lines, "Reparation" five-and-a-half, "Defamation" ten, "Master and Servant"

extends to two-thirds of a page, "Bankruptcy," "Insolvency" and "Sequestration" have about a page a piece, and a page is occupied by "Life Insurance." How charmingly unencumbered would the path of the lawyer be, if these subjects could be treated with equal brevity now! The second class for whom Mr. Bell wrote were the striplings training for the law. On them he looked with pity, for they had no guide but Erskine's "Principles." We are not quite certain to what extent the modern law-student leans on this seventh edition. Probably he finds it a valued aid. But as to the third class for whom the Dictionary was written, "the men of business in the country," there is no doubt whatever that now-a-days the Dictionary is their constant stay and comfort. The other day a country solicitor, vexed in soul because his client was about to lose his chance of adjudging the property of a debtor whom he had too long delayed to sue for his debt, found in the Dictionary this ray of hope—"In the action of constitution with a view to adjudication, where delay might exclude the creditor from the *pari passu* ranking, the Lord Ordinary will pronounce decree of constitution at once, reserving all objections *contra executionem*; and with the same view, the Court, on a special petition, will dispense with the *inducia* and calling of the summons, and with the reading of the decree in the Minute-Book." The lesson was well laid to heart, and although the procedure narrated had apparently not been resorted to for the past fifty years, within two days all the forms of the Court of Session were suspended; the client's debt was constituted, and a summons of adjudication served, *M'Kidd*, 27 S.L.R. 353. Mr. Bell, however, could never have anticipated that the class destined most to rely upon his Dictionary, was not the layman, not the student, not the country agent, but the class constantly occupied in reading law, the members of the Bar. It is almost entirely to the present editor, Mr. Watson, that the credit is due of having made the Dictionary an indispensable weapon in the armoury of the professional man; and in this new edition it will be found that the weapon is tempered to the highest state of efficiency. Mr. Watson has read in a very thorough and appreciative manner all the case law since his previous edition of 1882, and the effects of that reading are to be found on every page. It is perhaps a slight misfortune that the book was in the press before the important legislation of last session had been published, as the careless reader is apt to overlook the "Addenda" at the end of the volume, the importance of which cannot be over-estimated.

It is pleasant to be able to say that this Dictionary is not yet perfect, and that some scope remains for the ingenuity of the specialist, as well as some material for improving future editions. For instance the articles "Acceptance," "Homologation," and "*Rei Interventus*," which the editor has adopted *en bloc* from the 1838 edition, are noticeably deficient: and the first mentioned may be even said to contain bad law. There is no modern authority that we know of for the proposition that a trader is bound by an order sent to him for goods, unless he at once rejects it.

In dealing with "Amendment of Record" it would have been highly convenient if a reference had been given to the leading cases regulating the *quantum* of expenses to be exacted where amendment is allowed, especially to *Keith* v. *Outram*, 1 R. 958. Under "Arbitration" we miss a reference to the rule that a decree-arbitral is reducible which does not exhaust the submission, *Paul* v. *Henderson*, 5 M. 613, and also to the rule that a submission silent on the subject of duration is good for forty years, *Fleming* v. *Wilson*, 5 S. 906. Neither under "Bank Credit" nor under "Cautionry" do we find a reference to the case of *Hamilton* v. *Watson*, 1 Bell's App. 67 (approved in *Young* v. *Clydesdale Bank*, 17 R. 231), which settled that a banker has no duty to disclose to an intending cautioner the state of accounts between the principal and the bank. Similarly we miss both under "Banker" and under "Sequestration" any notice of the important cases of *Black* v. *Melrose*, 2 D. 706, and *ex parte Schofield*, 12 Ch. D. 337, relative to the treatment in bankruptcy of bills deposited with a banker in security but not discounted. And it may in this connection be observed that the division (brought down from the earliest edition of the Dictionary) of Bankruptcy questions into the three-fold state of "Bankruptcy," "Insolvency," and "Sequestration" is confusing and unjustifiable. The articles on these topics, admirable in themselves, should be brought into juxtaposition. Only one other criticism shall we venture to make. Mr. Watson does not sufficiently appreciate the slothfulness and over pressure rampant among his brethren, or he would not continue to cite cases by the name of only one of the parties. We think that we are entitled to expostulate on this subject, as this feature of the Dictionary was not inherited by Mr. Watson from his predecessors, who habitually gave the references in full.

These are, however, minor criticisms. Mr. Watson's Dictionary holds the field as an unrivalled book of reference for the Scots practitioner, and seems destined to do so for a long time to come.

JOHN F. M'LENNAN.

Trial by Combat. By GEORGE NEILSON. Glasgow: WILLIAM HODGE & Co., 1890.

"Trial by Combat," says the author in his first chapter, "came into existence—no tradition knows when." One would be inclined to suggest that it existed from the beginning, and that we might search more hopefully for the genesis of any other kind of trial. That in early ages the strongest took what seemed good to him is certain; and long after the dawn of law and order the good old plan attributed by Wordsworth to Rob Roy continued to interfere with justice. In some nations, as in the older civilisations of South Europe, the Judicial Duel seems to have been extinguished at an early date, while in modern Europe, nourished by the adventitious aids of Church and chivalry, it stuck firmly to the judicial

system, and died hard. Mr. Neilson has, on the whole, succeeded in producing an interesting history of the institution. He has studied its development in both England and Scotland with much industry, and has gathered many anecdotes from Bracton, Bower, and other authors to enliven his pages. The Battle of the Clans in 1396 is dwelt upon at some length; and in regard to this event we cannot pass over the author's rather contemptuous reference to the opinion of Dr. Hill Burton. Dr. Burton was an accurate and painstaking historian, and Scotsmen owe him not a little for what he has contributed to elucidate the history of his country. Mr. Neilson, in fact, seems to attach far too much importance to this clan contest. There seems to be no reason to regard it as other than a scheme to get rid of some of the most troublesome caterans who harried the lands adjacent to the Highland border; and, as usual, their own internal quarrels furnished a means to achieve this. In the history of Scotland the fight on the North Inch is an event of no significance; nor does it seem to belong very directly to Mr. Neilson's subject. The subject-matter of the book is good, and it contains a good deal of curious and useful information.

M. D.

An Outline of the Law of Property. By THOMAS RALEIGH, M.A., Fellow of All Souls College, Oxford. At the CLARENDON PRESS, 1890.

This may be called a small book, since it contains only 117 pages, but, although dealing with a very great and intricate subject, it is an extremely clear and good book. Many valuable pieces of law-writing are spoiled by atrocious literary style. Mr. Raleigh, on the other hand, not only knows his subject, but can explain it with admirable lucidity. Take, for example, what is said about words of purchase and words of limitation on p. 73.

The preface says that the book has been written "with an exclusive regard to the needs of those who are beginning the study of English law," but it may certainly be read with profit by much more advanced students. It is described as containing "initial explanations, for want of which even elementary books may prove unintelligible." Elementary books are frequently the most unintelligible of all, but Mr. Raleigh's explanations are given with such simplicity and force that they carry the reader beyond the elements, and some way towards a systematic knowledge of the subject. The method of statement resembles that with which Sir James Stephen and Mr. Pollock have made us familiar. Mr. Raleigh, indeed, does not adopt the pedantry of numbered propositions, his exposition is continuous, but almost every important paragraph receives a concrete illustration from the Law Reports. There are forty-one such cases explained, several of very recent date. Annexed to the book, is a table of thirty-six important English statutes relating to property, twenty-three of which belong to the nineteenth century. Mr. Raleigh asks for criticism, and

one or two observations occur. The reader may fairly expect a little more about personal property than the book contains. Mr. Joshua Williams' two books on Real and Personal Property are of about equal size. The interesting and difficult subject of securities over moveables might be developed with advantage. Again, the illogical character of the distinction between real and personal property would be more strongly illustrated by a statement of the law of heir and executor, and landlord and tenant than of the cases put on p. 8. It seems a mistake in arrangement to explain disabilities for holding property under the title "Owners in Severalty," for these disabilities apply to all ownerships. The case of *Haigh* v. *Kaye* (L.R. 7 Ch. 469), cited on p. 17, does not seem to illustrate the doctrine of trust implied by law in the absence of writing. It is a case where apparently a trust was proved contrary to the terms of a written conveyance. The principle upon which the necessary evidence was admitted in such a case might have been explained. These suggestions are made because Mr. Raleigh asks for them, but they do not affect the opinion already expressed that this book is an extremely able piece of condensed exposition.

W. C. S.

La Lucha por las Nacionalidades. Dr. D. Adolfo Morís y Fernandez-Vallin, Catedrático de Derecho internacional en la Universidad de Santiago: Segunda Edición. Madrid, 1888.

Time was when Spaniards were the foremost pioneers of the science of International Law, earliest and most famous of whom were Vitoria, Soto, Ayala, and Suárez, men of the 16th and beginning of the 17th century, and the immediate precursors of Alberico Gentili and the illustrious Grotius. Since then most of the great publicists have belonged to countries other than Spain: one need only mention a few names, such as Puffendorf, Bynkershoek, Vattel, and after a long interval Martens, Ortolan, Savigny, Bluntschli, Mancini, Kent, and our own Lorimer. But in the great historical and philosophical revival of the science, inaugurated within the last half-century by men like Savigny and Bluntschli, Spain has actively participated. In 1836 the study of the Law of Nations was revived in Spain as a University subject; in 1842 that of Natural Law was added; in 1845 International Law was inserted by Government in the regular law curriculum, and has since been taught in connection with the Philosophy of Law; and at length in 1884 it was enacted that all candidates for the Doctorate in Law should study both Public and Private International Law and the critical History of Treaties. And several new chairs have accordingly been established of late in the Spanish Universities. To this great revival of the study of International Law this monograph by Professor Morís is a very noteworthy contribution. It formed the opening

lecture of the law session in the University of Compostela in 1887, and is now in its second edition, prefaced with a "prologo" by Professor Fermin Canella Secades of the University of Oviedo. Professor Moris divides his monograph, the title of which (doubtless suggested by Ihering's Kampf um's Recht) may best be rendered by "Struggles for Nationality," into the historical, the philosophical, the "naturalistic," the ethnographical, the philological, and the "harmonious" struggles respectively. The historical part consists of a masterly review of the wars and the treaties which have shaped the chief nationalities of Europe; but perhaps greater interest attaches to the philosophical part, in which the author vigorously combats the doctrines of Comte and Herbert Spencer, while admitting that they "form a natural reaction from the exaggerated idealism of the Middle Ages." Under the title of the "harmonious struggle" he discusses those lofty aspirations for the peaceful development of nations which have chiefly emanated from the Italian school, represented by the illustrious Mamiani and Mancini, and he concludes with an eloquent passage to the effect that nothing short of the triumph of constitutional liberty in individual states will afford a guarantee for the "perpetual peace" of the future.

The author's chief merit consists in his truly scientific grasp of the subject and in his able demonstration of the fact, even yet imperfectly understood, that International Law is a noble study, of which history, philosophy, ethnology, philology, and both public and private municipal law are the indispensable and inseparable handmaids.

J. KIRKPATRICK.

The Local Government (Scotland) Act in relation to the Public Health. By JOHN SKELTON, C.B., LL.D., Advocate, Secretary of the Board of Supervision. WILLIAM BLACKWOOD & SONS, Edinburgh and London, 1890.

The Law relating to the Public Health, annotated with special reference to the changes introduced by the Local Government (Scotland) Act, 1889. By J. EATON DYKES, Advocate, and DUDLEY STUART, Advocate. Edinburgh: BELL & BRADFUTE, 1890.

Mr. Skelton's book is apparently intended merely to hold the field till the larger work which he announces is published. But probably no better summary introduction, or by a more competent hand, to an annotated edition of the Public Health Acts could be furnished than the first part of this book. In the introduction the author indicates one or two weak spots in the new scheme of local administration, out of which difficulties are not unlikely to arise in practice. For example, the Local Government Act allows an appeal by five ratepayers to the County Council against any proceeding or order of the District Committee. But there is already an appeal in certain cases under the Public Health Acts

to the Sheriff or the Board of Supervision. Does the new appeal supersede the old? or are there to be two concurrent appeals to different judicatories, who may pronounce contrary decisions? Another difficulty will arise in cases where the District Committee is carrying out orders of the Board of Supervision, and is forbidden to proceed by the County Council on appeal. The Board can take action against the District Committee, but not against the County Council, for it is apparently enacted that proceedings to enforce the provisions of the Public Health Acts shall be taken against the District Committee. The County Council is undoubtedly charged with a general responsibility for the administration of the law of public health, and if a District Committee pleads that it is acting upon the statutory direction of the Council (of which, indeed, it is truly a committee), it is difficult to see how this is consistent with a reservation of direct action by the Board of Supervision against the District Committee. On principle, it would be more consistent to imply a right of action in the Board of Supervision against the County Council. But it is obvious enough that is not the view of the framers of the Act. They probably expect that the appeal to the County Council will gradually render unnecessary the interference of the Board of Supervision, and we trust it may. *Quid juris?* Mr. Skelton refers three times to the fact that—despite the tautological care shown by the framers of the Act to exclude women from the new Council, section 9 declaring that no woman shall be "eligible for election" as a County Councillor—women may yet sit on County Councils. It comes about in this way:—A woman may be under the existing law a member of a parochial board. Each District Committee contains a representative from the Parochial Board of each parish, wholly or partially within its boundaries. This representative, appointed by the other members, may be a woman. A woman may therefore be a County Councillor, at least for public health and road business. She has apparently no voice in the general administration of the county, or its finance, or its police; but she may give her counsel in the cleansing of sewers and the purging of pigstyes, and the proper metalling of the roads. It can hardly be suggested that the words of section 9 can be read into section 78, so as to disqualify the women members of a parochial board from being appointed to a District Committee. If it be suggested that the appointed members of District Committees are not, strictly speaking, County Councillors, then take the case where a county is not divided into districts. There are under the present provisional scheme eight such cases, though, as Mr. Skelton notes, the Boundary Commissioners may leave none. In all such cases the powers and duties of the District Committee devolve on the County Council. The parochial and burgh representatives are then to "be deemed to be County Councillors" (sec. 78, sub-sec. 3).

The second part of Mr. Skelton's book comprises epitomes of the chief statutes referred to in the Local Government Act and of the circulars of the

Board of Supervision, which it is highly convenient to have under one cover.

While Mr. Skelton was writing his introduction, Messrs. Dykes and Stuart have got out their completed manual. The reading of annotations to a statute, merely for reviewing purposes, brings no pleasure and little profit. The only real test of a book of this kind is to have for some time used and applied it practically in the work for which it is intended. Here it can only be said, upon a moderate examination of the notes, that much has been included, and little seems to have been omitted. The very important Notification of Disease Act, 1889, is printed in the Appendix. English decisions, where the laws are parallel, and Sheriff-Court reports have been laid under contribution. There is a good index. The parodist of Fletcher of Saltoun, who said that any one might write the book if he wrote the index, would, we think, be satisfied with it. There are, however some faults in the book. It may be a question whether a book on public health administration should include the Cattle Plague Acts, but it should certainly include what are known as the Dairy Acts, more especially section 9, subsec. 7, 49 & 50 Vict. c. 32. This is conceded by the authors, for they print the relative circular of the Board of Supervision. It is scarcely understood in Scotland that since 1886 the question of dairies has been definitely separated from the general administration of the Cattle Plague Acts, and recognised as a proper matter of public health. As little doubt can be felt that such a book should contain some account of the Adulteration Acts, including the recent Margarine Act. The defective administration of these Acts was always mentioned as one reason for having a County Council. It is true that they do not fall, as the Dairy Acts do, to the District Committee, but surely the purity of food is a main element in public health. We think also that Messrs. Dykes and Stuart should have printed the Housing of the Working Classes Act, 1885. It is an important Act which will to some extent, solve the allotment question in Scotland. The authors truly say that they could not print the whole series of Artisans and Labourers Dwellings Acts, but what is really important is the Act of 1885, with a short explanation of the other Acts. Besides the Act of 1885 contains new substantive sanitary law—viz., the sections relating to tents, vans, and sheds. Messrs. Dykes and Stuart do not discuss the much-discussed question whether the smoke-consumption sub section of the nuisance clause in the Public Health Act. 1867, applies without burgh as well as within burgh. The word "smoke" does not occur in their index, although the case of *Murphy*, 11 Rett. 694, is noted in its proper place. The perusal of this book cannot fail to suggest two anomalies in the present state of the law. First, the administration of the Vaccination and Burial Ground Acts has, by a turn of expression in the recent statute, been left with the Parochial Board, and not transferred to the District Committee. Second, the administration of the Factory and Workshop Act has, as regards bakehouses, been transferred from a Crown Inspector to a

responsible Local Authority. Why should not the whole duty be transferred?

Lawyers' Cash Book-Keeping. By JOHN W. M'CLYMONT, Solicitor. Glasgow: WILLIAM HODGE & Co., 1890.

This little book by Mr. M'Clymont, Solicitor, Ayr, which has been sent to us, is intended for the use of law-agents. It is a very slight volume of twenty-seven pages, and deals only with book-keeping in relation to that most important of all books—the cash-book. While assuming that every well-regulated office will contain a separate set of books for professional business and for cash, the object of the author's system is to introduce into the cash-book and other books separate columns, in which entries can be made and balances applicable to each branch of business ascertained. Its prominent feature is, as the author states, to make the cash-book contain "a division of the practitioners' whole transactions into classes by means of appropriate columns." Columnar tables are given for the purpose of illustration, and the system is on the mixed principle of single and double entry. Whether the system is an improvement upon that contained in the well-known work of the late Mr. Carter, is a question which must be determined by practice. But the author's plan is suggestive, and is not complicated, and certainly eighteenpence might be worse expended than in getting a copy of the book.

Notes on Decided Cases.

Bills of Exchange—Delivery without Indorsation (*Hood* v. *Stewart*, March, 1890).—In no point is the law of Scotland more distinguished from the law of England than in the refusal of the former to recognise any real right as flowing from the mere pledge or deposit of title-deeds or securities. If the delivery were the result of a contract containing an obligation to grant a disposition, an assignation, an indorsation, to a negotiable instrument, not payable to bearer, or whatever might, in the particular case, be the proper form of complete assignment, no doubt such contract might be enforced by action for implement. But in hardly any case could such antecedent contract be proved without writing, and even after such proof, until actual implement, no real right would be vested against creditors in the person to whom title-deeds or securities had been delivered. Whether, if the antecedent contract were established by oath of party only (*i.e.*, if the contract was oral only), the delivery would be sufficient *rei interventus* to prevent resiling from a contract requiring writing to its formal constitution, has not been decided, and is not likely to be decided, favourably to the transferee by delivery. For practical purposes, the ordinary statement that the mere delivery of securities requiring disposition, assignation, or indorsation, to their formal transfer, is of no avail in Scotland, may be taken as correct. In other words, the doctrine of equitable assignment—that a person who has received delivery of securities, with a right to have them formally transferred to him, may be treated in equity as if he had actually got his indorsation or assignation—is unknown to the law of Scotland. Documents of title belong to him, and to him only, who has the real right in the *res* to which they refer. There have already been instances before the Courts in which English lenders have been misled by the notion that merely obtaining corporal possession of the title-deeds to Scottish land, or of Scottish securities, would protect them against a subsequent real right. However much may be said in favour of the Scottish rule in general, it is fitting that no diversity should exist in such a matter as the transference of bills of exchange by delivery. Accordingly the Act of 1882 which has in so beneficial manner codified the law of bills of exchange for the whole

United Kingdom, provides in section 31, "Where the holder of a bill payable to his order transfers it for value without endorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the endorsement of the transferor." This section has recently been put to the severest test by the case of an accommodation bill, in which the acceptance was for the drawer's accommodation, and accordingly the drawer had no right to sue the acceptor on the bill. It was, however, from its nature put by the acceptor in the drawer's hands for the very purpose of being discounted or of being used by the drawer for the payment of his debts. The contract, in short, of the acceptor was to pay to any holder for value to whom the drawer might duly pass the bill. In the case of *Hood* v. *Stewart*, recently decided by Lord Trayner and the Second Division of the Court of Session, the drawer handed the bill to a creditor of his own in payment of a previous debt or to retire a previous bill; that is, he delivered it for value. By some omission no indorsation was made to the creditor, and the bankruptcy of the drawer followed while the bill still remained unindorsed in the creditor's hands. Possibly even after bankruptcy the drawer might have validly indorsed, or might even have been compelled to indorse; such at all events may be inferred from English authorities. Neither the bankrupt drawer nor his trustee in this case did indorse; and the creditor resorted to a direct action in his own name against the acceptor. The main difficulty lay in the terms of the section conferring on the transferee, by delivery without indorsement, only "such title as the transferor had in the bill." It was, of course, urged that the drawer having no right to recover from the acceptor, the transferee without indorsement could have no higher right. This objection is one which could not be raised if the acceptance had been for value. The Court, however, in both the Outer and Inner House, after some hesitation, decided that the transferee for value of an accommodation bill (and much more of an ordinary trade bill), without indorsement, could sue the acceptor. The bill had been put only to its intended use in being passed to a third party for value, and the liability sought to be enforced against the acceptor, as the result of the drawer's dealings with his own creditor, was precisely the kind of liability which the accommodation acceptor had agreed to, and had authorised the drawer to impose on him. The decision, which applies to all bills of exchange as defined by the Act, appears to be sound, and it is of importance and interest as showing the introduction by statutory authority of a novel rule into the law of Scotland.

R. V. C.

Contract—Specific Implement.—The judgment of the Court of Session in *Kennedy* v. *Stewart*, 16 Rett. 421, was affirmed in the House of Lords on 17th February, 1890, 27 Sc. L.R. 386. The action was brought to enforce an

agreement for sale of the entailed estate of Murtly, the pursuer being Mr. J. S. Kennedy, financial agent, of New York, and the defender being Sir Archibald Douglas Stewart, the heir of entail in possession. There was a great controversy as to the meaning of the words used in the agreement, "subject to the ratification of the Court," but it was ultimately held that Sir Archibald was bound by his agreement to take the necessary steps for obtaining authority to sell under the Rutherfurd Entail Act of 1848, and to purchase the consent of the heir-apparent under the Entail Act of 1882. But the plea was also argued and considered in the House of Lords whether, in the case of an agreement of this kind, the pursuer had any remedy by way of specific implement, and must not content himself with damages. The grounds of this plea were apparently twofold—(1) The defender was a limited owner; (2) he thought he was selling on condition the Court and the heir-apparent were satisfied with the sale. It was, of course, out of the question to suggest that the defender's blundering construction of the terms of his own contract should disentitle the pursuer to any remedy which might otherwise be available. No doubt the extremely vague doctrine of the Court of Chancery upon this subject is, as stated by Lord Macnaghten in the present appeal: "The Court of Chancery has refused specific performance in cases of mistake, when the mistake has been on one side only, and even when the mistake on the part of the defendant has not been induced or contributed to by any act or omission on the part of the plaintiff." But his Lordship added that, in modern times, that doctrine had been applied only in cases where the circumstances were such that it would be highly unreasonable to enforce the agreement specifically. This limitation seems to be even vaguer than the original doctrine. If this matter had to be decided by English Chancery law, it might have been better to postpone the decision. As appears from another note in this *Review*, the agreement in question is now the subject of reduction on the ground of essential error, and also of circumvention. If that action fails in setting aside the agreement, the facts disclosed, although not sufficient for reduction, might well constitute a case of mistake in the sense of the modern authorities referred to by Lord Macnaghten. But the true answer to any argument based on these authorities is that made by the Lord Advocate *in arguendo*—viz., that the practice of Chancery has nothing to do with the remedy of specific implement in Scotland. Specific implement is in England an extraordinary remedy given by a Court of Equity in cases (chiefly those of purchase of land or houses) where damages would be an insufficient compensation. At common law breach of contract gives rise to nothing but a claim of damages. This no doubt followed from the rigid adherence to the old *formulæ* or writs of action. In Scotland, on the other hand, where common law and equity are administered by the same Court, there is some authority for holding that specific implement is the ordinary remedy, as much as damages, and that the creditor may choose between them. Lord Watson

points out that the difference between the two systems as regards contracts of sale appears in another direction. In Scotland he says the *actio quanti minoris* is unknown, but in England they have the familiar remedy of specific performance of part of the contract, with compensation in money as regards the other part. But, with deference to Lord Watson, the *actio quanti minoris* is not equivalent to the compensation allowed in certain cases of sale of land or houses in England. What is equivalent is the claim for deduction of the value of the part of the subject withheld, and this was reserved by the House of Lords' judgment in *Gordon* v. *Hughes*, 1 Bligh, 287 — see Erskine, iii. 3, 10, Lord Ivory's note, 107. Whatever the principle and extent of these differences may be, there seems no doubt that the two laws agree in giving the remedy of specific implement in the ordinary case of a sale of land by a limited owner who can by certain procedure get power to fulfil his contract. The Court of Session gave such a decree recently in the unreported case of *Merry & Cuninghame* v. *The Earl of Glasgow*, where an heir of entail had agreed to grant a ninety-nine years' lease; and the practice of Chancery, from the early cases where an heir in tail was ordered to levy a fine in order to perform his agreement, down to the present time, has always been to the same effect. In fact, the only authority which the appellant was able to cite in the present case was *Thomas* v. *Deering*, 1 Keen, 729, a decision which has been doubted by Lord St. Leonards, and which was distinguished by the fact that the tenant for life was unable to procure the consent of the trustees of the settlement, and therefore, by reason of impossibility, the suit for specific performance was necessarily dismissed. It would, however, have been interesting if the noble Lords had developed with greater precision the fundamental differences of English and Scots law on this important subject. Lord Watson said: "In Scotland, the breach of a contract for the sale of a specific subject, such as landed estate, gives the party aggrieved the legal right to sue for implement; and, although he may elect to do so, he cannot be compelled to resort to the alternative of an action of damages, unless implement is shown to be impossible, in which case *loco facti impres-tabilis subit damnum et interesse*. Even where implement is possible, I do not doubt that the Court of Session has inherent power to refuse the legal remedy upon equitable grounds, although I know of no instance in which it has done so." This dictum is confined to cases of sale, and no attempt is made to indicate the conditions in which specific performance might be considered too inconvenient or unjust. As the learned Editor of Bell's "Principles" has observed (section 29, note 4), "the subject has been illustrated by almost no decisions." But the doctrine laid down by Lord Stair is worth restating. He says in his Institutes (I. 17, 16), in the first place, that "it is in the creditor's option to pursue for performance or for damage and interest." This is a general statement of the law of contract. As regards the rule, "*loco facti impresta-bilis*," &c., he explains that "in some cases, if the delay be wilful or fraudulent, all personal execution by escheat and caption

will proceed." This apparently means that, even where performance had by fault become impossible, the penalty of disobedience to a decree *ad factum prestandum* might be inflicted. Construing the same rule, Lord Stair adds: "Interest may either be competent for the whole obligation, as when it is imprestable, or when any part or qualification is unperformed, for the value thereof." This, however, must not be read as applying to an *actio quanti minoris*, but only to the case of part performance. "In obligations," he goes on, "which are not *in dando*, but *in faciendo*, the common opinion of the doctors is that there can be no pursuit for performance, but only for interest . . . but it seems more suitable to equity that it should be in the creditor's option, even after the delay, either to suit for performance or interest, as he pleaseth, if both be prestable." The general principle, therefore, laid down by Stair, goes far beyond the case of the sale of a specific subject dealt with by Lord Watson. Indeed, in many contracts relating to specific things, the obligation may be so far conditional that it may be defeated (even as regards a claim of damages), by the extinction of the thing, where that was not due to fault. On the other hand, in an ordinary sale of fungibles or manufactured goods, it has always been laid down that the seller is entitled to send the goods, and the buyer is entitled to sue for delivery, and although, in the great majority of cases, the prudent and usual course may be for the buyer to buy elsewhere and claim damages, yet even extreme cost and difficulty make no defence against a claim for specific performance. Professor Bell thus sums up the law with reference to obligations *ad factum prestandum*. "Such contracts may in Scotland be specifically enforced where the act can be performed by another, and the action may be laid alternatively for performance or for damage. Where the obligor is *himself* to perform the act and refuses, or where the act becomes impossible, damages are substituted for specific performance." The first exception here relates to personal contracts, such as contracts to marry, or to those involving personal skill, such as the writing of a book. It would not, however, apply to a contract of sale of goods to be manufactured by the seller, a common contract in the iron trade. So also, contracts of service and partnership, which involve confidential or close and intimate relations, are not now specifically enforced, although the old common law looked with favour on the specific enforcement of the former class. Apart from these exceptions, however, the language of Professor Bell is as general as that of Lord Stair. In the scarcity of decisions to illustrate this subject, it is interesting to notice that in *M'Arthur* v. *Lawson*, 19th July, 1877, 4 Rett. 1134, the judges in considering whether a relevant averment had been made of a contract "to give a substantial interest in a business," applied the test whether specific performance could be decreed in terms of the documents founded on. That is to say, a contract enforceable to any effect must be capable in terms of being specifically enforced, although considerations of policy outside the contract may deprive the creditor of specific performance in certain

cases. In *Moore* v. *Paterson*, 16th December, 1881, 9 Rett. 337, where performance of an obligation to make an access through the ground of another, could be obtained only at enormous cost, it was the opinion of the Court, although no decision was required, that no decree for specific implement could have been pronounced. With deference, however, to Lord Shand, he seems to state the matter wrongly when he says: "But it must always be in the discretion of the Court to say whether the remedy of specific implement, or one of damages, is the proper and suitable remedy in the circumstances." The true view, rather, is that, except in cases of impossibility (to which the debtor has not contributed), cases to which familiar reasons of public policy apply, and, it may be, some cases of extreme and unexpected hardship, which have not yet occurred, the creditor is entitled to his option.

W. C. S.

Church in landward-burghal parish—Allocation—Sale of Seats.—The case of *Mackay* v. *Wood*, 7th Nov. 1889, 17 R. 38, is not without importance, as it raised a novel question in Church law—viz., the right of Trade Incorporations, to whom church seats have been allocated for the use of their members, to sell such seats, when their membership has dwindled down to a few individuals. The circumstances, which gave rise to the case, are the following:—The parish of Brechin is a landward-burghal parish. In 1807 by agreement among the parties interested, the sittings in the parish church were allocated among the heritors of the landward part of the parish, various voluntary Trade Incorporations (which at that date included the great mass of the inhabitants of the Burgh), and certain other individuals. Some sittings were allocated to the Town Council of the Burgh, but practically all the seats which appertained to the burghal portion of the parish were apportioned to Incorporations, including, amongst others, the guilds of Glovers, Tailors, Weavers, and Shoemakers. These guilds in course of time became reduced to a few members, without powers or duties, and who did not represent any portion of the community. These members, having thus more seats than they could personally occupy, were in the practice of letting the seats allocated to their respective Incorporations and spending the rents in an annual supper or dinner. In 1886 the Rev. James Mackay, minister of the first charge, and several of the elders, wishing to bring to an end this somewhat disreputable state of matters, purchased the sittings from the remaining members of the several Incorporations and let them to parishioners at moderate rents—intending, after the expense of purchasing the seats had been met, to hand the rents over to the Kirk-session for the use of the congregation. Alexander Wood and several other members of the congregation objected to the sale, refused to pay the seat rents, and by coming early to the church on the Sundays took

possession of certain of the sittings to the exclusion of those to whom Mr. Mackay and the other purchasers had let them. The purchasers raised an action in the Sheriff-Court to have Wood and the others interdicted from entering or using these sitting or interfering with the use of the pursuers or those deriving right from them. The Sheriff-substitute granted interdict and the Sheriff-Principal adhered. The defenders appealed to the Court of Session, and the case was argued before the Second Division of the Court.

Before considering the judgment, it may be well to state shortly the law as to sittings in church, which in a series of cases has been clearly laid down. Seats in parish churches are allocated in accordance with the character of the parish. Parishes are of three kinds—(1) wholly landward, (2) wholly burghal, and (3) partly landward, partly burghal. (1.) In a landward parish the seats are allocated among the heritors in proportion to the extent of their lands within the parish. The seats are inseparable pertinents of the estate, and each heritor holds the seats allocated to him as trustee for the persons resident on his lands. He has no absolute right of property in the sittings, and cannot sell them or let them for gain (*Duff* v. *Brodie*, 29th June, 1769, M. 9644; Lord Monboddo's opinion in *St Clair* v. *Alexander*, 21st November, 1776, 2 Hailes, p. 720; *Skirving*, 21st June, 1796, M. 7930; Lord Cringletie's opinion in *Ure* v. *Ramsay*, 5th June, 1828, 6 S. p. 917). (2.) In burghal parishes the church seats are vested in the magistrates, as trustees for the community, liable to provide whatever is necessary for the proper performance of public worship within the burgh. They are the sole heritor-representative of all the property within the burgh; but, as they have no beneficial interest in the property, they have been held entitled to let the seats to the inhabitants of the burgh, the seat-rents being applied in defraying the expenses incurred by the magistrates for ecclesiastical purposes. A right on the part of magistrates to sell seats to residents within the burgh has also been recognised in special cases, but it is doubtful if a conveyance of this kind would be held valid if timeously challenged. The leading case on the subject of church seats in burghal parishes is *Clapperton* v. *Magistrates of Edinburgh*, 14th July, 1840, 2 D. 1385. (3.) As regards the allocation of church seats in landward burghal parishes, the law was very clearly summarised by the Lord President in *Stephen* v. *Anderson*, 18th November, 1887, 15 R. 72. The allocation in such cases may be carried out in two ways—either (*first*), the division may be made, as if there was no burgh at all, among the different individual owners of heritable property in both landward and burghal portions of the parish, in which case the rules stated above as to parishes wholly landward apply; or (*second*), the magistrates of the burgh may be treated "as one heritor representing the interests of the whole inhabitants," and the seats allocated amongst the magistrates, as such heritor, and the individual heritors in the landward portion of the parish, in which case the rules stated above as to parishes wholly landward will apply to the landward

portion of the parish, and the rules stated as to parishes wholly burghal apply to the burghal portion. The second mode of allocation is much the more usual.

The peculiar circumstances of the present case will at once be seen. Brechin is a landward burghal parish, but in 1807 the seats in the church, which appertained to the burgh, instead of being allocated amongst the individual possessors of property within the burgh or handed over to the Magistrates as representatives of the interests of the inhabitants, were allocated to various trade incorporations including in their ranks the great mass of the burgh population. The question for the Court to decide was this:—Could these Incorporations, or rather the few individuals representing them in 1886, sell for gain against the wishes of certain parishioners the seats allocated to them in trust in 1807? The Court, reversing the judgment of the Sheriffs, answered this question in the negative, and their decision was clearly right and in accordance with the principles laid down in former cases. The Lord Justice-Clerk makes a plain statement of the law. After dealing with the allocation of the seats to the Incorporations he goes on:—"Each corporation thus became a kind of trustee for the members, holding the seats for the purpose of apportioning them among the members and practically arbitrating between the members as to the allocation. But the corporations had, and could have, no right to deal with these seats for purposes of general gain. . . . It is a different question whether it is possible for a corporation to make merchandise of the whole area committed to it by selling to a few individuals the space which it has received in trust, that these individuals may dispose of it as they please. I am of opinion that they, in doing so, commit a breach of the trust imposed on and accepted by them."

While the sale has thus been set aside, it is plain that the state of matters, which was in existence before the sale of the seats, should not be reverted to. The Lord Justice-Clerk, making use of a somewhat mixed metaphor, describes the Incorporations in their present state as "skeleton corporations which trade in the seats they can no longer use and spend the proceeds on feasting," and he terms such proceedings "a most scandalous state of things." It is clearly just, that, as these skeleton corporations have taken to eating and drinking, some body, more representative of the general public, should break in upon them, like the flood of old, and sweep them all away. In the words of the Lord Justice-Clerk, the fact that these corporations have now no members toward whom they can fulfil their trust in allocating the seats which were committed to them, "is a reason for holding that the trust and therefore the rights under the trust have come to an end." And although the Court did not decide what body should supersede these practically defunct corporations, that point not being raised in the action, there would not seem to be much room for doubt, in accordance with the legal principles above set forth, that the Magistrates of the Burgh, as trustees for the community and representing all the property

within the burgh, are legally bound to take over the trust and the rights under the trust which have now come to an end as far as the Incorporations are concerned.

J. C. C. B.

Postnuptial Contract of Marriage — Reciprocal Provisions — Jus Crediti — Present Assignable Right.—The special case decided in the Court of ultimate resort a few weeks ago, in which *Rodger's Trustees* were the first parties, *James Buchanan's Trustees* the second parties, and *James Buchanan's Next-of-Kin* the third parties, strikingly illustrates the popular idea of the uncertainty of the law.

A deed was construed and acted upon in a certain way with regard to one of its main provisions for a long series of years, in accordance with the opinion of eminent leading counsel. At the close of that period, parties who held a fund affected by the provision raised the question whether the adopted view of the law was the correct one, and several alternatives were submitted to the First Division of the Court of Session for their opinion and judgment. The Court unanimously, and with little hesitation, held that the accepted interpretation was, in one of two principal particulars, incorrect; and they gave effect to an opposite contention. On appeal the House of Lords (also four judges) unanimously, and with no hesitation, rejected the opinion on this point of the First Division, and gave effect to the opposite view—the one originally entertained.

But the case is one also of very considerable legal interest. The question raised was whether a certain provision of the deed—a postnuptial marriage-contract—was testamentary or of present operation, and views expressed by two of the appellate judges (the Lord Chancellor and Lord Watson), with reference to the case and to opinions given in the Court below, have an important general bearing on all questions falling within this category of law.

The precise point at issue was whether a provision made by Mrs. Buchanan, one of the spouses who were the parties to the contract, passed to her husband a share of residue, over which she had a power of appointment among the issue of the marriage, and failing issue a general power of disposal. The leading words of the conveyance were these:—"For which causes, and on the other part, she . . . has given, granted, and disponed, as she does hereby give, grant, assign, and dispone from her, her heirs and successors, to and in favour of the said James Buchanan, his heirs and assignees whomsoever, heritably and irredeemably, All and Sundry her . . . whole estate, goods, chattels, and effects, heritable and moveable, real and personal, now pertaining and belonging to her, or that shall happen to pertain and belong to her in any manner of way, and wherever situated, at the time of her death, including and comprehending therein,"

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&c. The Lord President, who gave the principal opinion, held, in view especially of other clauses in the deed, that, with respect to the moveable estate, this conveyance was merely testamentary, although the presence of other specific provisions might render it *de presenti* with regard to heritage. The other clauses thus founded on (in addition to the reference to the time of death, contained in the dispositive clause itself), were one appointing Mr. Buchanan sole executor and universal legator, a reservation of power to alter during the spouses' joint lives, and a clause dispensing with delivery of the deed. Lord Mure stated a view that marriage-contracts were, in their nature, substantially testamentary. The other judges simply concurred. The provision being held to be testamentary, the rule of *Bell* v. *Cheape* (1845, 7 D. 614) was applied, and the "heirs," not the "assignees," of Mr. Buchanan were found entitled to the residue, as conditional institutes under the destination above quoted.

In reversing this judgment, and finding Mr. Buchanan's testamentary trustees entitled to the fund, the Lords decided that the provision in question was not in its nature testamentary, but a contract provision, giving an immediate right though only future possession. With regard to the particular question before the Court, the Lord Chancellor emphasised the fact that the deed purported to be a matrimonial contract by which each spouse undoubtedly gave something to the other, and the circumstance that it took the place of an ante-nuptial contract; he found in the language, and in the provisions (excepting the appointment of Mr. Buchanan as executor) nothing inappropriate to such a deed; and he altogether declined to give a different construction to the same words in the same clause of conveyance, according as they were applicable to the moveable or heritable estate. On the general law, his Lordship stated—with reference to Lord Mure's view of the testamentary character of marriage-contracts—that he believed it to be impossible to lay down such a canon of construction. The provisions of such an instrument, he thought, in ninety-nine cases out of a hundred were primarily intended as much and even more, to regulate the reciprocal rights of the parties during the continuance of the marriage, than to determine the destination of the several properties contained in the instrument after their death. In the judgment of Lord Watson, in which particular application and general principle were throughout interwoven, the additional points were chiefly these—the necessity of looking specially to the leading clauses and provisions, and to the whole tenor and purpose of the deed, and the peril of determining these by such a clause as the one appointing Mr. Buchanan executor, which might be meant to provide a useful auxiliary title of possession; the emphasis given to the element of contract—as between the contracting parties, and irrespective of any third parties; and the definition of such a deed as "*inter vivos* but *mortis causa*, in contradistinction to a testamentary deed." The grounds of his Lordship's judgment are well summarised in the closing sentences—"I think the appellants are entitled

to judgment on this broad ground that the deed is a deed of contract, that the right which each party gets to the estate of the other is the right of a creditor and not of a legatee, that each has a right of credit which vests at once. In that view of the deed I do not think it admits of dispute that, according to the law of Scotland, A and his heirs and assigns simply means a present right of credit in A, no matter how long the enforcement of it may be delayed." Lord Bramwell and Lord Herschell concurred in these judgments.

One or two observations may be ventured on this striking conflict of high authorities. A careful consideration of the case, with the opposing opinions, leads ultimately, it is thought, to the comforting conclusion that the final tribunal has judged rightly. The element of contract seems to have been overlooked in the lower Court (perhaps even in the pleadings) or underestimated. The mutuality of the arrangement and provisions is not touched upon at all; the word contract does not occur in the opinions save in the name "marriage-contract;" and the fact that the deed purports to be a mutual contract is not explicitly mentioned. Then the objection to construing differently the one clause in question for the moveable and heritable estate does not appear to be adequately met. With regard to the rule of *Bell* v. *Cheape*—it may be remarked that the adverse argument there stated by Lord Fullarton seems to have force even for the case of legacies; and, in the circumstances of the present case, the transference of Mrs. Buchanan's money to her husband's next-of-kin, and not to those representatives and objects which he himself chiefly favoured, would seem a result not likely to have *been actually intended*.

A. M.

Contract—Essential Error.—The judgment of the House of Lords in *Stewart* v. *Kennedy*, 10th March, 1890, partly reversing that of the Court of Session, 16 Rett. 857, contributes materially to the elucidation of a department of the law of contract in which there are still many dark corners. Sir A. Douglas Stewart, of Grandtully, offered, by holograph letter, to sell to Mr. Kennedy the entailed estates of Murtly, &c., at the price of twenty-five years' purchase of the rental; and this offer was accepted by Mr. Kennedy. The dispute arose out of an ambiguous sentence at the end of Sir Douglas's letter, viz.:—"In the event of your acceptance, the sale is made subject to the ratification of the Court." Sir Douglas averred that by using these words he understood he was protecting himself by a suspensive condition, and that the transaction would only be ratified by the Court after investigation and approval of the price as adequate, in the interest of future heirs of entail. But this construction of the offer was negatived in an action decided some months ago by the Court of Session and the House of Lords, and an absolute sale was held to have been concluded. Sir Douglas Stewart then

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raised an action of reduction of the sale, and proposed various issues for the trial of the cause—among others the following:—"Whether in granting the said letter the pursuer was under essential error as to its import and effect?" The majority of the Judges of the First Division, agreeing with the Lord Ordinary (Kinnear), refused this issue on the ground that the error alleged was not error *in substantialibus* of the contract. Lord Shand, however, was for granting the issue, holding (1) that the error was essential, and (2) that it was of itself a sufficient ground of reduction.

As to the essentiality of the error, the House of Lords agreed with Lord Shand. The Lord President had held that in regard to none of the three essentials of a contract of sale (the parties, the object, and the price) was there any room for doubt; that the error alleged related merely to the application of the price, which could not be an essential of the contract, as it did not concern the purchaser; and that there was no error in regard to the nature of the contract, both parties knowing that they were making a contract of sale, and nothing else. In reference to these views Lord Herschell observed:—"It appears to me that the error, if it existed, was one which affected the substance of the contract. To agree to sell in any event at a price fixed appears to me to be one thing; to agree to sell at that price only in case the Court, upon a consideration of all the circumstances, should come to the conclusion that the estate ought to be sold at that price appears to me to be quite another thing. I think it is a fallacy to say that the difference affected only the application of the purchase money, whether it was to be settled in the same way as the entailed estate, or divided between the liferenter and the next heir. It went really deeper than this. It affected both parties to the contract, for it concerned them both, whether the sale was to be an absolute one, or to take effect only if the Court were so well satisfied that the price and other conditions were proper, as to order a sale on these terms. And I cannot say that the alleged error was one which did not touch the price, inasmuch as it involved the question whether there was to be a sale at that price absolutely, or only if the Court approved of it."

But there remains a question of far more general importance, whether assuming error in substantials, that is *per se* a ground of reduction? Is a party to a contract, who shows that he misunderstood its import in a material particular, entitled on that ground alone to rescind the contract? If so, as Lord Watson observed, "no contract in writing could be obligatory if the parties honestly attached, in their own minds, different meanings to any material stipulation. As soon as one of them obtained the final judgment of a competent Court in favour of his construction the other would be at liberty to annul the contract." That such is not the general understanding of the law is shown by the fact that no case was cited in which it had been attempted to void a contract on the ground of error alone. In *M'Lauria*, 3 R. 265, where an issue of essential error was allowed, the

obligation sought to be set aside was purely gratuitous. And all the other cases cited, when carefully examined, prove to be cases, not of error merely, but of error induced by misrepresentation of the other party to the contract. The general rule is thus stated by Lord Watson:—"Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that, in the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right to rescind, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract." Professor Bell's statement, therefore, that "error in substantials, whether in fact or in law, invalidates consent where reliance is placed on the thing mistaken" ("Principles," sec. 11), must in this view be taken to be subject to modification in the case of bilateral contracts. Thus taking the contract of sale, although, owing to mistake, there may have been no real agreement in the mind of a seller, yet the language used by him may have the same legal effect as if there had been real agreement, for the criterion is not what was in the mind of the seller, but what is the reasonable construction of his language as read by the purchaser. (See Pollock "On Contract," pp. 234-5 and 430-1.) In the present case, "by delivering his missive offer the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations, construed according to their legal meaning, whatever that might be. He contracted, as every person does who becomes a party to a written contract, to be bound in case of dispute by the interpretation which a Court of law may put upon the language of the instrument" (*per* Lord Watson).

The House of Lords accordingly disallowed the issue of essential error alone, and the case now stands for trial on two issues—(1) One of facility and circumvention, and (2) one of essential error induced by representations made by an agent of the purchaser.(*a*)

G. W.

Prescriptive Possession.—The law on this subject has been advanced by the opinions delivered in the House of Lords in *Warrand's Trustees* v. *Mackintosh*, 19th February, 1890, 27 Sc. L. R. 393, reversing the decision of the Court of Session, 15 Rett. 833. In that case the question arose whether during the period 1853 to 1887 Mr Mackintosh of Holme, who had a grant of

[(*a*) It is not clear from this decision whether it was intended to lay down a rule applicable to formal contracts by writing as distinct from ordinary parole contracts. If so, the principle would be that, in parole contracts, the parties bind themselves to abide by the construction of the contract, no matter what the intention of either of them may have been. With deference it is thought that the dicta of the Law Courts are sometimes loose. If a party to a contract prove that he was under error as to the main essentials of a contract (*i.e.*, the object or price), how can there be any consensus *in idem placitum*?—Ed. *Juridical Review*.]

one half the salmon fishings in the Ness belonging to that estate, and who had admittedly possessed these fishings *ex adverso* of the upper half of his estate, had sufficiently proved possession of these fishings *ex adverso* of the lower half of his estate for the purpose of construing his title and showing that it applied to these lower fishings. The decision of the case mainly turned upon the question of title, the majority of the Second Division regarding Mr. Mackintosh's title as a grant of one half *pro indiviso* of the salmon fishings *ex adverso* of the whole lands of Holme, while the House of Lords, agreeing with Lord Rutherfurd Clark and the Lord Ordinary (M'Laren) in the Court below, held that Mr. Mackintosh's own possession clearly identified the subject of the grant as consisting only of the salmon fishings *ex adverso* of the upper half of the lands. The title of Warrand's Trustees, upon the other hand, was an express title to all the salmon fishings in this part of the river Ness. But on the minor question as to the sufficiency of possession by Mr. Mackintosh of the lower fishings, an important difference of opinion developed itself. Lord Rutherfurd Clark held that this possession was insufficient, adding, "Further, it was by rod only, and I hold it to be settled in this Court that where salmon fishing can be fished by net and coble, mere angling cannot establish a prescriptive right, *Richmond*, 8 M'P. 530. The principle on which this rule depends is not difficult to discover. It is nothing more than this, that when a right is claimed by prescriptive possession, complete possession must be asserted and proved, and that acts which fall short of complete possession will be ascribed to tolerance, and will not be regarded as the assertion of a right on the one hand nor as the recognition of a right on the other." There is no doubt that net and coble fishing has always been practicable at this part of the Ness. But it was pointed out by Lord Watson in the House of Lords that in the *Duke of Richmond's* case—(1) Lord Seafield was endeavouring to make out a prescriptive right to salmon fishing under a title *cum piscationibus;* (2) it was admitted that the Duke of Richmond had a title to salmon fishing, and had constantly exercised the right of salmon fishing by net and coble. For the purpose of construing an express title to salmon fishing by possession, and showing to what subjects it applies, Lord Watson thinks that "proof of user by rod and line, if regular and effective, and not disturbed by others fishing with net and coble, will be sufficient." It would, therefore, appear that Lord Rutherfurd Clark was wrong in applying the principles of the *Duke of Richmond's* case to the question raised by the present case. No doubt there was evidence that the appellants had occasionally used net and coble after flood time, but the respondent had an express title, and claimed only a concurrent right. In these questions of salmon fishing, possession explanatory of an express title stands in a different position from prescriptive possession under a general title. This seems also to have been the opinion of Lord Young and Lord Kingsburgh in the Court of Session (15 Rett. pp. 847-854). The force of this distinction, however, is lessened by the fact that, according to the opinion of these

judges, an averment of possession by rod-fishing may be accepted as relevant for the purpose of making a right to salmon fishing under a general title, even where fishing by net and coble is not impracticable. They are certainly not alone in that opinion. It was hinted at, in a guarded way, by Lord Westbury and Lord Colonsay in *Stuart* v. *M'Barnet*, L.R. 1 Sc. and Div. 390-91. In the *Duke of Richmond's* case, Lord Justice-Clerk Moncrieff, after pointing out that rod-fishing, as a luxury, might become more profitable than net and coble fishing, observed: "And if a proprietor with a title bearing *cum piscationibus* had for forty years not only let the rod-fishing in a stream for a considerable rent, but had debarred all others from the exercise of any right of salmon fishing, the question would present itself in a very different aspect." The same distinguished judge repeated in *Lord Advocate* v. *Lord Lovat*, 7 Rett., H. of L. 135: "I should be inclined to say that if letting the rod-fishing was more profitable than using net or coble, that possession is strongest which produces the greatest amount of profit." It was no doubt these weighty *dicta* that encouraged Lord Young to state his opinion with so much freedom in the case now under notice. He disclaimed, indeed, all intention of going back on decided cases, which belonged to a time when net and coble was regarded as the only serious mode of salmon fishing. But he added: "I am not at all prepared to say that I should not hold a general grant of fishing to be explained by possession into a grant of salmon fishing by such commercial and profitable use as could be had of it, for instance by letting it out for rod-fishing at those great rents to which I have referred." This is entirely *obiter*, and therefore it is unusual, but at the same time satisfactory, to find it strongly adopted by Lord Watson in the House of Lords. He says: "If a proprietor, holding a grant *cum piscationibus*, by preventing intrusion on his water was enabled to let it at a rent of £100 a year for angling merely, instead of letting it to net and coble fishers for £50, I should certainly be of opinion that he was in a full and effectual possession of the right of salmon fishing, as if he or his tenant had fished with net and coble. Moreover, I see no reason for holding that the doctrine ought to be confined to the case where a proprietor lets his fishings. But I do not think that occasional angling will be sufficient, or that the use of the rod will be of any avail, when it is practised in competition with net and coble fishing. The latter is by far the most destructive method, and besides the mere slaughter of the fish, it seriously interferes with an angler's sport." This, of course, cannot be called decided law, but it will enable the Court of Session so to decide when the question next arises. It is an instructive exposition in the concrete of the principles on which legal effect is given to long continued possession, and it shows the expansive vigour of the common law, adapting itself to new conditions of society. Apparently the law is left in this position. For the purpose of explaining the extent of a salmon title, possession by rod-fishing will always be accepted, if it has the character of

prescription—*i.e.*, if it is continuous and exclusive. For the purpose of acquiring a right to salmon fishing under a general title, possession by rod-fishing will be accepted only where that exercise of the right is more valuable than net and coble fishing, and where therefore it amounts to complete possession.

W. C. S.

COLONIAL APPEALS.

Winmill v. *Gallie*.—In this case, which was decided in October, last year, in the Supreme Court of New Zealand (*Otago Times*, 11th October, 1889), the question at issue was the testamentary capacity of John Gallie, a blacksmith in Otago. The disputed will was made on 20th August, 1872, and the testator died on 5th September, 1878. The will itself was an exceedingly simple one, leaving all the testator's property to his wife, subject to the duty of maintaining and educating his children during their minority. It was proved that the testator, originally a shrewd, strong-willed man, keeping a very firm hand over his affairs, had in 1861 or 1862 undergone an illness, which left him in a state of partial dementia, had thereafter been confined in an asylum, from which he was only released on his wife's recognisances, and had up to the date of his death transacted no business except of a formal character. The general evidence of testamentary incapacity was clear, and the presiding judge, Mr. Justice Williams, properly pronounced against the will. The case derives its chief interest from his lordship's judgment, in which the whole law of the subject is exhaustively and most ably reviewed. It affords an opportunity of directing attention to a subject which has not hitherto been noticed as it deserves —viz., "*The external standard" in the substantive law of insanity.* "The standards of the law," says the younger Holmes ("Lectures on the Common Law," p. 108), in a passage which every student of comparative jurisprudence should learn by heart, "are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's powers and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is that, when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents, and hurting himself or his neighbours, no doubt his congenital defects will be allowed for in the Courts of Heaven, but his slips are no less troublesome to his neighbours than if they sprang from guilty neglect. His neighbours accordingly

require him, at his proper peril, to come up to their standard, and the Courts which they establish decline to take his personal equation into account." . . . "But if insanity" (adds the same writer) "of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse."

Good sense, however, notwithstanding, the legal capacity and responsibility of the insane were for generations determined by rigid, arbitrary, and contradictory "external standards." It may be interesting and instructive to place upon record a few of the anomalies which our ancestors gravely declared to be law. Bear in mind that in each of the following cases one, and only one question was raised—viz., *Is the capacity adequate to the act?* and then consider how that capacity was at one and the same time tested in different departments of the substantive law of insanity. 1. Where the contract of a lunatic was in issue, the common law, for the somewhat circular reason, that "no man of full age can be permitted to disable or stultify himself," denied to an insane person the privilege, which it gave to his successors in interest or blood, of avoiding his act on the ground of mental incapacity. 2. Where the marriage of a lunatic was the subject of judicial investigation, a very different external standard was applied. "Without soundness of mind," said Sir John Nicholl in *Portsmouth* v. *Portsmouth* (1 Hagg. E.R., at p. 359), "there can be no consent—none binding in law. Insanity vitiates all acts." To the same effect Lord Penzance expressed himself in *Hancock* v. *Peaty*, 1867 (1 P. & D. 335): "The question here is one of health or disease of mind, and if the proof shows that the mind was diseased, the Court has no means of gauging the extent of the derangement consequent upon that disease, or affixing the limits within which the disease might operate to obscure or divert the mental power." 3. In deciding upon the testamentary capacity of the insane, the Courts applied, though with wavering fidelity, the same external standard; and, as late as 1867 it was held, in *Smith* v. *Tebbitts* (L.R. 1 P. & D. 398-437), that any, the least degree of insanity, would vitiate a will made under its influence. 4. The external standard for determining the criminal responsibility of the insane has been twice changed by English lawyers. The earliest theory was, that only a lunatic whose mental capacity was as low as that of a wild beast, should be exempted from punishment. In the beginning of the present century, "the wild beast theory" yielded to "the general *right* and *wrong* theory," which gave place in 1843 to the "rules in Macnaghten's case." The medical jurisprudence of insanity, so far as the criminal law is concerned, owes its origin to demonology, and its imperfect development to the vagaries of M. Pinel and his disciples. I do not propose, however, to elaborate this point at present, or to set forth the limitations, which a fuller statement of the law as to the contractual and testamentary capacity of the insane would necessitate. What deserves notice is that, in each of the departments of law above referred to, there is a steady movement

towards the establishment of a new rational and uniform external standard. It may be defined very briefly: "In view of all the circumstances of this case, was the person, whose conduct is in question, capable of the act imputed to him?" [*Cf. Jenkins* v. *Morris*, 1880 (14 Chan. Div. 674); *Durham* v. *Durham* (10 P.D. 82); *Banks* v. *Goodfellow* (L.R., 5 Q.B. 549).] This work has been done by judges who were not too strongly influenced by the subtleties of legal history. "Ignorance of the past is sometimes the best law reformer."

A. Wood Renton.

Phillips v. *Martin*.—The Judicial Committee of the Privy Council will not in general disturb the verdict of a jury upon a question of fact, unless the preponderance of evidence in favour of the appellant is so great that no jury, acting as reasonable men, could properly return it. The case of *Phillips* v. *Martin*—an appeal from the Supreme Court of New South Wales—offers an instructive lesson upon the application of this principle. The sole question at issue was whether two deeds—a disentail, dated 22nd January, 1875, and a conveyance, dated 1st June, 1875—had been, as they purported to be, signed by the respondent, Caroline Martin. The original action was tried in the colony before Chief Justice Darley and a jury. In support of the plaintiff's case, the attesting witnesses and two experts in handwriting were called. The defendant, an old woman nearly ninety years of age, was the only material witness on the other side; but her denial of the alleged signatures was positive and unshaken. Of the two attesting witnesses, one was an old man who gave his evidence in an unsatisfactory style, the other was a stranger to the defendant at the time when the deeds were executed, and had not seen her again in the period of thirteen years which elapsed between that date and the litigation. The jury found a verdict for the defendant. A new trial was refused by a majority of the Supreme Court of New South Wales whose judgment has now, in accordance with the rule above explained, been unanimously affirmed by the Privy Council. The original decision in *Phillips* v. *Martin* was by no means clearly right. The case presents undoubted elements of difficulty; but the jury who saw and heard the witnesses were better qualified to form an opinion than the appellate tribunal which had before it merely a record of the evidence.

Perhaps the most curious circumstance in connection with the case is the entire absence of interest in, or comment upon, the expert evidence—I am, of course, judging the proceedings solely by the official record. Two scientific witnesses are called, they have made disputed handwritings the object of special and professional study, have compared the admitted signatures of Caroline Martin with those which she denies, and are ready, presumably, to testify not to mere accidental or fanciful analogies, but to those permanent habits of writing, which it is the boast of the modern

expert that he can detect. These witnesses are barely examined, are subjected to no cross-examination worthy of the name, and apparently exercise no influence upon the issue of the case. Now it is true that *Phillips* v. *Martin* differs from most of the *causes célèbres* in which scientific evidence of handwriting is of importance. There the writer is usually dead—here she is alive and can speak for herself. This point, however, loses much of its force when we recollect her obvious interest in denying the authenticity of signatures which meant loss of money and property. The cross-examining counsel elicited from one, at least, of the experts, the fact that he was a *lithographer*. Had a stranger, a little read, and it must be admitted an imperfectly written chapter in the legal history of England been before the cross-examiner's mind, it is probable that he would have left this subject untouched. At one time, the expert in handwriting, like his unfortunate brother the medical witness, was regarded with the utmost jealousy by the Courts of law. He is now treated both by the bench and by the bar with marked respect. The causes which have brought about this change in judicial and forensic opinion centre in the life of a *lithographer*. Charles Chabot (1816-1882) raised the expert's craft from an art (to be practised deftly and not without profit) to the dignity of a science, by showing the world that a scientific witness could give evidence without improper bias, and by directing attention, not to incidental and often imaginary peculiarities in the writings submitted to him, but to the character of the writer portrayed there, which cannot permanently be disguised. *Naturam expelles furcâ, tamen usque recurret* was the motto of the new learning. The evidence of this remarkable man broke down the famous codicils in the Great Matlock Will case, and softened the asperity of the late Chief Justice Cockburn towards expert witnesses. Chabot, also, made an elaborate, and, by the reluctant admission of the *Quarterly Review*, a successful attempt to fix on Sir Philip Francis the responsibility for the letters of Junius. Before his death, he had the satisfaction of witnessing the growing reputation of the science which he had created.

A. W. R.

Hunter v. *The Government of British Honduras.* (*a*)—This case is not one of exceptional legal interest; but it offers an instructive object-lesson upon the way in which justice is sometimes done, or not done, in our minor Colonial possessions, and as such deserves to find a place with the romance of *A. M. Dillet* (12 App. Cas. 459).

Stated briefly, the material facts were as follows:—Some years ago the Government of British Honduras engaged C. T. Hunter, a local contractor, to repair the town and harbour of Belize—1. Part of the

(*a*) The writer is indebted to Adam Walter, Esq., counsel for the plaintiff, for a note of the proceedings in this case.

contract was the construction of canals. Hunter was of opinion that the plans submitted to him by the Colonial engineer, to whose specifications in this matter he was bound under his contract to conform, were altogether inadequate, and intimated his doubts to the Government. He was, however, after certain negotiations, ordered to proceed, and he did proceed with the work according to the views of the Colonial engineer. Part of the structure collapsed. 2. Another part of Hunter's contract was to dredge the foreshore of Belize, according to the directions of the Colonial engineer. The plant was prepared, but no directions were forthcoming. On the collapse of the canal wall, the Government seized Hunter's plant and refused him an extension of time for the completion of the contract, which had been delayed by the negligence of their consulting engineer. The effect of these high-handed measures was to involve the contractor in serious pecuniary difficulties, and for the time to destroy his credit.

The primary question between the parties—viz., the liability for the collapse of the canal wall, was determined in Hunter's favour by an arbitration held in Belize in the summer of 1888, and the Colonial engineer was subsequently requested to resign his office. The question of damages was recently the subject of a second arbitration held in Downing Street. Sir Benjamin Pine, K.C.M.G., ex-Governor of the Leeward Islands, and another gentleman acted as arbitrators; and they find Hunter entitled to £3500 damages with the costs of both arbitrations.

A. W. R.



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The Right Hon. The Earl of Selborne

EX LORD HIGH CHANCELLOR OF GREAT BRITAIN

XUM

THE FEDERAL CONSTITUTION OF CANADA (*a*)

II.

WHEN the authors of the Federal system of Canada adopted the resolutions of Quebec and the British North America Act, they had before them the unhappy experience of the United States in the difficulties arising out of the persistent assertion of State rights. They accordingly proceeded to enumerate with great care the powers of the Dominion Parliament and the Provincial Legislatures respectively. This is directly opposed to the principle of the United States constitution, in which the powers of the Federal Government only are enumerated, and powers not delegated to the central authority are reserved to the States. In the Canadian constitution the residuum of power is given to the Government of the Dominion. It is expressly set forth in the introductory words of section 91 of the British North America Act, that the Parliament of Canada is "to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned . . . exclusively to the legislatures of the provinces." In order to place the matter beyond doubt, the same section not only states that the enumeration of Dominion powers is not to restrict the generality of the words just quoted, but it concludes with the declaration that "any matter coming within the classes of subjects enumerated in this section shall not be deemed

(*a*) The first part of this article will be found, *supra*, p. 131.

to come within the classes of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively by this act to the legislatures of the provinces.

Although only twenty-three years have passed since the establishment of the Federal union, the time of the Courts of Canada and of the judicial committee of the Privy Council has been much occupied by the consideration of cases which have arisen upon the interpretation of section 91, and of section 92, which contain the enumeration of dominion and provincial powers. A careful examination of these two sections will show the student that, despite the obvious intention to give predominance to the Dominion Parliament in cases not expressly provided for, there are in the very terms of the enumeration itself the elements of grave doubt and controversy. Questions of difficulty have constantly arisen in connection with "property and civil rights in the province," over which exclusive authority has been given by section 92, sub-section 13, to the provincial legislatures. It necessarily happens that in legislating on subjects within its exclusive jurisdiction the Dominion Parliament may trench upon the provincial rights in this particular. Again, with regard to certain classes of subjects generally described in section 91, as belonging to the Dominion, legislative power may nevertheless reside as to some matters, falling within the general description, in the provincial legislature. Or, subjects which in one aspect, and for one purpose fall within section 92, may in another aspect and for another purpose fall within section 91. Or, the powers of the Dominion and provincial authorities are in certain cases expressed in such broad and general terms as to cover and include the same subject. For instance, insurance has been judicially determined to fall within the express power of the Dominion Parliament to regulate trade and commerce, and also within the more specific power of the provincial legislatures over "the incorporation of companies with provincial objects." Consequently the Dominion Parliament has passed a great number

of Acts, incorporating insurance companies to do business throughout the Dominion. The provincial legislatures also incorporate similar companies to transact business within the limits of a province. At the same time it is authoritatively laid down that the Dominion Parliament has no power to regulate by legislation the contracts of a particular business or trade in a province, but the form of the contract, and the rights of the parties thereunder, must depend upon the laws of the country or province in which the business is done —the power being given to the local legislatures to legislate upon "property and civil rights in the province." (*a*)

In the case of the inland fisheries, difficulties have also arisen. Here the conflict lies between the powers of the Provinces over "property and civil rights," and those given to the Dominion over "sea-coast and inland fisheries." It has been decided by the Supreme Court of Canada that the Dominion Parliament may exercise a general power for the protection and regulation of the fisheries, and may authorise the granting of licenses, where the property, and therefore the right of fishing thereupon, belongs to the Dominion, or where such rights do not already exist by law; but it may not interfere with existing exclusive rights of fishing, whether provincial or private. Therefore, any lease granted by the Dominion Government to fish in fresh water non-tidal waters, which are not the property of the Dominion, or of which the soil is not the property of the Dominion, is illegal. In the same way, where the exclusive right to fish has been acquired as incident to a grant of land, through which a non-tidal river flows, the Canadian Parliament has no power to grant a right to fish therein. So also, the ungranted lands in a province being in the Crown for the benefit of the people, the exclusive right to fish follows as an incident, and is in the Crown as trustee for the benefit of the people of the province, and therefore a license of the Minister of Marine and Fisheries

(*a*) *The Citizens and the Queen's Insurance Companies* v. *Parsons*, 45 L.T., N.S. 721; Can. Sup. Courts R., vol. iv. p. 277; 4 Ontario App. 109; Bourinot's "Manual," pp. 123-128.

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would be illegal.(*a*) Here we see the effort of the Courts to interpret the constitution so as to reconcile the respective powers of the Dominion and the Provinces where they appear to clash, and to make the exercise of the rights of the former consistent as far as possible with those of the other.

With the view of reconciling the difficulties that are constantly arising with respect to property and civil rights, the following principles have been laid down by the Canadian Courts:

That as there are many matters involving property and civil rights expressly reserved to the Dominion Parliament, the power of the local legislatures must to a certain extent be subject to the general and special legislative powers of the Dominion. But while the legislative rights of the local legislatures are, in this sense, subordinate to the rights of the Dominion Parliament, these latter rights must be exercised as far as may be, consistently with the rights of the local legislatures, and therefore the Dominion Parliament has only the right to interfere with property and civil rights, in so far as such interference may be necessary for the purpose of legislating generally and effectively in relation to matters confided to the Parliament of Canada.(*b*)

But it is reasonable to assume that the right of the Federal Parliament to legislate in this manner is limited to such legislation as is absolutely necessary to give full effect to its lawful powers. It cannot be argued from the most strained interpretation of the constitution, that the Federal legislature should, in the exercise, for instance, of its general power to provide for the peace, order, and good government of Canada, obliterate the jurisdiction of the local legislatures over matters of a purely provincial or municipal character, or assume full control over civil rights and property.(*c*)

On the other hand, the local legislatures, whose powers

(*a*) *The Queen* v. *Robertson*, Canada Supreme Court R., vol. vi. pp. 52-113.
(*b*) Can. Sup. Court R., vol. iii. p. 15; vol. iv. pp. 110 and 111, 242.
(*c*) Can. Sup. Court R., vol. iv. 272.

are limited compared with those of the General Parliament, must be careful to confine the exercise of these to the particular subjects expressly placed under their jurisdiction, and not to encroach upon subjects which, being of national importance, are for that very reason placed under the exclusive control of Parliament.(*a*)

Where a power is specially granted to one legislature, that power will not be nullified by the fact that indirectly it affects a special power granted to the other legislature. In other words, it is only in the case of absolute incompatibility that the special power granted to the local legislature gives way.(*b*)

The wide construction placed on the general power given to the Dominion Parliament "to make laws for the peace, order, and good government of Canada," can be seen from a decision of the Judicial Committee of the Privy Council with respect to the Canada Temperance Act, which is a law of "local option," giving the ratepayers in any locality the power to prohibit the sale of intoxicating liquors, and to regulate the traffic in liquor generally. Their Lordships laid it down emphatically (an issue having been taken as to the power of the Dominion Parliament to pass the measure), that "laws designed for the promotion of public order, safety, or morals, and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights." They are of a nature which "fall within the general authority of Parliament to make laws for the order and good government of Canada, and have a direct relation to criminal law, which is one of the enumerated classes of subjects assigned exclusively to the Parliament of Canada." Few, if any, laws "could be made by the Parliament for the peace, order, and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have

(*a*) Can. Sup. Court R., vol. iv. 348.

(*b*) Meredith, C. J., 5 *Legal News*, Montreal, 333.

been intended, when assuring to the Provinces exclusive legislative authority on the subject of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it." On these grounds the Judicial Committee decided in favour of the constitutional character and validity of the Scott Act.(*a*)

In the first ten years of the Confederation there was a tendency in the Courts, as well as in Parliament, to minimise the jurisdiction of the provincial legislatures, and to claim that they were only practically municipal corporations of large powers. It was even claimed that the Crown is not represented in the provincial governments. In one memorable case it was practically decided by a mere majority of the Supreme Court of Canada that the Dominion Government alone has the right to appoint Queen's Counsel as a prerogative right of the Queen, who is represented directly by the Governor-General. (*b*) With the progress of Confederation, however, there has been a steady assertion of provincial rights; a determination, in fact, on the part of the provincial governments to stretch to an extreme degree both the express and the implied powers of the provinces, and the general result of recent decisions has been to strengthen the claims of the advocates of "provincial rights." It is now generally admitted, or more strictly speaking, the weight of authority goes to show, that the Crown is represented in the person of the Lieutenant-Governor as the head of the provincial executive, so far as concerns the performance of

(*a*) 7 App. Cas. 829.

(*b*) *Lenoir* v. *Ritchie*, Can. Supreme Court Rep., vol. iii. pp. 575-640 The opinions expressed in this case by three judges with respect to Queen's Counsel have never been considered satisfactory by eminent lawyers in Canada and England, who have looked into these legal questions. The provincial governments continue to appoint such counsel concurrently with the Dominion Government, by virtue of provincial statutes; and the consequence so far has been a multitude of counsel, and a lessening of the estimation in which the honour should be held. General opinion favours a test case before the Judicial Committee of the Privy Council.

all executive or legislative acts that have to be performed by such functionaries in the Queen's name—the assembling and dissolution of the legislature, and other executive acts.(*a*) But the decision which has given greatest force to the assertion of provincial rights is one pronounced by the Judicial Committee of the Privy Council on a License Act of Ontario, which was decided to be within the powers of the provincial legislatures. The ground of the decision was that the powers conferred by the act in question are in the nature of police or municipal regulations of a merely local character for the good government of taverns, &c., and such as are calculated to preserve in a municipality peace and public decency, and repress drunkenness and riotous conduct. The Judicial Committee laid it down emphatically, that the provincial legislatures are "in no sense delegates of, or acting under any mandate from the Imperial Parliament." They go on then to say, that when the British North America Act provided that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the provinces and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from, or as agents of, the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area, "the local legislature is supreme, and has the same authority as the Imperial Parliament or the Parliament of Canada." (*b*)

Three large octavo volumes(*c*) are now required to contain the various decisions given on the cases in which constitu-

(*a*) Todd's "Parliamentary Government in the Colonies," pp. 392, 393; Can. Sup. Court R., vol. v. pp. 637-643. See also *Theberge* v. *Landry*, 2 App. Cas. 102, which appears to sustain the provincial contention that the Crown is a constituent part of the provincial legislature.—*Canada Law Journal*, Jan., 1880

(*b*) *Hodge* v. *Reginam*, 9 App. Cas. 117.

(*c*) See Cartwright's "Cases on B.N.A. Act," 3 vols., Toronto. Another volume is promised this year.

tional difficulties have arisen. All the Courts of the provinces have the right to interpret the constitution, and declare an act of any legislative authority in the Dominion *intra* or *ultra vires* as the case may be. They do this in the ordinary process of law, and not under any special power given them by the constitution. The Supreme Court of Canada, however, was established for the purpose of acting as far as possible as a Court of Appeal for the provinces. It is not, however, the ultimate Court of Appeal for the Dominion, since it is the continual practice of the Judicial Committee of the Privy Council to entertain appeals from the Supreme Court, when it is considered any error of law has been made and substantial interests are involved. Indeed, the Court can be considered only a general Court of Appeal for the Dominion itself in a limited sense, since there is in every province the right to appeal from its Appellate Court directly to the Privy Council.(*a*) But the general sense of the people is tending more and more to make the Supreme Court, as far as practicable, the ultimate Court of Appeal in all cases involving constitutional issues. It is felt that men, versed in the constitutional law of Canada and of the United States, and acquainted with the history and the methods of government, as well as with the political conditions of the country at large, are more likely to meet satisfactorily the difficulties of the cases as they arise, than European judges who are trained to move in the narrower paths of ordinary statutes. A remarkable assertion of the judicial independence of Canada can be seen in the Act (*b*) passed by the Parliament of the Dominion

(*a*) Cassell's "Practice of the Supreme Court of Canada," p. 4. *Supra*, p. 137, the copyist gives the number of Supreme Court judges incorrectly; the Court consists of a chief justice and five puisne judges. By Dom. Stat. 50 & 51 Vict. c. 16, all original Exchequer Court jurisdiction is taken from the Supreme Court, and a judge of the Exchequer Court appointed. Appeals are allowed to the Supreme Court, within certain limitations.

(*b*) Can. Stat., 51 Vict. c. 43. The report of the Canadian Minister of Justice on this Act (which has been allowed), contains a strong assertion of the right of the Canadian Parliament to pass any Act affecting the Royal prerogative, since that body has under the B.N.A. Act, full jurisdiction over the Criminal Law, the

in 1888, which enacts that "notwithstanding any royal prerogative" no appeal shall be brought in any criminal case from any judgment or order of any Court of Canada, to any Court of Appeal or authority by which, in the United Kingdom, appeals to Her Majesty in Council may be heard.

Whilst there exists in the Crown of England a general power of disallowing any Act passed by the Parliament of the Dominion, the Imperial Government has given to the Governor-General in Council the right to review all the Acts passed by the several provincial legislatures, and to disallow, or, in other words, veto them for good and sufficient reasons.(*a*) That is to say, the Dominion Government now occupies towards the provincial legislatures the same relation which the Imperial Government formerly held towards the provinces before they became parts of the Federation. The exercise of this power has given rise to some controversies between the Dominion and the Provinces on account of the general government having considered it expedient in the public interests to disallow acts which were believed to be within the constitutional jurisdiction of the legislatures that passed them. The British North America Act does not limit the exercise of the power; the Dominion Government may disallow not only an Act which is unconstitutional in whole or in part, but also one that is quite within the competency of the legislature, but is at the same time regarded as injurious on grounds of public policy. Consequently a power, essentially sovereign in its nature, is to be used with great

constitution of a general Court of Appeal for Canada, and the peace, order, and good government of the Dominion. In another case, still under the review of the Imperial Government—the Canadian Copyright Act of 1889, which conflicts with imperial legislation on the same subject—the Canadian Government takes the ground that the Canadian Parliament can legislate on all subjects over which it has legislative jurisdiction by section 91, even if in doing so it repeals an imperial statute, applicable to the Dominion, passed previous to 1867, when the Imperial Parliament gave such large powers to Canada. This legislation is subject, of course, to the general power of disallowance possessed by the Crown. See Canadian Sess. Pap. for 1889 and 1890, Criminal Law and Copyright. Bourinot's "Federal Government," p. 39, *note*.

(*a*) B.N.A. Act, 1867, §§ 56, 90.

caution. The exercise of the veto may have its uses in restraining hasty and unconstitutional legislation, or in cases involving the peace, integrity, and security of the Confederation, on which there is consensus of opinion to support the Central Government. The principle, however, appears now generally laid down by the leading statesmen and lawyers of both political parties in Canada, that the wisest policy is not to interfere with any legislation which is clearly within the constitutional rights of the provinces, and does not affect the harmony and vital interests of the confederation as a whole. As a rule the safest practice is to leave the Courts to act as the arbiter in all cases of constitutional controversy. The exercise of such power by a political body has obviously its dangers in a Federation composed of several provinces, jealous of their constitutional rights, anxious to preserve their local autonomy, and looking with distrust on every attempt to interfere with their legislative authority.(*a*)

The experience of Canada since 1867 proves quite conclusively that there is in the Dominion, as necessarily in all countries united by the federal principle, a tendency to friction between the National and the Provincial Governments arising out of the distribution of powers. The doctrine of State sovereignty is at times pressed to undue limits in Canada, as was the case for the greater part of a century in the United States. Happily for the Canadian Federation, there is no great social institution like slavery to complicate the political situation and give a fictitious strength for a while to the advocates of State rights. The presence of a large community speaking the French language, and possessing institutions differing in essential respects from those of the majority of the people of Canada, is one of the strong reasons for the constant assertion of provincial rights, apart altogether from the fact that such an assertion must always more or less exist in any system of federal government. Mr. Dicey(*b*) has stated with much force that the sentiment

(*a*) Bourinot's "Federal Government in Canada," pp. 58-62.
(*b*) "The Law of the Constitution," 3rd ed., p. 133.

"which animates a federal state is the prevalence throughout the citizens of more or less allied countries of two feelings, which are to a certain extent inconsistent—the desire for national unity and the determination to maintain the independence of each man's separate state." This is as true of Canada at the present time as it was of the United States before the war of rebellion, the result of which has been to strengthen the Central Government, and to make the doctrine of State sovereignty practically a dead issue. Notwithstanding the great care taken by the draftsmen of the Canadian constitution to draw the lines of division rigidly between the respective authorities of the Dominion, cases of conflict are inevitable. The danger in such a system lies in the indiscretions of politicians, in the provinces especially; its safety lies in the legal foundation of the constitution, and in that respect for law which exists in communities governed by the principles of English jurisprudence, and working out their future on the basis of British government. The perpetuation of the Canadian constitution and the harmony of the members of the Confederation rest in a large measure on the Judiciary of Canada, just as the constitution of the United States owes much of its strength to the legal acumen and sagacity of a great constitutional lawyer like Chief Justice Marshall, and of the able men who have, as a rule, composed the Federal Judiciary. The instinct of self-preservation and the necessity of national union must in critical times prevail over purely sectional considerations, even under a federal system, as the experience of the United States has conclusively shown us; but, as a general principle, the success of confederation must rest on a spirit of compromise, and in the readiness of the people to accept the decisions of the Courts as final and conclusive on every constitutional issue of importance.

JNO. GEO. BOURINOT.

THE CRIMINAL RESPONSIBILITY OF THE INSANE.

IN all questions not admitting of verification by direct experiment, there is in men of different habits or schools of thought, or whose minds are led in one or other direction by education or professional bias, a tendency to run into extremes, to attach undue weight to arguments urged on one side and to depreciate or ignore those on the other.

In determining how far persons manifestly or presumably insane are to be held accountable for the performance of criminal acts, that is, of palpable violation of natural law, or of acts which every one of ordinary intelligence must know to be opposed to the fundamental principles of society, as murder, rape, theft, forgery, &c., in short, all gross offences against person or property, this tendency has unfortunately assumed the form of a chronic feud between the legal and medical professions.

In this neither is wholly without blame, the former ignoring the fact that insanity is as truly disease of the organs of the mind, as dyspepsia is disease of those of digestion, and that there being in each case a plurality of organs with different functions, the structural changes and the consequent abnormal performance of function may be limited to certain organs, while others may be in a more or less healthly state of nutritive and functional activity; the latter exaggerating the importance of the existence of such disease in one part, and assuming its influence over every other.

No one who has studied psychology in the light of physiology of which it is properly a branch, and insanity in

that of psychology to which it stands in the same relation as pathology does to physiology, can fail to recognise the existence of three forms or types of insanity corresponding to the tripartite division of the mental powers or functions into emotions, intellect, and will—a moral, an intellectual, and a volitional insanity, each of which may be partial or complete and which may be variously combined.

The error of the lawyers is to demand evidence of *intellectual* incapacity as proof of all insanity, and that of some physicians, to assume *moral* irresponsibility when they have satisfied themselves of the existence of insanity in any form. Some again, following the lead of the French alienists, are given to a needless multiplication of species of insanity, as kleptomania, dipsomania, pyromania, &c., expressions which however convenient have little or no scientific value.

The non-legal and non-medical public, on the other hand, are for the most part apt to ascribe to some insane impulse (1) any act inconsistent with or unworthy of a well regulated mind, as well as (2) crimes the commission of which is almost inconceivable by or incomprehensible to men possessed of the commonest sense of morality or decency. Of the latter class—unusual crimes—I shall speak later: of the former, suicide affords the most familiar example. Thus coroners' juries, as a rule, impelled by motives of charity, return verdicts of temporary insanity in order to spare the relatives the pain of the denial of Christian burial of the deceased. These verdicts are, however, in many cases but pious fictions. I do not indeed deny that a man whose feelings are acute but whose will and self control are feeble, may be, for instance, so overpowered by a sense of guilt, or even by mere grief or anxiety, or if conscious of his innocence, by shame at the position in which he finds himself, as to be actually deranged, but suicide does not in itself imply mental aberration. One whose religious instincts are abnormal, who doubts the existence of future punishments, may deliberately weigh the certainty of punishment, disgrace, or poverty in this life, against the uncertainty of the future life and the hope of annihilation, and by an act

of free self determination choose the latter. Such a man is no more insane than was the younger Cato.

But to return—the lawyers unacquainted with the pathological aspects of insanity, and consciously or unconsciously recognising only the intellectual form, have always sought for one simple test which should be of universal application, and that which at present, in theory at least, rules the Courts, is the knowledge of right and wrong, coupled or not according to circumstances with the freedom of choice.

It is satisfactory to notice among some lawyers a growing feeling of dissatisfaction with the maxim in question, but it is to be regretted that many lose no opportunity of expressing, in strong terms, their dissent from the opinions of those physicians who, as they put it, "would upset the time-honoured test of the knowledge of right and wrong without proposing one equally precise in its place"—one that could be, as they say, as easily applied as this. They maintain that if this be taken away, in deference to the crotchets of "mad doctors," the Courts will have absolutely nothing to stand on, and that a man will have but to feign himself mad in order to commit murder or any crime with impunity. To every one of these statements I must demur, but most emphatically do I impugn that which claims for the *knowledge of right and wrong* the authority of antiquity; and I shall show from history that it is but the last of a series of positions taken up by the lawyers in their retreat before the advance of physical science. Indeed, this test, which they would raise to the position of a settled principle, is but one of a shifting succession of maxims equally false, and destined, like them, to yield sooner or later to others founded on a more rational and scientific basis.

The doctrines of the lawyers on the subject of insanity have been but reflections of the state of medical knowledge at the time of their formulation, or, more correctly, of the period immediately preceding, to which they have clung tenaciously, lagging behind the progress of science, though again and again forced to abandon their positions.

In this, as in other departments of medicine, the Greeks

and Romans were really better informed than the nations of mediæval Europe, and until the latter part of the seventeenth century science had retrograded. Hippocrates unquestionably held insanity to be a disease of the brain, Galen and Aretæus did so too, and the reforms in the treatment of the insane inaugurated by Dr. Tuke, when in 1792 he opened the Retreat at York, had been anticipated by Cælius Aurelianus, just seventeen hundred years before. Yet little more than twenty years ago a Lord Chancellor declared that "the introduction of medical opinions and medical theories into this subject has proceeded upon the vicious principle of considering insanity as a disease" (Hansard, clxv. § 1297), though what it was, if not a disease, he did not explain.

Taking the law of England as an illustration, three periods may be recognised in the history of the legal doctrines of insanity, each taking its distinctive character from contemporary popular beliefs as these did from the medical teaching of the preceding ages.

The first, which we may call the demoniacal period, began for legal purposes, with Littleton, and ended with Lord Mansfield. Then the plea of insanity was not allowed under almost any circumstances. "By the laws of England," said Sir Matthew Hale, "no man shall avoid his own act by reason of these defects;" and Lord Mansfield, in 1767, reviewing the past, "It hath been said to be a maxim that no man can plead being a lunatic to avoid a deed executed, or excuse an act done at that time, because it is said that if he were a lunatic he could not remember any act he did during the period of his insanity." He was glad to find that "this doctrine hath of late been generally exploded."

The unhappy lunatic was, during the second period, placed in a somewhat better position; the "doctrines of devils," so elaborately expounded by Burton in his "Anatomy of Melancholy," had given way before a more material pathology, and what we may call the "wild beast period" opens, though even this concession to humanity met with strenuous opposition from the pundits of the common law. The poor madman was

no longer supposed to be possessed by demons, and he was mercifully allowed to plead insanity, provided it could be shown on his behalf that he was *utterly bereft of reason*, and *no more accountable for his acts than a brute*. "Though he could not remember," said Lord Mansfield (*Chamberlain of London* v. *Evans*), "what passed during his insanity, yet he might justly say that if ever he did such an action it must have been during his confinement of lunacy, for he did not do it before or since;" and, in 1800, Lord Erskine said, in Hadfield's case, "The Attorney-General, standing undoubtedly upon the most revered authorities of the law, has laid it down that, to protect a man from criminal responsibility, there must be a *total deprivation of reason and understanding*" (*Rex* v. *Hadfield*, St. Tr. 1288).

With the nineteenth century dawned the third period, in which, in obedience to the dictates of humanity which had already inspired Pinel, Benjamin Franklin, and Tuke to ameliorate the condition of the insane, and led, in 1815, to the general inquiry into the conduct of asylums, the lawyers reluctantly admitted that lunatics as such, and without being entirely bereft of all that distinguishes a man from a brute, might yet be held irresponsible for their acts.

Knowledge of right and wrong, the new test of responsibility, though foreshadowed by Lords Kenyon and Erskine eighty years ago, derives its chief authority from the decision of all the judges, with one exception, in answer to five questions proposed to them by the House of Lords, on the acquittal, on the ground of insanity, of Daniel M'Naughten, for shooting Mr. Drummond in 1843. The rule laid down in their answer to the second and third of the questions was, "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such a defect of reason from disease of the mind that he did not know the nature and quality of the act he was doing, or if he did know it, as not to know that it was wrong," or, as it was more tersely put by Mr. Justice Byles, "Did he know what he was doing,

and if he did, did he know he was doing wrong?" On the fourth question, "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" the judges were unanimously of opinion that the party accused was equally liable with a person of sane mind.

An anonymous writer, who sometime ago discussed this question with some force in a well-known journal, declares that for the proper determination of the question "we are thrown back on the common-place tests which the ingenuity of lawyers has devised for determining the legal guilt or innocence of those persons whose sanity has been called in question. . . . Did he know that what he was doing was wrong? Or did he know that it was against the law? Supposing the question to have been answered in the affirmative, then following the legal analogy another test must be applied. Could he help doing it? For legal purposes this is usually put as follows:—Would he have acted as he did if he had known that, upon his acting in that manner, the greatest penalty permitted by the law for that offence would instantly and inevitably be inflicted upon him? This is an exceedingly useful and effective question."

But as Mr. W. Ribton, commenting on the case of Christina Edmunds, wrote: "*A man may be mad, and yet know what he is doing. A man may be mad, and yet know that in doing a particular act he is doing wrong.* Reason may be in her place, but destruction may be by her side, playing fast and loose with her promptings, controlling, disorganising, unsettling, and enfeebling the whole of his moral faculties, and leaving him tossed about by impulses—irregular, eccentric, delusional, and which he had no power to control. . . . The truth is that in cases of insanity the supremacy of the law has been pushed too far. *Law has been made to triumph over science, and the opinions of medical men, the only competent judges on such a subject, have been too autocratically disregarded.*"

When an eminent lawyer speaks out thus boldly in

condemnation of the conduct of his own profession, we may well hope that a new era is about to open. The anonymous writer above referred to goes on, indeed, to talk of "judges of the type of Lord Bramwell, who object to the acquittal of murderers not less *wicked* than others" (why did he not say *criminal*, for sin and wickedness are questions for the theologian, the lawyer as such having no more concern with these than the physician), "simply because they happen to be also afflicted with some more or less irrelevant disease of the brain." Irrelevant, forsooth! Could learned ignorance go further? Insanity is a disease of the brain, and the existence of such disease being proved or admitted, what has further to be shown is that, such disease does or does not in any particular case affect the self-control, and consequently the accountability, of the individual.

In pleasing contrast to these views is the language of one of the most distinguished jurists on the other side of the Atlantic, who has expressed himself in no uncertain tones. "The legal profession," says Mr. Justice Doe, "*in profound ignorance of mental disease*, have assailed the superintendents of asylums, *who knew all that was known on the subject*, and to whom the world owes an incalculable debt, as visionary enthusiasts and sentimental philosophers, attempting to overthrow settled principles of law; whereas, in fact, *the legal profession were invading the province of medicine*, and attempting to install *old and exploded medical theories* in the place of facts established by the progress of scientific knowledge."

But true as this statement of the learned judge undoubtedly is, it does not adequately represent the absurdly confused state of the law at the present time; for if our precedents did absolutely exclude the teachings of modern science, they would, however contrary to right reason, have at least the merit of formal consistency. But the actual practice of the Courts is inconsistent with itself, requiring the jury to be instructed in the new medical theories by the experts, and in the old medical notions by

the judge; or, as the same learned authority pointedly puts it: "It is the practice for experts under the oath of a witness to inform the jury in substance that knowledge is not the test, and for the judge not under the oath of a witness to inform the jury that knowledge is the test, and the situation is still more impressive when the judge is forced by an impulse of humanity, as he often is, to substantially advise the jury to acquit the accused; or, as has sometimes happened, to find him guilty of a minor charge, on the testimony of the experts, in violation of the test asserted by himself (*a*). The predicament is one that cannot long be tolerated when it is once fully realised. If the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness, and showing himself qualified to testify as an expert." *Quod esset absurdum.*

Would it not be at once more reasonable and more dignified to abandon an equivocal and, were the issues less grave, we might say ludicrous position which the advances of modern physiological, pathological, and psychological science have rendered untenable, and frankly to admit that the state of a man's mental faculties is as purely a problem to be solved only by medical experts as is that of the circulation in or nutrition of his brain with which it is closely bound up, if not absolutely identical?

It is not difficult to show that the alleged dangers of such a concession to medical science are unreal, for when a man is adjudged upon the evidence to be insane, his irresponsibility does not entitle him to be set free. A lunatic at large would be more dangerous than a sane criminal, for while the latter probably might not, the former almost certainly would repeat the offence.

A judgment of insanity, however, should confine a man, if not for life, at least until such time as he may give satis-

[(*a*) *E.g.*, The case of *Dingwall*, 20th September, 1867, 5 Irvine's Justiciary Reports—Lord Deas' direction to the jury.—Ed. *Jurid. Rev.*]

factory evidence of a complete and probably permanent recovery; the period of incarceration in the asylum should in no case be less than that to which a sane man would have been committed to prison as a penalty for the same offence, which in the case of murder would be the term of his natural life. With such conditions we need entertain no fears of fictitious pleas of insanity.

It is far easier to prove the fictitious character of pretended insanity than it is to determine the existence of the genuine disease. Insanity feigned with a view to avoid the consequences of an act is always *post factum*, for the very good reason that a crime—*e.g.*, murder, is either premeditated, or it is not. If the result of a momentary impulse, it is obviously not foreseen, and therefore could not have been provided for—if premeditated, the criminal would be apt, by convincing the world of his insanity, to bring about his confinement, and thus put its perpetration out of his power. Again, it is not so easy to feign insanity as some seem to imagine. *Ars est celare artem*, and the real madman uses every means to conceal the fact of his insanity, of which he is dimly conscious, and which only shows itself in spite of his efforts to hide it. The impostor, on the other hand, overacts his part, and betrays himself by inconsistencies and exaggerations of conduct and language into which the madman, unless a downright maniac, would never have fallen. The impostor tries to make people believe that he is mad, the madman that he is sane. As a learned judge, quoted by Dr. Taylor, observed: "It may safely be held that a person feigning insanity will rarely if ever try to prove himself sane, for he runs the great risk of satisfying others that he is sane, the conclusion that he desires to avoid. There is no better proof in general that the insanity (supposing other evidence to be strong) is real, than the keen and eager attempts of the *accused* to prove that he is sane, and his strong and indignant remonstrances against being held to be insane, although that would protect him against trial and punishment."

It is, however, quite true that a lunatic may admit his

insanity when concealment is no longer possible or useful, and especially when he may benefit by so doing, as when one threatened to kill a warder, adding, "You know I am mad, and can't be hanged for it!" but the case is altogether different from that of a man still at large, and whose liberty is essential to the execution of his purpose.

But the question that engages the attention of judge and jury, is not so often the proof of a man's insanity as gathered from evidence, collateral and *aliunde*, matters with which the experts are more immediately concerned, as it is the state of his mind at the time, as inferred from the motiveless or irrational nature of the act for which he is being tried. When, for instance, a mother destroys the babe at her breast, or a sober man murders a wife or children to whom he was known to be warmly attached, they are, in the absence of any conceivable motive for the act, or what amounts to the same, of anything which under any circumstances could be assigned as a motive in the case of any sane person, however weak, wicked, or cruel, generally and properly assumed to be of unsound mind and temporarily unaccountable.

But we must not measure the motives of all men by the high, intellectual, and moral standards which regulate the conduct of those in whom passion and emotion are controlled by reason and religion, and whose wills are governed by a strong sense of duty; on the contrary, to the weakly wicked, to the sensualist, to him whose conscience is seared and who has long given the reins to his lusts and passions, no motives can be too mean, no provocation too slight, to prompt them to any crime.

It is a grave but by no means an infrequent error, to assume the insanity of the accused, from the disproportion between the motive and the heinousness of the deed. But as Dr. Casper, the renowned medical jurist of Germany urged: "The trifling character of the *causa facinoris* may in one case be as striking a proof of the monstrous criminality, the extraordinary atrocity of the culprit, as it may in another, and under other circumstances be of his irresponsibility." The

true "character of the *causa facinoris* may," he goes on to say, "be a conscious impulse to the gratification of a selfish desire—a selfish desire of any kind—whether its object be the acquisition of property, the indulgence of sensual lust, a thirst for revenge, the mere wish for notoriety, indeed, in not a few instances, an ungovernable impulse to wreak one's anger on some one or something; nay, more, there is in some persons, from Nero and Domitian of old, to the Count of Charleroi and many obscure wretches in our days, a positive enjoyment in wickedness, a pleasure in cruelty, which produces crimes, the unheard of barbarity of which . . . has only too frequently led to the erroneous assumption of an irresponsible mental condition in the perpetrator, whereas there was in them nothing else than the highest and most devilish development of the criminal nature."

The question of insane delusions or hallucinations is one beset by peculiar difficulties, since these are, to a great extent, what physicians call *subjective symptoms*, of which others gain cognisance only by the outward manifestations to which they give rise, and which may be feigned or assumed with a definite purpose. The opinion of the judges, on the occasion already referred to, that a person committing an offence in consequence of an insane delusion, was equally liable with one of sane mind, is a doctrine which would not, without great qualification, be subscribed to at the present time.

But apart from the fact that such hallucinations as internal voices irresistibly prompting the individual to the perpetration of some criminal act may be simply alleged *post factum* in extenuation of the offence, they are often the expression consciously or unconsciously of the impulse itself. They can be of diagnostic value only when it can be shown that the individual has already long laboured under such or other hallucinations (especially aural or optic), the existence of which he has not concealed, and may have deplored or resisted, or when the act of which he is accused has been carried out solely from delusionary motives, and is

repugnant to his previously known character. In short, every case must be decided on its own merits, the man and not the act being the object of investigation. An eminent German lawyer, after pointing out the necessity for admitting the deprivation of voluntary action by drunkenness, somnolence, somnambulism, or delirium, and referring to the countless forms of insanity from mere eccentricity to pronounced mania, says: "All these conditions, however, have only a judicial signification when they amount to true insanity or imbecility, and partial insanity is also insanity, as, too, are *fixed ideas when they govern the whole man*. Aberration and distraction of mind can, therefore, only come in question when they possess the character of insanity or imbecility, *and deprive the individual of the power of voluntary action*. Any supposed mental or emotional disease must, therefore, in questions put to the jury, be treated as insanity or imbecility, and in respect of morbid or abnormal bodily conditions (as somnambulism or delirium), "the question must also be asked how far freedom of action was thereby excluded."

As an illustration of the "fixed ideas governing the whole man," we would recall the case of the man Goulstone, a sober and industrious fellow, a kind husband and father, who almost in the presence of his wife, whom he immediately informed of what he had done, took the lives of all his children fearing, as he said, that he should not be able to preserve his rapidly increasing family from want! an idea which had for some time preyed on his mind. Here was a *motive*, as the public prosecutor urged by his counsel, and urged successfully, for the jury found him guilty; but it was the motive of a madman. A sane man, good and strong, would have struggled on, and a bad one might have absconded, leaving them chargeable to the parish. A weak one might have made away with his own life, in order to escape from the crushing weight of his cares, as many others have done, but this was the act of a man good enough when possessed of reason, but bereft of it at the time by trouble.

This man who after some weeks' despondency got up and killed his children, lest they should starve, was most certainly not accountable, and was properly removed, by the intervention of the Crown, to the asylum at Broadmoor.

Stupidity short of absolute idiocy, on the other hand, is not to be urged as an excuse for crimes against the plain laws of nature, such as murder, though it may be in extenuation of more artificial offences, as forgery, of the nature of which the individual may be ignorant.

Very little value can be ascribed to the retention, or otherwise, of a *remembrance of the circumstances* attending the deed, once forgetfulness may be simulated, and the palpably mad may retain in their memory the minutest circumstances of an event. Nor is *design* any proof of sanity, for perfectly insane persons often act with the greatest subtlety and artfulness, and may be engaged for weeks or months in contriving and making preparations for some act, (*e.g.*, escape from an asylum), but *post factum* efforts at concealment show that then, at any rate, the person knows that he has done wrong, though they prove nothing as to his responsibility at the time of committing the offence, any more than reckless indifference to the consequences.

The most difficult problems, whether from a psychological, medical, or legal point of view, are presented by cases of epileptic insanity. In these, which have been exhaustively discussed by Dr. Krafft-Ebbing, the intermittent character of the insanity is most marked. Long intervals of perfect sanity, alternate with periods of mania, melancholy, or horrible despondency, with every kind of religious, moral, or mental aberration, and often homicidal or suicidal impulses as well as hallucinations. These paroxysms are often remarkably sudden on their onset, and at the same time the symptoms of epileptic disease are not infrequently extremely obscure and difficult of recognition.

For example, a German staff-sergeant of over twenty years' good service and paymaster of his regiment locked his office door at the end of his day's work, called on the wife of

a neighbour with whom he was on the best of terms, and after half an hour's friendly conversation stabbed her in some thirty or more places, leaving her dead. He had, until next day, no clear recollection of what he had done, but when he realised it exhibited the bitterest remorse. He had for some time been in low spirits, but the only symptom pointing to epilepsy was a nocturnal weakness of the bladder, for which he had consulted several medical men. Being unmarried, there was no one to prove the occurrence of fits during his sleep. He, however, was not executed, and subsequently, while in the asylum, characteristic epileptic attacks developed themselves. To have hanged this man would have been a judicial murder, but in this country he could have escaped death only by the Royal prerogative.

Our law unfortunately does not, like that of Germany, recognise *degrees of criminal responsibility*, or responsibility with a diminished amount of imputability, a doctrine which, whatever theorists may say to the contrary, is more rational and more merciful than our hard and fast lines, or than the elastic and reprehensible practice of French juries of finding "extenuating circumstances" for the most cold blooded crimes.

EDWARD F. WILLOUGHBY.

FOREIGN COMPANIES UNDER FRENCH LAW.

FOR a long time the right of foreign companies to carry on business in France does not appear to have been questioned, and they were allowed to sue or to be sued in the French Courts. This practice was in accordance with article 3 of the Code Civil, which lays down the principle, that the laws concerning status and capacity of persons govern Frenchmen, even if resident in a foreign country, and as a matter of course admits the converse proposition that foreigners in France continue to be governed by the laws of their respective countries as regards their personal status. The allowing of foreign companies to do business in France was merely an extension to companies (*moralische personen*) of the principle relative to individuals; and this extension was amply justified by the fact that companies, at least as distinguished from ordinary partnerships, may properly be considered as a mere creation of the law, and as having no existence of their own apart from the law.

This practice, in the case of simple partnership, in which all the partners are under unlimited liability, could not give rise to serious difficulty; but it was not so as regards foreign companies, in which one or more of the partners assume an unlimited responsibility whilst the others contribute only a fixed sum, to which their liability is limited; nor with those of limited liability in which the responsibility of shareholders is limited to the extent of the shares subscribed for. Partially limited and limited companies have, as regards third parties, a legal existence quite apart from that of the partners who only bring in a certain amount of money; such

companies might therefore afford to unscrupulous people means of deceit. It is to obviate this danger that in all civilised countries it has proved necessary to regulate by certain enactments the formation of partially limited and of limited companies.

The principle contained in article 3 of the Code Civil is no obstacle to the application of French law to the two last classes of foreign companies. It is a well-established principle that, in France, French law must prevail over any foreign law, where the application of the latter would be repugnant to the settled principles and policy of French law; but only in such case ought French law to intervene. It is beyond doubt that French law has always considered the regulation of partially limited and to limited companies as a matter of interest to its policy. A statement of French law in respect to companies "en commandite" (partially limited) and "anonymes" (limited), although necessarily short, will suffice to establish this proposition.

A company "en commandite" is composed of two kinds of partners, whether its capital be divided or not into shares. One or more of the partners, called "commandites" or "gérants"—that is to say, managers—are personally liable for all the debts and engagements of the company to an unlimited extent; they transact the whole of the business of the company, which takes its name from one or more of them, with the addition of "& Co." The other class of partners, called "commanditaires," one or more in number merely invest capital in the company; and, in order to limit their liability to the capital thus invested, they must keep entirely aloof from the management of the company, and remain sleeping partners. Any interference on their part might render them liable to an unlimited extent towards third parties. The great freedom allowed by the Code of Commerce for the formation of companies of this kind proved dangerous, and, after several alterations in the law, the conditions under which they might be constituted were minutely settled in the Law of the 24th July, 1867, which is still in force.

XUM

Limited companies are called "Societés anonymes;" their capital is always divided into shares, and the liability of shareholders is limited to the nominal value of the shares held by them. The Code of Commerce did not allow the formation of this kind of company without a formal authorisation of the State. To obtain such authorisation, the articles of association had formerly to be approved of by the Council of State. This requirement was partly abolished by the Law of 23rd May, 1863, and was finally repealed by the Law of the 24th July, 1867, except as to life insurance companies and tontines, which are still subject to the control of the Council of State.

Many of the provisions of the Law of 1867 are applicable both to companies "en commandite" and to companies "anonymes." For instance, the division of capital into shares of not less than £4 each (where the capital does not exceed £8000), and of not less than £20 each (when the capital is above £8000); the necessity that the whole capital should be subscribed, and that one-fourth of the nominal value of each of the shares subscribed for in cash should be paid up, before the company is declared to be finally constituted; the obligation that such subscription and such payment should be verified by a notarial declaration; the conditions upon which shares can be made payable to bearer: the approval by a general meeting of shareholders of the special advantages stipulated in favour of promoters. All these are common to both forms of company.

One of the most important provisions of the Law of 1867 is that which regulates the publication of the deeds or articles of association, by which the companies are formed; it applies alike to all kinds of companies. Within a month of the constitution of any commercial company one duplicate of the constitutive act (if it be a deed under private signatures), or a notarial copy of such act (if it be a notarial deed), must be lodged with the Registrar of the Justice of the Peace, and another copy with the Registrar of the Tribunal of Commerce of the district, in which the registered

office of the company is situated; and where the company has several establishments, the same deposit must be made in each of the districts in which an establishment is situated. In the case of a company whose capital is divided into shares there must be annexed to this constitutive act a notarial copy of the declaration, showing the subscription of the whole of the capital and the payment up of one-fourth of it, together with a certified copy of the resolutions of the two general meetings of shareholders approving the advantages stipulated in favour of promoters. To the constitutive act of an anonymous company must be annexed a certified list of the subscribers of shares, stating their names, occupations and residences together with the number of shares held by each of them. Within the same space of one month an extract of the constitutive act, containing its leading features, must be published in one of the newspapers appointed for the insertion of legal documents. And in order that the public may easily obtain full information respecting the companies, a memorandum must be added to the publication stating when and where the documents have been lodged, so that anyone may have inspection thereof, and get copies or extracts. Any resolution changing the articles of association has to be deposited and published in like manner.

Notwithstanding this strictness of French law with respect to companies, the French Courts by recognising foreign companies and allowing them to sue and to be sued, had given them the means of carrying on business in France without complying with the requirements of French company law. This practice applied to both limited and unlimited foreign companies. No other condition was required for this purpose than that of their having a legal status duly constituted according to the laws of the country in which they were formed. In France private international law is to a great extent founded on reciprocity; and when in 1848 the Belgian Courts declined to take cognisance of actions brought before them by French companies, on the ground that they had no legal existence in Belgium, the question of

the existence of foreign companies in France came to be discussed. After some diplomatic intercourse the matter was settled as regards Belgium by the Law of the 30th May, 1857, which authorised Belgian companies, duly constituted according to Belgian law, to exercise their rights in France, and enabled them to sue and be sued in the French Courts, provided they complied with the laws of France.

This law is very important because it not only decided the question as regards the Belgian companies, but also enacted that the benefit of its provisions might be extended by a simple decree of the Government to other countries. Since 1857 the benefit of this law has been extended by decrees (resembling the English Orders in Council) to nearly all the European countries, as may be seen by the following list :—

Turkey and Egypt, 7th May, 1859 ; Sardinia, 8th September, 1860 ; Portugal, 27th February, 1861 ; Duchy of Luxembourg, 27th February, 1861 ; Switzerland, 11th May, 1861 ; Spain, 5th August, 1861 ; Greece, 9th November, 1861 ; Roman States, 5th February, 1862 ; Holland, 22nd July, 1863 ; Russia, 25th February, 1865 : Prussia, 19th December, 1866 ; Saxony, 23rd May, 1868 ; Austria, 20th June, 1868 ; Sweden and Norway, 14th June, 1872.

With regard to England a special convention was signed on the 30th April, 1862 ; it reads as follows :—

" 1. The high contracting parties declare that they mutually grant to all companies and other associations, commercial, industrial, or financial, constituted and authorised in conformity with the laws in force in either of the two countries, the power of exercising all their rights, and of appearing before the Courts of law, whether for the purpose of bringing an action, or for defending the same throughout the dominions and possessions of the other power, *subject to the sole condition of conforming to the laws of such dominions and possessions.*

" 2. It is agreed that the stipulations of the preceding article shall apply as well to companies and associations,

constituted and authorised previously to the signature of the present convention, as to those which may subsequently be so constituted and authorised.

"3. The present convention is concluded without limit as to duration. Either of the high powers shall, however, be at liberty to terminate it by giving to the others a year's previous notice. The two high powers, moreover, reserve to themselves the power to introduce into the convention, by mutual consent, any modifications which experience may show to be desirable."

These words, "the sole condition of conforming to the laws of such dominions and possessions" do not in any way refer to the constitution of English companies. That is governed solely by the law under which they were created. This provision must be understood as imposing a compliance with such principles of French law as are applicable to all persons including foreigners within the French territory, such as the laws of public policy as understood in France, those relating to the safety of the State and of persons, to real property, to jurisdiction and procedure, all of which will obviously always prevail over any foreign law, whatever it may be. In conformity with these principles, it has been decided that the minute provisions of French law as to companies are not applicable to foreign companies, when they are authorised in general by a decree or a convention. The effect of this decision is to recognise foreign law as to these companies, and to substitute it for French law.

Thus, English companies may by virtue of the Convention of 1862, own real property in France.

In such case they are equally with French companies bound to pay two taxes; the land tax and a special tax called "taxe des biens de mainmorte" which is imposed on all corporations, French or foreign, owning land in France; it amounts to 62½ centimes per franc of the land tax and was instituted by the Law of 16th January, 1849. The amount of the land tax is fixed yearly in the Budget.

Foreign companies carrying on business in France are

also obliged to pay a special tax imposed upon every person or company, whether French or foreign, doing business in France. It is called "Patente" and was created by the Laws of 25th April, 1844 and 15th July, 1880, it consists of a fixed tax according to the class of trade and of an *ad valorem* duty assessed upon the value of the rent. The foreign companies who pay no rent in France avoid this tax.

A decree of the 7th February, 1880, regulates the negotiation of foreign stocks on the French money markets. The Committee of Stock-brokers on the money market they control may allow or prohibit the dealings in shares, debentures, or other securities whatever they may be called, of foreign companies, corporations, or undertakings. When an application for official quotation is made, the Committee of Stock-brokers has to examine the deeds, statutes, and articles of association according to which the stock has been created; these documents must be certified by the Consul of the country to which the foreign company belongs, to be in due form according to the foreign law. The Consul must also certify that the stock is quoted on the money market of that country, or that no official money market exists there. The Committee of Stock-brokers may also require any other information they may deem necessary. To be quoted on the French money markets, the foreign stocks must not be under 100 francs if the capital of the company be under 200,000 francs, nor under 500 francs if the capital be above that amount.

In any case it is incumbent on the company applying for official quotation to satisfy the Committee of Stock-brokers that they have in France a representative accepted by the Minister of Finances as responsible for any taxes due to the French Treasury. Whatever the decision of the Committee of Stock-brokers may be, the Minister of Finances may always prohibit the negotiation in France of foreign stocks.

The negotiation of foreign securities in France is not legal, and an official quotation is not obtainable, until the company issuing such securities has complied with the

requirements of French law in view of the assessment and payment of certain taxes to which the securities of all companies whether French or foreign are subject in France.

In accordance with the article 4 of the Law of 29th June, 1872, the shares, debentures, certificates of loans, whatever may be their denomination of the foreign companies, corporations, &c., have to pay a similar tax to that imposed by that law on the income of French securities. It amounts to three per cent. and is levied on the interest, dividends, income and other profits of the shares of companies and other financial and commercial concerns; it is also levied upon the interest paid upon the loans made to the same, and on the profits paid to sleeping partners in respect of their capital. The amount of tax payable is adjusted according to the resolutions and reports declaring the dividends on shares, from the accounts of interest paid on debentures or of profits paid to sleeping partners, and returns have to be made for that purpose.

A Decree of 6th December, 1872, was made in pursuance of the Law of June of the same year for the purpose of regulating minutely the mode of collecting of the tax on the income derived from companies. We need not go into all the details of this Decree, but must mention its provisions as to foreign companies. A distinction is made between the companies whose shares are admitted to official quotation on the French money market, and those which are not quoted. As regards the former, the tax on the income of their shares is made out in the same way as the amount payable for stamp duty and transfer, the details of which are included in a Regulation of Public Administration, dated 24th May, 1872. The companies whose shares are not quoted, but who have moveable or immoveable property in France pay the tax on account of the income of their French property, and also on a certain portion of their capital; the amount of capital on which the tax is assessed on account of income is fixed by the Minister of Finances with the assistance of a Special Commission.

Besides this tax, which is nearly akin to an income tax, foreign securities like French securities have to pay three other taxes—(1) Stamp duty; (2) Transfer duty when assigned for a consideration; (3) Succession duty or a special duty in case they be included in a gift. Of the latter tax we will say nothing, for it is not applicable only to the matter now under consideration, and would involve long explanations on matters beyond the narrow compass of the present notes. We will confine our observations to stamp and transfer duties.

The Law of the 5th June, 1850, which created a stamp duty on the shares and debentures of French companies, does not refer to foreign companies, for which special provisions exist. Several modes of taxation have been tried and by article 9 of the Law of 23rd June, 1857, the shares and debentures issued by the foreign companies were to be stamped in a like manner to the French securities under the Law of 5th June, 1850, thus making them liable to an annual stamp duty of 5 centimes (now increased to 6 centimes) per 100 francs of their nominal value. The number of securities upon which stamp duty is payable is to be determined by the Minister of Finances in accordance with the provisions of the Decree of 17th July, 1857. This tax is payable on the shares as long as the company exists and on the debentures until they are redeemed. But another Decree of 28th March, 1868, extended to foreign companies, the benefit of article 24 of the Law of 5th June, 1850, which exonerates from payment of the annual stamp tax companies in liquidation, and those who for the last two years have paid neither dividends on their shares nor interest on their debentures.

As regards the transfer duty also different systems have been in force, but by a Decree of the 6th December, 1872, made in pursuance of the Law of 29th June, 1872, this tax is to be assessed in the same way as the stamp duty, that is to say upon a proportion of the capital fixed by the Minister with the assistance of the special Commission. In accordance

with the Decree of 11th December, 1864, the transfer duty is payable at least upon half the share capital and on the whole of the obligations of foreign companies. For French companies this tax amounts to 50 centimes per cent. upon each transfer of registered securities or upon conversion of same into securities to bearer, and to 20 centimes per 100 francs and per annum on securities to bearer. The value of the shares and debentures for the purpose of assessing the tax is deemed to be that of their average quoted value in the preceding year, or in default of a quotation upon the declared value. As it was impossible to inspect the transfer books of foreign companies, the Decree of 17th July, 1857, in order to insure the payment of this tax, provides that foreign securities are all to be treated as securities to bearer, and to pay the annual tax of 20 centimes per 100 francs. The companies are responsible for the payment of this tax, the amount thereof is deducted by them from dividends and interest they pay to the holders of their securities to bearer; and they require payment of this duty on registered certificates before registering any transfer on their books or delivering new certificates to bearer; this of course can only be done by foreign companies on the proportion of their securities, which is declared to be circulating in France and on which duty is levied.

In order to insure the payment of the taxes, every foreign company is bound to have in France a French representative personally responsible for the same; such representative must be appointed by the company and accepted by the Minister of Finances before any business is carried on in France.

The issue and description of securities of foreign companies is only allowed after the appointment of this representative. Within one month after the closing of the subscription, the Minister of Finances fixes the amount upon which the above taxes for stamp and transfer duties are payable.

French law on foreign companies is far from complete,

and many questions might be raised which cannot find place in these short notes. In 1882 a special Commission was appointed by the Minister of Justice to study a reform of French law on companies. In its Report the Commission proposes to introduce into the new law a section upon foreign companies. But no legislative action has yet followed upon this Report, and many objections have been brought forward which may prevent it from ever becoming law, especially as some of the reforms proposed do not coincide with the present state of the French legislation and practice relating to foreign companies.

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THE *DE FACTO* PRINCIPLE IN JURISPRUDENCE.

THE systematic study of law has not been unaffected by the methods adopted in other branches of scientific inquiry; and the answer to the question, What is law? is no longer sought in the clouds of *à priori* speculation, but in the facts of experience. Theories based on the fiction of a state of nature are as dead as Queen Elizabeth; the constructions of the absolute philosophies are discredited; and a wider and fuller acquaintance with primitive society, in the past and in the present, has shown the insufficiency of Austin, and has resulted in the enlargement of the conception of the historical school.

That *fact* is the basis of *law* is a principle with which the present generation of Scottish lawyers should be familiar; for it is the principle which the late Professor Lorimer expounded in his lectures and in his writings through a long series of years, with an enthusiasm and learning which filled his students and readers with admiration. When we asked what is law? he bid us turn to human nature for our answer; and it is mainly to the consideration of his conception of human nature, and the theory of law which he founds upon that conception, that the following paper is devoted.

"All human laws," says Burke, "are declaratory;" and in so far as they fail to declare the law of nature, they "must be errors and may be crimes."(a) It is, then, of primary importance to ascertain what is their substantial reality, or, in other words, what is the law of nature.

(a) See Lorimer's "Institutes of Law," 2nd edition, 1880, pp. 10 and 255.

It is to be observed that "law" is here employed "in the general sense of cosmical arrangement," and that "nature" is used "in a more restricted sense than that in which it is often identified with created existence. The law of nature, in the jural sense, is not the whole scheme of the universe, but the branch of that scheme which has reference to human relations." It is the law "which, by the nature of all rational creatures, and independently of their volition, determines their relations to each other and to surrounding existences." And in order to acquaint ourselves with its character we must have recourse to a method of inquiry which is at once subjective and objective;—subjective, in so far as we avail ourselves of the teaching of consciousness;—objective, in so far as we rely upon the testimony of external observation. But "it is not from the objective but the subjective side that we must enter the field of ethics in search of a natural basis for the science of jurisprudence." (*a*)

The problem, in the solution of which we are interested, is threefold. Is man autonomous? If he is autonomous, how is this law revealed to him? What is the law which man's nature imposes on him?(*b*)

We are told that in its reply to the first question, the testimony of consciousness concurs with the testimony of history. If we interrogate consciousness, we are certified of our own existence. That we exist is the ultimate fact of consciousness. We know that we are, and that we did not create ourselves. Thus we receive our nature, with its "fundamental qualities and radical impulses," as a possession —as a gift. If we rely on a revelation made, not through our nature, but to it, we believe that this nature is not only necessary but right. It is necessarily received, for we had no choice in the matter. And that it is right as well as necessary is attested not only by the voice of consciousness, but by the unanimous response of the best witnesses of every age.(*c*) Thus our nature accepts "its fundamental qualities

(*a*) Lorimer's "Institutes," pp. 2, 37, 209.
(*b*) *Ibid.* p. 54. (*c*) *Ibid.* pp. 63-184.

and radical impulses—those qualities and propensities which are natural to it—as absolutely normal, and consequently as the criteria of right and wrong."(*a*)

If, then, man is "a law unto himself," how is this law revealed to him? It is revealed to him by conscience. But conscience, be it observed, is not a separate organ, by means of which our knowledge of right and wrong is imparted to us; and "which is so far from being in harmony with our other faculties and senses, that its very object is to condemn the impulses of our general nature."(*b*) It is to be identified with "the dicta of our general and normal nature as a whole, as opposed to our special and exceptional nature;" and it "looks for the moral law, the rule of life, as a gradual manifestation and recognition of this nature, to and by itself."(*c*) "When I am told to 'follow what is *useful*,' I have still to ask, 'What *is* useful?' When I am told to follow 'what is *according to law universal*,' I must ask, 'What *is* according to law universal?'"(*d*) Nature is the measure of the what; my normal nature is the test of the quality of my actions.

What, then, is the law which man's nature imposes upon him? "We must now place ourselves in contact with objective existence, and inquire whether the nature which we are thus to obey reveals to us rights and duties as existing in ourselves and others, and if so, what is their character, and what are their relations and their limits."(*e*) But I cannot interrogate my neighbour's consciousness; my knowledge of his rights and duties is derived from my knowledge of myself; and, accordingly, it is from the subjective side that we must make our start.(*f*) Now we have seen that our existence is necessarily received,—that we had no choice in the matter. —that, in short, it is independent of human volition. We receive it as given. But "though the relation of Creator and creature excludes the idea of a right to existence on the part of the latter, the moment existence is conferred that relation bestows on it the character of a right which neither its pos-

(*a*) *Ibid.* p. 60. (*b*) *Ibid.* p. 186. (*c*) *Ibid.* p. 194.
(*d*) *Ibid.* p. 194. (*e*) *Ibid.* p. 204. (*f*) *Ibid.* p. 209.

sessor nor any other creature is entitled to dispute."(*a*) Thus "the fact of being involves the right to be;"(*b*) and the admission of the right to be involves the admission of a number of other rights,—the right to continue to be, the right to the conditions of existence, the rights of development, of reproduction, of transmitting to our descendants the conditions of existence, &c., &c.,(*c*)—in short, of the right to liberty, —"*i.e.*, to the exercise of our own subjective powers." This liberty is not merely negative, it is positive, in character; "it is a claim not only not to be hindered, but to be helped."(*d*) Thus the measure of existence and of the right of existence is the power to exist; and, accordingly, subjective rights are limited in the first instance, not by objective interests, but in their own nature; and it is in subjective rights that we have the first manifestation of the principle of order.(*e*) If, then, the fact of being involves the right to be, my recognition of other existences involves my recognition of other,—of objective, rights; and it is "the existence of subjective and objective rights and duties, and of their mutual dependence," which "constitute the sole revelation which nature makes to us with reference to human relations."(*f*) "All that nature teaches us directly is, first, that we ourselves, and, second, that the other organised existences of which we are cognisant, possess individual powers, with correspondent individual rights. From these data, by the aid of our reasoning faculties, we infer the general law that 'right corresponds to power.'"(*g*) At the same time, we are to keep in view that the might, which is the source of right, is might which is real and permanent,—might which harmonises with nature as a whole. It is thus power approved and recognised by reason; for reason is "neither more nor less than the divine element of nature as a whole, making its voice heard above the distracting and self-contradictory outbursts of our separate impulses."(*h*)

(*a*) *Ibid.* p. 213. (*b*) *Ibid.* p. 212. (*c*) *Ibid.* pp. 213-235.
(*d*) *Ibid.* p. 235. (*e*) *Ibid.* p. 236. (*f*) *Ibid.* p. 243.
(*g*) *Ibid.* p. 245. (*h*) *Ibid.* p. 429.

The ultimate appeal is to human nature,—to human nature as a whole,—and, by human nature as a whole, Professor Lorimer means the existence of the individual with "its fundamental qualities and radical impulses." What, then, are these fundamental qualities and radical impulses, and how do they find expression in action?

We must be content to take human nature as it is manifested in human beings. It is beyond the scope of our present inquiry to trace the course, or to indicate the stages of the process of which human nature is the outcome; and, accordingly, we must take man as our starting point.

Human nature is one and indivisible. At the same time, it presents several aspects; and because it is often more convenient to discuss one only of these aspects at a time, we are in danger of forgetting or overlooking the fact that human nature is an organic unity. Men do not carry their "needs and greeds" in one pocket and their reason in another; nor can they be wrenched asunder, and treated apart from their surroundings. So far as we know anything about them, men are at once animal and rational; at once separate beings, and in touch with an external world of beings, and of beings like themselves.

And not only is human nature one and indivisible, but its fundamental characteristics are always and everywhere the same. We find that men are everywhere and always beings who feel the pressure of hunger, thirst, fatigue, heat and cold, and sexual appetite, that they speak, and that they think. We find, in short, that, as they can live only in accordance with the laws of life, so they can think only in accordance with the laws of thought. It is in action that the unity of human nature attains its clearest expression. Action springs from a sense of insufficiency, disharmony, or incompleteness. This is abundantly plain in so far as the mere "needs and greeds" are concerned. But life, in so far as it is human,—in so far as it transcends the existence of the brute,—is far more than the simple process of adjusting supply to demand. On the side of life, which is purely animal,

particular want is met by particular gratification. But human life, even in its least complex forms, rises above this hand-to-mouth existence. The veriest savage is, at times, at all events, concerned with something other than his present need. He "looks before and after," he rejects that in order to secure this; in other words, he selects. But selection implies comparison, and comparison presupposes a standard by which to compare. Unconscious as he is of the process, he gives effect to the law of thought in deciding upon the claims of his "needs and greeds;" he refers, that is to say, the particulars to a universal, to a standard, and he determines upon that course of action which shall most nearly approximate to that standard. Thus we see that a man is more than his desires, for he surveys them, and compares them; and, throughout all their strugglings and strivings, he remains constant until he selects and identifies himself with his selection. What, then, is the standard which directs his choice? In every case it is at once the same and different. It is the same in so far as every one adopts that course of conduct which he regards as most conducive to his well-being on the whole. It is different in so far as no two men form exactly the same conception of well-being. In so far as he acts rationally, a man does not snatch at this or that gratification; but he acts in a certain way in order to give effect to the conception which he has formed of his well-being on the whole. It is not the momentary pleasure, it is the satisfaction of the whole man that he seeks, —the satisfaction of his whole nature.

It must not be forgotten, however, that, of the individual man apart from his fellow-men and from the world that surrounds him, we know absolutely nothing. Human beings are invariably found in groups. Of course, there have been men who, for longer or shorter periods, have been altogether cut off from human intercourse. But if we take a human being, and throw out of account his whole environment—*e.g.*, the land of his birth, its climate and character, its constitution, government, laws and institutions, the society

in which he moves, its fashions and customs, and his position in it, his home, his family, his friends, his business pursuits, studies and amusements, the religion he professes, the language he speaks, the books he reads, the food he eats, and the clothes he wears,—what have we left of the man himself? He must, at all events, have been born, and he must have inherited certain qualities. Helpless in his infancy, he is wholly dependent upon others. However rude may be the language which he speaks, it is the outcome of long ages of human intercourse. In short, human nature, as we know it, presupposes the existence of social relations—of the life of the group. The group may be simple in character—it may be a family or a clan, or it may be a society of infinite complexity, including within it many other groups. But whatever may be its size or specific nature, man finds in its membership not merely the certain supply of his animal wants, but the only possible assurance of his well-being on the whole. Apart from it, the well-being of the individual is impossible. He must join in the common purpose; he must contribute and co-operate towards the general good. And as he lives the life and thinks the thoughts of the society in which he moves, his conception of well-being is coloured and informed with that life and thought. He comes to reproduce that life and thought in his actions without question and as matter of course. In other words, his actions are the outcome of his character; and his character has been formed by, and is the permanent expression of, the interaction between himself and the group to which he belongs.(*a*) The principle, accordingly, to which he strives to give effect, or the standard, in accordance with which he determines upon his course of conduct, or the ideal, which he endeavours to realise, is not a formal, empty, categorical imperative; but a concrete universal—it is the well-being of the group, of which he is a member.

If we confine our attention to the earliest—*i.e.*, to the

(*a*) *Cf.* Hegel, *Werke*, ii. 342.

least complex forms of society, we find that, so far as its members are concerned, the group is their world. Life beyond its limits is regarded as impossible. Within is the peace; outside of it is war unceasing. It is thus a little world in conflict at all points with the larger world which lies around it. But above and beyond this conflict there are mighty powers and forces to whom the issue belongs. And to the primitive mind, the fact that the group survives proves that it is divinely favoured. It is thus a sacred circle; and to secure its well-being is the end of its members in action—is the universal law according to which they must act. It is upon unquestioning obedience to this law that right to membership—the right which is the foundation of all other rights—depends. This law is, in groups, structurally simple, at once religious, moral, and legal; for legality, morality, and religion are as yet undifferentiated; and accordingly, an offence against it is not only a crime, but a sin. It is limited in its application to the members of the group; and as those beyond the pale of the group—the stranger and the outcast—are outside of the law, they are regarded as wholly without right—even to their existence. But as the group enlarges—as it extends into new and unfamiliar relations—sudden emergencies arise which call for rapid decision, for which no precedent provides, and with regard to which custom is powerless; and thus alongside of the old religious law, there springs up a new practice. Moreover, as the group becomes more complex—as it comes to include within it other groups, with laws and customs of their own—the conviction gathers strength, that some rules are, and some are not, universally obligatory; and eventually, law becomes distinguished from religion and morality, has assigned to it a sphere of its own, and is regarded as a rule (or rules) of outward conduct recognised by the members of the group as obligatory upon all, because upon the observance of that rule (or those rules) the life of the group depends.

It is, however, sufficient for our present purpose to insist

on the proposition, that, if we turn to the facts of human nature and interrogate them, we learn that man is part and parcel of the society in which he lives; that society by itself and the individual by himself are unreal, unmeaning, and unintelligible; that, in short, man is a member of a social organism, and that to act as such is the law of his life, and the condition of his rights. This law, then, is the measure of rights. I have a right to act or forbear in so far as my action or forbearance is an expression of the law. In the assertion of the law I assert my right, and, in asserting my right, I assert the law.(*a*)

The grounds upon which we take exception to Professor Lorimer's theory must now be sufficiently obvious. He saw that Kant's categorical imperative was unworkable, and he endeavoured to discover a principle which should really be of universal applicability. Kant tells me that my principle of action is a moral principle if it is capable of serving as a universally valid law of conduct. But, as Hegel has pointed out,(*b*) the difficulty is for me as a moral being, to determine which of alternative principles of conduct is to be affirmed as law universal; and, when once I have made up my mind on that point, the operation of the universal law is superfluous, and, further, my principle of action has always a specific character, —it is concerned, that is to say, with particulars. But, if it is to be moral, it must be universal. It must, that is to say, be a universal principle with a specific character. In other words, its specific character must be invested with a universal form. But the result of this process is of no value; for if I can make my principle moral by giving it a universal form, I can make any principle I choose moral; and what I may choose depends wholly and solely on my own caprice. Professor Lorimer, accordingly, replaces Kant's maxim, "Follow law universal" by his maxim "Follow nature as a whole;"(*c*) and it is upon the ground that his conception of

(*a*) *Cf.* Von Ihering, *Der Kampf ums Recht*, 6th edition, 1881, p. 55.
(*b*) *Werke*, i. 335 *et seq.*; *cf.* Bradley, "Ethical Studies," 1876, Fourth Essay.
(*c*) "Institutes," p. 184.

human nature as a whole is erroneous that we join issue with him. For he insists upon that aspect of human nature in which the individual seems to assert himself as a separate and independent entity, and ignores that other, and most important, aspect in which appears the organic union of man with his fellows. This misapprehension affects the whole course of the argument. He inquires what is the teaching of nature; and the results at which he arrives may be summarised in few words. I know that I exist. My existence I received necessarily, for I had no choice in the matter. And I must accept my nature not only as necessary but as right; for I must believe it to be right, if I believe it to be the gift of an all-righteous God. Besides, my consciousness says that it is right; and the evidence of my consciousness is corroborated by the best witnesses of every age and country. In short, the proposition that "the fact of being involves the right to be" rests ultimately upon my belief that my nature,—my existence "with its fundamental qualities and radical impulses,"—is right. In other words, because my existence is *right—i.e.*, right as opposed to wrong, it is *a right—i.e.*, right as correlative to duty. Professor Lorimer thus arrives at the meaning of one term of a relation by a process which leaves the other term, and the relation, wholly out of account. In short, his whole system rests upon his private individual belief that, because he thinks that his nature is God-given, and therefore right, because the witnesses, who, in his opinion, are the best witnesses, agree with him, and because he believes that every other human being is possessed of a nature similar to his own, "right corresponds to power."

It is one thing to throw Austin overboard; it is altogether another thing to find the origin of rights in the nature of the individual *qua* individual. The proposition, enunciated by Professor Lorimer (*a*) and Mr. Herbert Spencer (*b*) that law cannot create rights may be perfectly true. But it is none

(*a*) "Institutes," pp. 257 *et seq.*

(*b*) "The Man *versus* the State," 1885, pp. 87 *et seq.*

the less perfectly untrue that the individual *qua* individual could have any rights of any kind whatever. If I say that I have a right to act in a certain way, I admit, by implication, that there are certain ways in which I have not a right to act. In other words, the assertion of a right implies the existence of a limitation; and of a limitation which has its origin, not in my nature as an individual, but in the fact that I am a member of society (*a*). Apart from a corporate life, "rights" have no existence. "Mights" there may be; as, however, the individual independent of, and unconnected with, others like himself, is a mere figment of the imagination, we need not trouble ourselves with discussing his possible endowments.

A true philosophy of law cannot be started upon mere opinion; it must found upon the whole facts with which human relations are concerned. The ascertainment of these facts is thus its necessary *prius*. When that labour is accomplished, then the task of philosophy commences—"then the owl of Minerva begins its flight."

P. J. Hamilton Grierson.

(*a*) *Cf.* p. 236, with Herbert Spencer, *ubi. cit.* p. 96.

THE WORK OF THE WEST INDIAN COMMISSIONERS.

II.

THE SLAVE LAW OF THE WEST INDIAN COLONIES.

A GENERAL view of the principles underlying and determining the development of any branch of law is very hard to find. "The law did not begin with a theory. It has never worked one out."(*a*) Its life has been not logic but experience. "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges these with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."(*b*) Attempts to generalise upon the origin and growth of any body of law are, therefore, attended with a double danger. The real creative elements may be, not principles of universal application and abiding force, but historical and accidental circumstances, which are either incapable of being discovered at all or have long since lost their significance. Then there is also the consequent risk that, deriving no clear light from his scrutiny of the past, the student should bring to bear upon the problem before him the standards and ideas of the present day, and ransack his wits for some kind of ingenious solution, however great may be the sacrifice of accuracy which it involves.

(*a*) O. W. Holmes' "The Common Law," p. 77.
(*b*) *Ibid.* p. 1.

Under the pretext of avoiding such difficulties as these, it would be easy to give a superficially clear, but colourless, account of the slave laws, substantive and adjective, of the West Indian Colonies. A scheme might readily be worked out, partly on alphabetical, partly on chronological lines, with faultless accuracy, and with just sufficient detail to arouse the curiosity and sustain the interest of everyone under whose notice it came. Yet I suppose there is no reader who would not applaud the effort to reanimate the old Colonial Slave Acts with their former meaning, or who would too strictly inquire whether the new life breathed into them was tainted with some modern heresy.

Beneath the intricate and often contradictory rules, of which this department of colonial law was composed, one can detect the existence and inter-action of a few elementary principles. First, there is the influence of the Roman law, which had laid its grasp on the West Indian Islands at the time when they belonged, some to Holland, and others to France. Then there is the common law of England, to which all English-speaking peoples, to some extent, unconsciously defer. In the third place, we shall find the views of the early settlers stereotyped in colonial legislation, and, which is far more important, descending as a living tradition to their successors. The last constituent of which we need take account is the conception of public policy which prevailed at the time among the ruling classes in the West Indian Colonies. Let us see whether this analysis throws any light on the intricacies of the slave laws.

The Roman master, if a *paterfamilias*, was invested with something of the authority of a civil magistrate. He had a power over his slave, not only of imprisoning, chaining, or scourging him, but extending even to life. By the fundamental principles of colonial law, of which "the traces (in the language of the Commissioners)(*a*) though sometimes faint, are everywhere discoverable, the power of the master

(*a*) First Report (Barbadoes), p. 65.

over the slave was considered absolute." The enforcement of the criminal law *against* slaves was often mild to imbecility. But the domestic treatment of a slave by his master, was in many of the colonies subject to no judicial review. "There is not," say the Commissioners(*a*) "in Barbadoes, any law regulating the quantum and kind of punishment, the hours of labour and rest, and the provision of food, and (except nominally) of clothing. These are dependent on the performance of moral duties, of which good men feel the obligation, but of which the breach is unfortunately not cognisable before any earthly tribunal. A wicked and cruel master or delegate, *so that he do not kill or maim a slave*(*b*), may inflict upon him any degree or severity of punishment. . . . A justice of the peace is indeed limited in the number of lashes *he* can order a slave to receive, but the master has uncontrolled, undefined, and absolute power."

Even in those colonies where the power of the master over his slave had been restricted by positive law, the spirit of the *dominica potestas* remained. The slave was incompetent as a witness against a free person. There were no Courts for the trial of questions of manumission. In some of the islands(*c*) inquests on slaves were scarcely ever held. In Nevis,(*d*) the coroner's jury in such an inquest was reduced from twelve to three. Other illustrations of the point in question might readily be given. Many of them will be touched upon incidentally in the course of this paper. Not the least curious manifestation of the influence of Roman law, even in those colonies which displayed little overt sympathy with the *patria potestas*, is the history of the

(*a*) *Ubi supra* at p. 66.

(*b*) In which case he might, perhaps, bring himself within the reach of the common law. An interesting summary of colonial opinions on this point is given below.

(*c*) First Report (Tobago), p. 88; Do. (St. Vincent), p. 24; Third Report (Montserrat), p. 38.

(*d*) Third Report (Nevis), p. 54.

office of advocate *pro deo* at Demerara.(*a*) This official was, in the origin and by the design of his appointment, a slaves' counsel. His practical work appears to have been to usurp the functions of the fiscal or public prosecutor! It is very difficult to set forth adequately, by a few isolated instances, the evidences of the all-pervading influence of the *jus civile* in the West Indian slave laws. But they force themselves upon the attention of a student of the reports at every page.(*b*)

"The common law of England has little or no relation to a state of slavery." From this eminently just observation, the West Indian lawyers drew conclusions that would have made Coke turn in his grave. There were indeed a few sturdy judges who held that what Bracton says of the villein was applicable to the slave—*vita et membra sunt potestate legis* (lib. I. c. 9), but the silence of the common law was for the most part very differently interpreted. In the absence of any positive imperial legislation, the status of slavery must be regulated by colonial law. Colonial law declares the slave to be his owner's *property*, usually real, sometimes (as in the Bahamas where there were few plantations) (*c*) personal. Now the law of England, although it has little to say about slavery, has a very clear and broad conception of the rights of property. The West Indian planter claimed, therefore, not without success, from the common law of England, those rights as an owner of real or personal "property," which it would have indignantly denied to him as an owner of slaves.(*d*)

The views of the early settlers as to the rights of their slaves may readily be gathered from the admirable abstracts of

(*a*) Second Report (2nd series), pp. 17, 18.

(*b*) Thus in British Guiana, Tortola, and Antigua, an offence committed by a slave was considered *crimen qualificatum*, calling for severe punishment. In British Guiana, Trinidad, and Jamaica, every coloured person was presumed to be a slave, but in a majority of the colonies the Roman presumption *pro libertate* prevailed.

(*c*) Third Report (2nd Series), Bahamas, at p. 71.

(*d*) First Report (Barbadoes), pp. 62-65.

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the colonial statutes, which are prefixed to the Commissioners' Reports. A few specimens may suffice :—

"Every negro adjudged guilty by confession, proof, *or probable circumstances* shall be adjudged to be publicly and severely whipped, not exceeding forty lashes," &c. No. 82. Hall. cl. 13.(*a*)

"Any negro, or other slave or slaves, may be apprehended and brought before a justice for any threatening, fighting, or quarrelling one with another, *or for any insolent language or gesture to any free or white person*, . . . or for any misbehaviour whereby the public may be disturbed, *or any particular person immediately aggrieved*—and ordered to be flogged, not exceeding thirty-nine lashes," &c. No. 196, Hall.(*b*)

"Slaves personally insulting or in any manner contemptuously treating any white or free person, harbouring runaways, gaming, fighting, or guilty of any crime which by the law of England would be deemed larceny, shall be punishable for any such offence at the discretion of any one Justice of the Peace; not to extend to life or limb."(*c*) Here contemptuous behaviour, gaming, fighting, and stealing are classed together as offences *ejusdem generis*. The spirit of these enactments was still alive in some of the West Indian Islands at the time when the Commissioners visited them. "There being no assigned place or appointed time (we read in the Report on Barbadoes) for the execution of slave malefactors, the wretched convict, as soon as sentence

(*a*) First Report (Barbadoes), p. 11.

(*b*) *Ibid.* at p. 13. At Demerara, slaves were formerly committed to prison for an indefinite period on the mere warrant of their owner, the practice being to state the cause of imprisonment under the vague term *misconduct*. Second Report (2nd Series), at p. 32. It is only fair to observe that vagueness was a characteristic not of the slave laws alone. Thus No. 11 of the laws of Montserrat was "an Act against *opprobrious language*, which if not duly prevented may overshadow the good Government and administers of justice in this island with the staple clouds of reproach and infamy." The name "Tory" was among the prohibited terms.

(*c*) First Report (Grenada), 96; Smith's "Laws," No. 54, cl. 3.

is passed, is fastened to the nearest tree, when, which frequently happens, the owner of the soil is at hand to prevent it. In such case, the miserable culprit is dragged from tree to tree, from estate to estate, and in one case of then recent occurrence, the constable was at last forced to throw the exhausted sufferer off the town bridge, securing the rope by a lamp-post."(*a*)

The planters of 1825, while deeply imbued with the spirit of their ancestors, were under the influence of new sanctions. They had a far keener conception than the early settlers of the value of the slave as a chattel; and they had also to conciliate the open enemies and the half-hearted friends of slavery. The public policy of the day was inspired by three leading ideas, viz.—(1) the slave is a chattel; (2) the slave is a valuable chattel; (3) the slave must be treated with consideration as a matter of expediency, if not of justice. A firm grasp of these ideas will enable us to understand one of the most complex and confused systems of law that ever regulated the mutual relations of men. Let us take them in order and trace very rapidly their operation in the positive law of the West Indian Colonies.

(1.) *The slave is a chattel.*—To the influence of this idea must be attributed the occasional (though disappearing) ferocity of the laws which defined his status, the almost universal rejection of his evidence in courts of law (*b*), the establishment of a distinct tribunal to try him, and the unerring certainty with which severe corporal punishment followed his conviction.

(2.) *The slave is a valuable chattel.*—Hence, there were no separate Courts for the trial of questions of manumission: the accomplishment of his freedom was to a slave a task of great, and often insuperable difficulty and expense; the free-

(*a*) *Ibid.* (Barbadoes), 50.

(*b*) All the objections to the admission of slave testimony—the low morality of slaves, their want of education and civilisation, &c.—were clearly objections to credibility and not to competency. They prove nothing but the weakness of the Colonial Bar.

holders, who sat with the justices of the peace as assessors or jurors, in the slave Courts, would hardly convict in capital cases; the slave had nearly always the benefit of professional advice and assistance, and in case of theft or injury to private property, the owner usually compounded the offence. The simultaneous existence of these, and of many other, inconsistent provisions in the colonial slave law, may readily be explained by a simple reference to the interest of the owner.

(3.) The influence of the *third* idea to which allusion has been made is apparent in such facts as these: that the obnoxious statute-law of the early settlers while unrepealed was never put in force; that the slave's *peculium* was treated as sacred: and that the benefits of secular and religious education were being gradually extended to the whole slave population.

The system which I have endeavoured to describe had its own grave disadvantages. Take, for example, the rule of law which rejected slave testimony. Two results followed. Acts of violence, of which slaves were the sole witnesses, went unpunished.(*a*) Again, even where there was other than slave evidence, the hardship of the law in excluding the only conclusive proof of guilt might be, and was, most unfairly and illogically pressed against an accused person. Thus, on the trial of Arthur Hodge,(*b*) an infamous slave owner, who was eventually convicted of murder on his own confession, the prosecuting counsel was permitted to say, without interruption from the Bench:—

"You well know, gentlemen, that only on the evidence of free persons can a free person be convicted; policy has decreed that slaves shall only be permitted to testify against their fellow slaves. . . . Were it otherwise, I would here introduce a number of sable wretches as witnesses, bearing the ostensible external marks of the prisoner's cruelty, whose

(*a*) *Cf.* Third Report (Montserrat), p. 38. A similar risk seems, in our own law, to have led to the relaxation of the rule against the admission of the evidence of lunatics.

(*b*) Third Report (Tortola), p. 93.

very appearance would make humanity shudder, and whose tales of woe would cause every nerve within you to vibrate with mental agony!"

The ripeness of the colonial slave system for legislative reform is made very clear by an amusing account, given by the Commissioners,(*a*) of the different answers which they received from the Colonial Judges and Law Officers to the simple question—From what source is the jurisdiction over slaves derived? From Colonial Acts, was the answer given on behalf of Barbadoes and Tobago. From the common law, replied the Chief-Justice of Grenada—the Attorney-General dissenting. A similar difference of opinion was found at Antigua. In Nevis, the Crown Officer drew a subtle distinction between the jurisdiction which the magistrate exercised over slaves, *as slaves*, and that which he exercised over them *as moral agents!* The Attorney-General of Dominica replied, with vague accuracy—"The rule upon the subject is . . . so little understood in the colonies, that decisions founded upon it will be often contradictory."

That within a three weeks' journey from the coast of England there should have been possessions of the British Crown in which a legal question at once so elementary and so important, remained unsettled, was in itself an excellent reason for the appointment of the West Indian Commission.

A. Wood Renton.

(*a*) Third Report, p. 97.

Current Topics.

Aurelio Saffi.(*a*)—Among the most illustrious of the sons of modern Italy, the late Marco Aurelio Saffi occupies a foremost place. To political science and international law he has rendered important services, and for her glorious *risorgimento* Italy is profoundly indebted to his genius and patriotism. Some of the most fruitful years of his busy life were spent in London and Oxford, and on several grounds Scotland claims a warm interest in his history.(*b*) His eventful career is well-nigh inseparable from the history of Italy for the last half-century; but even without a minute knowledge of that history, it is possible to form some estimate of the greatness of his work and the beauty of his character, and, in some degree, to understand why his death in April last was regarded as a great national bereavement.

Scion of a noble family of Forlì, in the Romagna, Marco Aurelio Saffi was born in 1819.(*c*) His parents were entirely free from aristocratic prejudices, and from an early age Aurelio, worthy namesake of the celebrated emperor, evinced remarkably wide and liberal sympathies. During the short-lived revolution of 1831, Forlì was the headquarters of the Italian patriots, including the elder Count Saffi, whose son was thus nurtured amid their generous aspirations for the emancipation of their country; and in 1832, after the withdrawal of the Austrians, when the agitation for reform in the towns of the Romagna was repressed with sanguinary ferocity by the mercenaries of Cardinal Albani, the national abhorrence of the Austrian yoke was succeeded by intense hatred of papal tyranny. From this period, therefore, may be dated that noble love of civil and religious liberty which formed Aurelio Saffi's foremost characteristic through life.

(*a*) When one of the Triumvirs of the Roman Republic, Signor Saffi decreed the abolition of titles of nobility, and therefore dropped his ancestral title of Count.

(*b*) He is survived by his widow, *née* Georgina Craufurd, sister of a former Member of Parliament for the Ayr Burghs, and four sons.

(*c*) For these facts I am chiefly indebted to a biographical notice, revised with the aid of data furnished by Signor Saffi himself, in the *Risorgimento Italiano*, 1885.

Having completed his early education at the Ginnasio or grammar-school of Forlì, Aurelio was sent to the Collegio Campana of Osimo (near Ancona), with a view to prepare for the University. Here, according to an old friend and school-fellow,(*a*) his brilliant talents at once made him the admiration and envy of all, and he was regarded as a master rather than as a fellow-student. He was at once an excellent classical scholar, a master of the history of his country, an enthusiastic student of Dante, marvellously ready as an *improvvisatore*, and *facile princeps* as an actor in the dramatic representations given by the students. When he entered the college, the students belonged, in nearly equal numbers, to two political parties—the *romagnoli*, or liberals, and the *papalini*, or clericals—yet such was the influence of Saffi, the leader of the former, that in this college, situated in one of the Papal States, and entirely under sacerdotal management, all the *papalini* were gradually won over to the camp of the patriots.

The scene changes to the University of Ferrara, where Saffi studied law from 1837 to 1840, and where his patriotic sentiments were further stimulated by the odious presence of an Austrian garrison. After graduating as a doctor of law, he went to the Roman bar, but from the outset he preferred the study of history and philosophy to the practice of his profession. At Rome, where he was introduced to many of the most eminent men of the period, he joined a distinguished literary association, which met at the house of the American consul, Mr. Green, and under the auspices of which he published his first work—an essay on the revolutions of the mediæval Italian communes. During his three years' residence at Rome, his attention was mainly devoted to his favourite studies, including his beloved Dante, and to the subject of constitutional reform.

Returning home to Forlì in 1844, Saffi soon begins his memorable career as an Italian patriot. The "Young Italy" and other secret societies were now vigorously pursuing their common project of emancipating their country from foreign and domestic tyranny, of rendering Italy "one and free" from the Alps to Capo Pachino; and Saffi threw himself heart and soul into the movement. In 1845 the illustrious Marchese Massimo d'Azeglio visited the States of the Church with a view to the better organisation of these societies, and on this occasion Saffi boldly addressed a "Remonstrance" to the papal authorities, rehearsing the national grievances, and earnestly praying for redress.(*b*) Saffi next accepts a mission to Bologna, at the instance of Azeglio, where he meets the leading reformers, communicates with the patriots of Piedmont, Liguria, Lombardy, and Venetia, and elevates the movement into a grand national cause. On his return to Forlì, Saffi was on the point of being

(*a*) Signor C. Trevisani, in the *Fanfulla della Domenica*, Rome, 20th April, 1890.

(*b*) This document, which created a great sensation at the time, was communicated by the British Ambassador at Florence to his own Government. See Blue Book regarding the affairs of Italy, 1846-47, Part i. p. 3 (Parl. Papers, vol. lvii. for 1849).

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arrested for high treason, when the famous amnesty proclaimed by Pius IX. in 1846 relieved him from this peril. He now becomes secretary of the Provincial Council of Forlì, and again throws his whole energy into the cause of reform. Nor were the reformers in the other Italian states behindhand. In Naples and in Sicily they demanded the restoration of their ancient constitutions, in Lombardy and Venetia they openly defied their foreign masters, and in January, 1848, the Revolution broke out almost simultaneously in Sicily and in Milan. The success of the nationalists, headed by King Charles Albert in person, seemed assured, for had not the Holy Father pronounced a solemn benediction on their banners? But within a month the Sovereign Pontiff reversed his policy, and caused general indignation by cursing the war he had so recently blessed.

The Revolution progressed, the Pope fled to Gaeta, and early in 1849 the Roman Republic was proclaimed. The government consisted of a National Assembly, elected by universal suffrage, and an Executive Committee of three members, elected by the Assembly. The first members of the latter were Montecchi, Saliceti, and Armellini; while Saffi, deputy for Forlì, was appointed Minister of the Interior. In this capacity he at once took vigorous measures for the enforcement of law and order, replacing the corrupt papal officials by men of integrity and ability. According to a contemporary, "Saffi was unwearied in inculcating concord and morality, bridling political license, repressing crime, and drawing the Roman Republic and the Austrian Piedmont into closer union with a view to their common emancipation." In March, 1849, after the disaster of Novara, the Assembly took stronger measures for the defence of the republic, and now appointed a new executive committee or Triumvirate, with almost dictatorial authority, consisting of Armellini, Giuseppe Mazzini, and Aurelio Saffi. Upon this Triumvirate devolved the tremendous task of governing the whole of the Roman States. Mazzini was the life and soul of the military organisation, while Saffi devoted his attention to administrative reform, allotting confiscated estates to poor farmers, and abolishing the crushing taxes on flour and salt. It would be deeply interesting to contrast the administration of this Triumvirate with that of revolutionary governments elsewhere. Suffice it to say that the illustrious Triumvirs and their ministers were men of the highest integrity, humanity, and simplicity, that "Saffi, Mazzini, and sometimes Garibaldi, dined daily at a humble *trattoria* at two francs each," that they heroically defended the Eternal City against the treacherous French besiegers, and that, after the surrender of the city and their enforced resignation of office on 1st July, 1849, General Oudinot and his commission of finance found all the public accounts in the most perfect order.

Impoverished, not enriched, by the high offices he had held during the last six months, Saffi is now an exile; but, undaunted by adversity, he at once returns to his favourite pursuits of literature, philosophy, international law, and above all to the advancement of the national cause. We next

find him settled at Lausanne, with Mazzini and a little colony of seven or eight other refugees, all engaged in conducting a review entitled *L'Italia del Popolo*, the keynote of which may be described as the rights of nationality. Persecuted, however, by almost all the European Governments, the exiles were compelled towards the close of 1850 to suspend the review. The scene is next transferred to the freer atmosphere of London, where a Society of Friends of Italy was formed by Mazzini and others, and where Saffi arrived in 1851 almost penniless, and compelled to support himself by teaching and writing. Among his articles of this period may be mentioned "Religion in Italy," in the *Westminster Review* of October, 1853, his *honorarium* of nineteen guineas for which "seemed to him quite a little fortune." Meanwhile his labour in the good cause is unremitting, and the Friends of Italy are in constant communication with Lombardy, Venetia, and other parts of the peninsula. Saffi next repairs to Oxford, where he was appointed Italian Lecturer in the Taylor Institute: and after the Congress of Paris of 1856, when British opinion had become more favourable to Italian unification, he was invited by the Friends of Italy to undertake a lecturing mission in 1857 to London, Manchester, Edinburgh, and other cities, where his eloquent appeals were greeted with the warmest sympathy.

By the war of 1859 the hopes of the patriots were strung to the highest pitch, but the inauspicious Peace of Villafranca, by which the Italian States were to form a federation under papal suzerainty, caused universal dissatisfaction. Mazzini and Saffi thereupon hastened to Italy, nobly resolved to subordinate their republican principles to the supreme object of unification. Baffled for a time, they returned to London, where they strenuously co-operated with the Friends of Italy and a committee bearing the motto, "Italy for the Italians," in further educating public opinion. In 1860, the incorporation of the Emilian States and Tuscany with Piedmont and the kingdom of Sardinia, enabled the exiles to return openly to their country; and shortly afterwards, when Garibaldi had effected his marvellous conquest of the Two Sicilies, he offered the Pro-Dictatorship of Sicily to his friend Aurelio Saffi, an offer which, however, Saffi did not see his way to accept. The other events of 1860 belong to general history. It suffices to say that, thanks to the united genius of Garibaldi, Mazzini, Saffi, and other patriots, seconded by the troops of Victor Emmanuel, the glorious consummation was speedily accomplished, and the Kingdom of Italy was recognised before the end of that memorable year by all the European powers except Austria. One pearl of great price alone was now wanted to perfect the crown of Italy. Rome, and the diminished States of the Church, still remained in the hands of the Sovereign Pontiff. Henceforth, "Rome for the People of Italy" became Saffi's watchword; and at length, partly owing to his exertions and those of Mazzini and Garibaldi, but more immediately as a consequence of the Franco-German war, Rome and the Papal States were finally incorporated

with the Kingdom of Italy in 1870. Saffi's patriotic aspirations are now realised, and the main object for which he had so nobly striven since boyhood is attained, although his republican ideals are not accepted.

A few other items of his work between 1860 and the date of his death remain to be briefly noted. For a time he is joint-editor of the *Popolo d'Italia* at Naples. In 1863 he becomes a member of the Italian Parliament, in which capacity he takes an active share in the work of a committee for the suppression of brigandage. But he soon retires from public life. For the next three or four years he resides chiefly in London, editing, in conjunction with Mazzini, the new weekly periodical, *Il Dovere*. In 1864 he acts as Garibaldi's secretary, on the occasion of the general's visit to Great Britain; and in 1865, appointed spokesman of his compatriots, he thanks Lord Palmerston for his great speech in Parliament in favour of Italy. At length, in 1867, he retires to his modest ancestral property of San Varano, near Forlì, in the Romagna.

Henceforth, apart from much political work between 1867 and 1870, he belongs to literature, to history, and to law. From this period date his numerous articles in *La Roma del Popolo*, including translations of two written by him for the *Fortnightly Review* in 1867. In 1872 he lost his illustrious master and friend, Mazzini, the editing of whose collected works, with most instructive historical prefaces and notes, has since been one of his chief tasks. In 1878 he was appointed Honorary Professor of Public Law in the University of Bologna, and by a unanimous vote of the Consiglio Comunale he received the freedom of the city. A little later we find him installed as President of the Democratic Association of Bologna, with Professor Carducci, the poet, and Professor Ceneri, Dean of the Law Faculty, as Vice-Presidents. In 1884 he visited Edinburgh, as the Bologna delegate to the University Tercentenary Festival, on which occasion he received the honorary degree of Doctor of Laws; and in 1888 he was a striking figure at the Octocentenary Festival of Bologna. He died at San Varano, in April, 1890.

Such in outline is the history of his life and mission. His published works consist of numerous articles in Italian and English newspapers and periodicals, Lectures on Alberigo Gentili and the Law of Nations, and, above all, his contributions to the collected works of Mazzini. "Saffi's publications," says his colleague Professor Ceneri, "and in particular his 'sublime pages' on Gentili, and his 'golden prefaces' to Mazzini, produced an immense effect on his countrymen, and will form a lasting monument of his wisdom, historical accuracy, patriotism, and magnanimity." Some sixty years ago, according to another authority, the idea of nationality was originated by Mazzini, and was afterwards scientifically developed by Mancini, Mamiani, and Saffi. "Italy is now an independent and united nation," says the venerable Saffi himself.(*a*) "Mazzini's

(*a*) Tercentenary Records of the University of Edinburgh, p. 124.

indomitable faith, Garibaldi's heroism, the concurrence of all parties in the struggle for independence, and a whole people's cry for national unity, have powerfully contributed to the solution of the problem." To its happy solution, be it added, no one contributed more powerfully than Saffi, and Independent Italy herself forms a glorious monument to his memory.

Opinions differ as to the respective merits of monarchy and republicanism, of which latter Saffi was a staunch upholder; but among those who had the privilege of knowing him no difference of opinion exists as to the beauty of his character. "I attended his classes at Oxford," says Mr. Bryce,(*a*) "in 1858 and 1859, and was at once impressed by the sweetness and charm of his manners, and by the superiority of his mind; . . . and my sense of his wonderful gentleness and simplicity of character was deepened by meeting him in private. . . . In 1860, when summoned by Garibaldi to act as Pro-Dictator of Sicily" (an office which, however, he saw reason to decline), "it was said at the time that the Hebdomadal Council was perplexed by the question whether the offices of Taylorian Teacher at Oxford and Pro-Dictator in Sicily could be held by the same person! . . . At Oxford he was profoundly respected by all who knew him, and beloved by all who knew him well. . . . In 1882 I paid him a visit at Forlì, where he spent part of each year on his little patrimonial property. Though he had, as it seemed to me, ceased to expect the triumph of his own republican principles, he spoke hopefully about Italy, and had retained unabated all his literary interests. . . . It was pleasant to observe on what friendly terms he was with his *métayer* tenants, and how profoundly he was respected in Forlì." In 1871 Saffi expressed cordial interest in Professor Holland's inaugural lecture at Oxford on Alberigo Gentili, and translated it into Italian; and in 1888 Mr. Holland and the present writer had the privilege of renewing the sage's acquaintance at the great Bologna Festival. On the eve of the festival, at which he was the most remarkable historic personage present, it was touching and pathetic to find him in his *quartier* in a picturesque old *palazzo* in the Via Zamboni, "engaged seven or eight hours a-day with examination papers." Among other friends and colleagues of Saffi may be mentioned two members of Edinburgh University—the late Professor Lorimer, a man of kindred genius, and Professor Masson, who for a time was secretary to the "English Friends of Italy."

A man of consummate ability, wide culture, and intense patriotism, Aurelio Saffi was at the same time the most honourable and most lovable of men—"one of those rare types of virtue," to use the eloquent words of Professor Ceneri, "who seem vouchsafed by heaven at long intervals to irradiate the path of life."

JOHN KIRKPATRICK.

(*a*) Professor of Civil Law at Oxford, &c., to whom I am indebted for these interesting reminiscences.

Civil Marriage and Canon Law—Mixed Marriages in Malta.—The law of Scotland has an interest, greater perhaps than that of any other part of the empire, in some startling proceedings which have recently taken place as to marriage and legitimacy in Malta. That possession was taken over by us from the French in 1801, and has since been governed by a local council, one-half native, one-half English or official, under the Crown. By far the greater part of the population is Catholic, but, some of the residents and the greater part of the garrison and naval squadron being Protestants, there have been always English, Scotch, and Wesleyan congregations. In these circumstances, mixed marriages—*i.e.*, between Catholic and Protestant, have occurred frequently, as well as others where both parties were Protestant. But no serious question seems to have occurred till, in August last, Sir J. L. A. Simmons, formerly Governor, was appointed "Envoy Extraordinary and Minister Plenipotentiary from the Queen to His Holiness the Pope" on a number of Maltese matters. The other matters may have been dealt with successfully, though some of them seem likely to raise complications in the future. But on the Law of Marriage the envoy has got us into a very awkward position.

The local law of Malta on marriage is the Canon Law, and that law, since the Council of Trent, invalidates all marriages not celebrated by a Catholic priest. The British Empire has, of course, never accepted such a result, and, during the present century, the great Catholic countries of Europe—France, Italy, and Austria—have, like ourselves and the Protestant North, adopted the general principle that mere civil marriage is valid, allowing members of any Church to *add* the ecclesiastical forms which the parties consider to be either essential or expedient. The Latin Church, deserted thus by the civil law of Europe, still lays great stress on having mixed marriages celebrated by her own priests, for they are generally forbidden to solemnise them except upon engagements to bring up the children in the Catholic faith. That, of course, is within the right of any communion to prescribe to its own members. But what the civil law is to enforce as to the *validity* of marriage is not a mere ecclesiastical question, and, in these circumstances, the Vatican was scarcely the place to go to for the solution of alleged doubts, nor was a gallant engineer officer the proper person to represent there the law of Great Britain. The result is seen in the following document laid before Parliament this spring (Miscellaneous, No. 1, 1890, p. 11):—

"Sir L. Simmons to Cardinal Rampella.

"Eminence,

"The undersigned, Envoy Extraordinary and Minister Plenipotentiary of Her Majesty the Queen of England, has the honour to acknowledge receipt of a note of your Eminence, by which he is informed that, with a view to removing all doubts as to the validity of marriages celebrated in Malta, in cases where either both parties do not profess the Catholic religion, or one of them belongs to that religion and the other

professes a different religion, and to eliminate the inconveniences which might arise therefrom — His Holiness the Pope has been pleased to declare :—

"1. That marriages celebrated in Malta by all those who profess the Catholic religion, whether both contracting parties be Catholics, or whether one of them be a Catholic and the other a non-Catholic, are not, and shall not be, valid if they are not celebrated according to the form established by the Council of Trent.

"2. That persons professing any other religion may validly celebrate their marriage without the necessity of going through the form established by the Council of Trent.

"The undersigned has to inform your Eminence that Her Britannic Majesty's Government will cause a Project of Law to be introduced in the Council of Government in Malta, in accordance with the above declarations, having for its object to regulate the civil effects of marriages celebrated heretofore, or which will in future be celebrated in that island.

"The undersigned, &c.,

"J. L. A. SIMMONS."

The strongest thing in this undertaking by Her Majesty's Plenipotentiary is that it is to declare, or provide, that "marriages celebrated in Malta," or even, as General Simmons specifically puts it, "those celebrated heretofore" there, are not valid if not celebrated by a Roman Catholic priest, and otherwise in Tridentine form. Now the marriages of that sort during this century have been numbered by hundreds. The children of such marriages—the parents in some cases being civilians, in others in one or other of the services—are scattered all over the world, unconscious, all of them, that the legitimacy of each is threatened by a single stroke. In this extremity the English chaplain to Government, the Presbyterian minister, and the Wesleyan pastor, came together in a joint petition that no doubt should be cast upon these marriages, whether in the past or in the future. But it has been found not so easy to slip out of the knot as to slip into it. Lord Salisbury writes a correspondent that by the agreement, "mixed marriages remain in the same position which they have previously held, and are not in any way affected." That apparently must mean that they remain invalid, and have always been so (unless in Trent form). But Sir James Fergusson, a week later, on 23rd May, when pressed in the House of Commons, explained that "care was taken in the Bill to be introduced, to prevent its having retrospective action which would invalidate such marriages"—to do so, at least, where the ceremony had been performed by "a clergyman of the Church of England." But this roused the Scottish Lion. The General Assemblies happened to be sitting, and the Free Church, which has had a Malta congregation for thirty years, at once sent a petition to the House of Commons, in the interests, not so much of our law, as of our countrymen.

"Considering that during the present century, many Scottish regiments

have been stationed, and many Scotchmen and English Nonconformists have resided, in Malta, your Petitioners feel called upon energetically to protest against the proposed injustice. As it is now admitted that the retrospective action of this new law will cause cruel injustice to those affected by it, they earnestly urge that your Honourable House will take measures to insure that provision against such injustice, both as to past and future marriages, shall be made applicable to all Her Majesty's subjects, without exception of Church or creed."

The Government is, of course, most desirous to avoid such injustice, and on 16th June the Under-Secretary stated that Scottish clergymen were intended to be included in the assurance he had already given. But he apparently still intends to introduce in the Project of Law the general canonical rule that such marriages "are not valid," and to save the exceptions by a system of dispensations or licenses which have been granted by the Governor in the past, and may or may not be continued in the future. Whether this will satisfy the Maltese Protestants, or their co-religionists here, we need not inquire. But in the interest of the general law of Europe, and of our own share in the public law of Britain, we trust that some broader treatment of so great a question may be adopted.

It is not easy to discover Lord Salisbury's ground for holding that Britain has come under engagements not only for "the maintenance of the Roman Catholic religion in that island," but also for "the enforcement of the canon law." The only historical foundation for it which we have seen is a very rhetorical proclamation by the Civil Commissioner on 15th July, 1801. But even in it the strongest passages are as follows:—

"His Majesty will protect your churches, your holy religion, your persons, and your property. . . . Happy people! receive with gratitude all this goodness from a King, who is the father of his subjects, who protects the weak against the strong, the poor against the rich, under whose dominion all are equally protected by the law."

The idea that the obligation to "protect your religion" obliges us to give the religious majority the power to refuse the right of marriage to a minority in Malta, where "all are equally protected by the law," seems very wild. There is nothing whatever in this undertaking to prevent Great Britain throwing open civil marriage even to those Catholics who choose to avail themselves of it. But when it comes to be a mixed marriage, and both parties prefer to be married by a Protestant, or in Protestant form—whether it be by Archdeacon Hardy in the English, or Mr. Wisely in the Scottish, or Mr. Laverack in the Wesleyan form—the proposal to refuse permission for this in the future, or to invalidate it when already celebrated without permission, is an unmeaningly retrograde step. Scotland, and the law of Scotland, had a clear interest, even in 1801, to insist that her view of marriage, which was the one even then underlying the international practice of Europe, should not be so gratuitously trampled

upon. But ninety years have all but passed now, and within that time the world of Europe has come round to the doctrine that marriage is a natural ordinance before it is an ecclesiastical; that the civil bond, and the resulting legitimacy, must be respected even where the Christian sacrament does not exist; and that those who enter into the civil bond should be encouraged to clothe it with such Church sanctions, and such alone, as they themselves prefer. To "enforce the canon law," which is the Latin Church law, against those who are not members of that Church, or who do not wish to submit to it, and who have chosen to be married according to the Protestant form, one of them being a Protestant, seems a strong suggestion to be made even by the Vatican—especially as the Vatican in the same breath recognises Protestant marriage generally as valid, though not according to the rules of Trent. The question is a world-wide one, to which every jurisprudence in Europe contributes its share. The law of England has no doubt special difficulties in the matter, and these are naturally reflected in the hesitations of English statesmen. But it is not too much to say that the marriage law of Europe—even of the great Catholic states of Europe—is already identical in principle with that of Scotland. And Malta is too small a pebble to arrest the revolution of the great wheel of European law.

A. T. I.

Right of Expelling Foreigners.—Public attention has lately been directed from two causes to the very delicate question of the so-called right of expulsion of aliens. One of these is the continued invasion of the Western States of America, and in a less degree of Australia, by armies of Chinese labourers; the other was the fact of General Boulanger carrying on his political campaign, while living first at Brussels and afterwards in London. It is admitted on all hands that in every sovereign state the power must exist of compelling foreigners to leave its territory, but it is equally clear that this power must not be exercised arbitrarily. Nothing would be more fitted to create international friction than to give a privilege to a favoured nation, or to expel *en masse*, the natives of a particular country. A well-timed series of short articles, in the *Journal du Droit International Privé* deals with this question, and indicates the principles on which this right has hitherto been put into practice in the different states. Probably in no European country would its exercise be so difficult as in our own. It may be assumed as a sound principle of international law that no state is bound to afford an asylum to a foreign politician or "pretender" who makes his temporary home a base of operations directed to overthrow the Government of his native country. There is therefore no doubt that the Belgian Government was within its right from an International point of view, in intimating to General Boulanger, after he had been three days in Brussels, that they could not continue their hospitality to him. This

polite phrase, like most of the neatly turned expressions of the *Comitas Gentium* was not to be mistaken. The Belgian Authorities could have withdrawn their hospitality if necessary and have conducted their guest to the door. In Belgium the matter is regulated by statute as well as common law. Foreigners are divided into "simple foreigners" and "resident foreigners." Any alien who presents a passport, or otherwise proves his identity, can at any time after his arrival in Belgium cause himself to be registered as a "resident foreigner." This brings him within the terms of a recent Statute which provides that any "resident foreigner" who by his conduct compromises the public peace may be treated by the Government in one of three ways.

1. He may be ordered to leave a particular place.
2. He may be required to live in a particular place.
3. He may be compelled to leave the country.

The last measure, however, can only be taken after the matter has been discussed at a Ministerial Council. The foreigner has then within twenty-four hours to cross the frontier he selects.

But the "simple foreigner" may be dealt with still more cavalierly. By the Belgian common law he is liable at any moment to the *renvoi*. The "*administrateur de la Sûreté Publique*, a functionary who roughly corresponds with our Home Secretary, receives every day the names of foreigners who have arrived, and their stay in the country is at his discretion." He may order any one of them to be conducted by the police to any frontier, and expelled. This is simplicity itself, and probably seldom leads to injustice in a country where the Ministry is responsible to the Chamber of Representatives, as is in Belgium the case.

Still instances have occurred which show the necessity for strict control of this power. It is not long since two German socialists, pursued by the law for their opinions, fled to Liege. German detectives were set to watch them there. After a time, the socialists, incurring the suspicion of the authorities, were conducted to the frontier. Now the "*renvoi*" differs from the "expulsion" in this among other things, that the authorities do not give their victim the choice of leaving the country by any frontier he may choose, but on the other hand turn him out where they like. Accordingly the German police pointed out to their Belgian colleagues that the cause of justice would be furthered if the two socialists were escorted to the German frontier instead of to the French. Like the unhappy rat, the door of whose trap is opened to let him escape into the jaws of the expectant terrier, the refugees had to walk across the frontier into the arms of the German police, who of course, as their crime was political, could not have got at them by the legitimate mode of extradition. Attention was drawn to the matter in the Belgian Chamber, and it is to be hoped such a violation of the rights of aliens will not be repeated.

In Italy the subject has recently been dealt with by statute. The new Italian Police Act, of the same date as the Criminal Code (30th June,

1889), prescribes that foreigners convicted of crime may be escorted to the frontier and expelled from the kingdom. Secondly, that the Minister of the Interior may, on public grounds, order any foreigner, whether merely passing through, or residing in the Kingdom of Italy, to be expelled in the same way. The principle on which this power, which existed before the Act, has been uniformly exercised in Italy is simple and good.

The Government never orders the expulsion of a foreigner except under two conditions:—First, that he has committed some act which would have made him amenable to the criminal law, if he had been an Italian; Secondly, that it appears in the circumstances inexpedient to proceed against him criminally. A foreigner has little reason to complain of expulsion on these conditions. It is true he might have been acquitted if he had gone to trial. On the other hand he might have been sentenced to a long term of imprisonment. It is fair enough to set the one against the other.

F. W. P.

Reviews of Books.

Commentaries on the Present Laws of England. By Thomas Brett, of the Middle Temple, Barrister-at-Law, LL.B., London University, B.A., Sch. T.C.D., &c., &c. 2 vols. London: Wm. Clowes & Sons, Limited.

Mr. Brett is already well-known as joint-author of Clerke & Brett's "Conveyancing Acts," and as author of "Leading Cases in Modern Equity;" his present book, therefore, comes before the profession well recommended. The field now chosen by him is not any one branch of English law, but "An account of the present Laws of England in their entirety." This is an immense undertaking, and whether or not it can be accomplished by any one within the compass of two volumes like the present, with a complete measure of success, may well be doubted. But it must be admitted that Mr. Brett has devoted a quite amazing amount of labour to his task, and that he has managed to produce a work of remarkable clearness and perspicuity. The references to cases are exceedingly numerous, as the Table of Cases shows; and these appear to have been selected with judgment and care. The book, in short, is a high-class piece of work of its kind, and a valuable addition to the practising lawyer's library.

In his preface, the author seems to expect the work to be read not only by the profession but by "the public" also; but when does the public ever read a law book? Blackstone's "Commentaries on the Laws of England," Bell's "Commentaries on the Laws of Scotland," and a few other legal works may, indeed, find places in the book shelves of non-professional readers, but they are rarely disturbed in their resting places; and it is to be feared that any attempt to popularise the study of law with the British public is not likely to be successful. Nor does the present book seem well adapted for such an attempt, being too condensed as to matter, and condescending to the minute details which make the law attractive only to those who earn a living by it.

A leading idea of the book is, to use the language of the author, "to

bring into prominence the present and living law," and this is well carried out. The book is disembarrassed of a great deal of obsolete law, and the actual system and the principles that govern the decisions of cases in the Courts of the day are the more clearly presented to the reader. This is, no doubt, a great gain; it cannot, however, but be accompanied by some corresponding loss. The history of English law is, owing to many causes, almost part of the law itself, and no one can thoroughly understand the law of to-day who is not familiar with the transitions it has passed through to reach its present state. The reader, therefore, will derive most benefit who is already, at least, fairly well acquainted with the subjects dealt with, for the book, in most of its parts, can by no means be said to be suited for the mere beginner in legal study. Its value to the practising lawyer is its capability of being used as a summary or book of reference, and, for some of the subjects treated, it would not be easy to find a better. We refer particularly to the subjects of real property law and equity. Its value, however, in this respect would, we think, be enhanced by a much fuller index. It is indeed remarkable how many of our law books fall short in this respect.

The growth and tendency of modern English jurisprudence are forcibly and ably illustrated throughout the work: and many of its pages are like so many milestones to mark the advance of English law in the direction of justice and common sense, breaking through the bands of "case law," and emancipating itself from the narrow constructions and hide-bound principles of the old common law. The author justly recognises how large a part in this transformation is due to the late Sir George Jessell, by the frequently recurring quotations and illustrations borrowed from the judgments of that great lawyer and judge—a due appreciation of whose eminence may perhaps be fairly taken to be a mark of a progressive English lawyer.

The space given to details is sometimes too great in a work intended to comprise a view of English law in all its branches, and there is, therefore, noticeable a certain want of proportion in the treatment of different subjects. Thus the mysteries of "grand" and "petit serjeanty" might well have been omitted, leaving them to be studied in the text-books specially devoted to real property law, while, on the other hand, the Statute of Frauds, is treated much too summarily, having regard to its great importance. The book also contains precedents of statutory forms of conveyances, which cannot surely be required except for the instruction of the first year student, for whom other parts of the work do not appear to have been designed. Instances such as these suggest that Mr. Brett has at times been undecided which class of readers to address, and has tried to make a compromise between the claims of lawyer and student, which, like most compromises, may fail to please both parties.

As we have already indicated, the question must arise whether a book attempting so much within such, comparatively, narrow bounds, can ever

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be altogether a success, even when the work of a lawyer and writer of great competence and skill. Some subjects must necessarily be treated inadequately, or even in outline merely. In the present instance, however, the portions of the book to which, it may be supposed, the author devoted his best efforts, are remarkably good, clear and concise presentments of the law, and nowhere in any page has there been noticed any substantial inaccuracy or slovenly treatment.

In conclusion, the book may be recommended as exceedingly useful for students preparing for examinations at or towards the end of their courses of study (the word "cram" has an ugly sound). But its merits are far beyond that purpose merely, and, we repeat, that the book may be confidently expected to take a prominent place among the practising lawyer's most used and best appreciated works of practice.

J. Walker Craig.

The Judicial Dictionary of Words and Phrases Judicially Interpreted. By F. Stroud, of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Limited, 1890.

This is unquestionably a work of practical utility. It will supply very efficiently a want which is met by no existing lexicon or other compilation. In Bouvier's American Dictionary there is a useful title under the head, "Words," which on a very limited scale seeks to serve the same end which Mr. Stroud has had in view; but Bouvier gives only bare references to authorities, and these mostly American. In the digests of the current series of English Law Reports, there are valuable titles under the same heading, and with the same purpose. In Elphinstone, Norton, and Clark on the Interpretation of Deeds, there is a glossary of terms interpreted by the Courts; there is a similar list in Hardcastle on Statutory Law; and in regard to the construction of terms in wills, a good deal may be gleaned from the index of Jarman, Williams, or M'Laren. But those who have profited most by these partial aids will best appreciate the service done by Mr. Stroud in compiling this elaborate and comprehensive collection of judicial interpretations, which not only embraces all that is most valuable in the collections mentioned, but contains a great deal more. Important questions of construction occur every day in regard to terms which cannot be classified in any special category or department; and many decisions will be gratefully discovered in these pages under alphabetical headings, which probably would never have been found elsewhere.

But while all practitioners will value the ready reference afforded by this book, it is obvious that the assistance derived must be more by way of analogy and suggestion than by way of direct authority. A

binding precedent is hardly to be looked for here; for a judgment on the meaning of a word as it occurs in one document cannot determine its meaning in another, with a different context. As is shown in an introductory chapter prefixed to the Dictionary, "every possible expression a man can use may be explained away by the context" (quoted from Vice-Chancellor Wood). In the case of wills, in particular, great latitude of construction is allowed, which English lawyers generally explain by the supposition that the testator is *inops consilii*, but which is sufficiently accounted for by the fact that the Court has no other object to keep in view than the discovery, by all admissible indications, of the testator's intention. In interpreting Acts of Parliament, also, considerable latitude is used; and the reason given by Lord Tenterden has, at all events, not lost force since his day—viz., that though the Legislature cannot be said to be *inops consilii*, yet "we may say that it is *magnus inter opes inops*." In the case of statutes, however, though the intention of the Legislature is always the primary consideration, the interests of parties affected are also, in case of ambiguity, weighed by the Court; and enactments restrictive of liberty, or productive of burdens, are strictly interpreted. Again, in construing a deed or contract, the criterion is not so much what was meant by the party undertaking an obligation, but rather what is the proper legal interpretation which the other party is entitled, in the circumstances, to put upon the words used. As Lord Watson said in the Murtly case, every person who becomes a party to a written contract, "contracts to be bound by the interpretation which a Court of Law may put upon the language of the instrument." These distinctions require to be remembered in using the Judicial Dictionary.

The author says in his preface that "this work in no sense competes with, nor does it cover the same ground as, the Law Lexicons of Jacob, Tomlins, Wharton, or Sweet. As its name imports, it is a dictionary of the English language (in its phrases as well as single words), so far as that language has received interpretation by the judges." But Mr. Stroud has not been careful to confine his work to the limits which he thus prescribed for himself. Many of the definitions given are not judicial but statutory; many others are taken from text-books; and many archaic explanations are borrowed from Coke, Spelman, and the Termes de la Ley. In so far exceeding the promise of his title-page the author has materially increased the bulk of the volume, but we doubt whether he has added much to its practical value. Had he stuck more closely to his text, he would certainly have been less liable to criticism on the ground of inequality of performance. For example, the descriptions of the ordinary terms of Criminal Law in Stephen's Digest are transferred to their appropriate pages in this dictionary; but the fact that the author of that Digest is a judge does not make his definitions "judicial interpretations," in the sense of the title of the Dictionary; and when all the crimes have separate articles, one is apt to inquire why the Dictionary is silent on some other

matters of equal interest—*e.g.*, Contributory Negligence, Copyright, *Donatio mortis causa*, Market Overt?

This is not by any means a philological dictionary. It rarely happens that a judgment on the construction of a word is based on etymology, though an instance may be found under *Quarry*, where a case is cited in which that word was held to be inapplicable to an underground pit or mine. But nothing is more frequent, if the word under construction is not of the commonest, than an appeal to etymology (often very desperate), from one side or other of the bar. One need only recall the recent case of *Ciceri & Co.* as to the meaning of "statuary"; or the famous English case of *Leeds* v. *Amherst* (14 L.J. Ch. 73), in which Mr. Bethell, afterwards Lord Westbury, contending that an equestrian picture of the Duke of Schomberg could not pass under a bequest of "portraits," founded on a particular use of the word *pertractare* in Cicero's *Natura Deorum*, and threatened the Lord Chancellor that if he decided against him he would be going against all the learning of all the colleges in Oxford. It might, perhaps, have been worth while for Mr. Stroud to insert occasionally, in brief parenthesis, such derivations as throw light on the true meaning of words. It is helpful, for instance, to know that *venue* comes from *vicinetum*. There is a good deal of etymology, it is true, in the numerous quotations from Coke and other old writers; but while much of that is valuable, some of it is rather antiquated. Under *Agreement* we have the following quotation from Plowden: "Agreamentum is a word compounded of two words—viz., of *aggregatio* and *mentium*, so that *aggreamentum est aggregatio mentium in re aliqua facta vel facienda*. And so by the contraction of the two words, and by the short pronunciation of them, they are made one word—viz., *aggreamentum*, which is no other than an union, collection, copulation, and conjunction of two or more minds in anything done or to be done." It amuses, rather than amazes, us to read this in the ancient pages of Plowden, but we marvel to find such whimsical nonsense solemnly reproduced here, without question or comment; and we marvel still more to find the same derivation given in Sweet's Dictionary, in which the etymology is generally a strong point. Ducange has a word upon this: "*Agreamentum ridicule definitur apud Rastall et leguleios Angl. aggregatio mentium.*" We should have expected that to be sufficient.

As a practical piece of legal work this Dictionary deserves high commendation. Only long use can bring to light the full merit of a book of this kind; but such examination as we have been able to make, has convinced us that Mr. Stroud's work is characterised by remarkable clearness and accuracy. All readers will gratefully acknowledge the pains that have been taken, by typographical aids, cross references, and otherwise, to facilitate search. The references to decisions have been verified with great care; and tables of cases and statutes are prefixed, with a generosity which, in dictionaries, is unwonted. Under certain heads there is a valu-

able classification of the decisions—*e.g.*, under *Or read as And, and vice versa*; *Precatory Trust*, where there is a list of phrases held to constitute such trust; *Reasonable*, where are lists of conditions held reasonable, and unreasonable; *Shall*, where the decisions are tabulated according as the word merely implies futurity, or is directory, or peremptory. We have noted hardly anything erroneous. There is a trifling slip in citing the case *Duck* v. *Bates* in the articles *Any* (p. 39), *Dramatic* (p. 228), and *Place* (p. 593); the reference being to the judgment of the Divisional Court (12 Q.B.D., 79), instead of to that of the Court of Appeal (13 Q.B.D., 843), which the quotations from the Master of the Rolls and Lord Justice Fry show to have been really in the author's mind. We should have suggested the amalgamation of the two articles, *A* and *An*, as the *dicta* relating to the one of these are surely equally applicable to the other. Besides the article *Et Cetera*, and referring to it, there is a separate head for the abbreviated symbol *&c.*; but we are unable to conjecture on what principle of selection the place chosen for the latter is between *Abutting* and *Acceleration*. The problem as to the proper spelling of "Indorse" or "Endorse" is solved with a wisdom and impartiality which remind one of Solomon's judgment; one article being given to *Endorse*, and another to *Indorsed*. Under *Blasphemy*, one might perhaps have expected some notice of the case of *Ramsay and Foote* (15 Cox, C.C. 231), and the law there laid down to the jury by Lord Chief-Justice Coleridge, which was impugned by Mr. Justice Stephen in the *Fortnightly Review*. Under *Profits*, the result of certain recent judgments is stated to be that "bonuses by an insurance company to participating policy-holders are 'profits' chargeable with income-tax." This is accurate so far as proprietary companies are concerned; but it should have been stated that the contrary has been decided by the House of Lords in regard to a mutual company. There is indeed a correct reference to the latter decision; but that does not sufficiently qualify the too general statement above quoted. Under *Cruelty*, it would not have been inconsistent with the author's usual method to notice the Cruelty to Children Act of last year; and under *Undue Preference*, we miss a reference to the Railway and Canal Traffic Act of 1888.

The Dictionary only professes to deal with English law; but there are some references to Scotch cases. Under *Science*, we find a *dictum* of Lord President Inglis in *Writers to the Signet* v. *Inland Revenue* (11 R. 34), relative to the exemption from duty appropriated to science, &c. Under *Strictly Temperate*, we are referred to the familiar case of *Standard Insurance Company* v. *Weems*; *Passenger Train* is illustrated by *Burnett* v. *Great North of Scotland Railway*; and in *Statuary*, the judgment of the Court of Session in *Ciceri & Co.* (subsequently affirmed by House of Lords) is cited. The article *Dispone* is wholly devoted to the law of Scotland, consisting of a reference to the case of *Kirkpatrick*, "as to the importance of 'dispone' in the operative words of a Scotch conveyance." We trust it will not seem ungracious if we mention that, by statute passed in the same

year as the decision in Kirkpatrick's case, the necessity for the particular word "dispone" was done away with, in regard to all deeds subsequently coming into operation (37 & 38 Vict. c. 94, § 27). One or two instances have occurred to us in which Scotch decisions might usefully have been added to the references. Under *Port*, for example, *Hunter* v. *Northern Marine Insurance Company*, 1888, 15 R. (H.L.) 72, 13 App. Ca. 717, might have been cited as to the construction of the words "in port" in a marine policy. Under *Condonation*, a reference to the judgment of the House of Lords in *Collins* v. *Collins*, 1884, 11 R. (H.L.) 19, in which the English as well as the Scotch law was examined by the judges, might have helped to clear up the question whether condonation may be conditional, as to which contradictory opinions are quoted in the Dictionary.

It is announced in the Preface that a companion volume, based on American decisions, is in a forward state of preparation. Might not room be made, with the help of a little excision, for the incorporation of the American decisions in a second edition of this Dictionary, which we doubt not will soon be called for?

GEORGE WATSON.

A Manual of Public Health and Sanitary Science. By T. G. NASMYTH, M.D., D.Sc. Edin., Ph.D., Camb., &c. Edinburgh: T. & T. CLARK, 1890.

The Handbook of Public Health. By JOHN SKELTON, C.B., LL.D., Advocate, Secretary of the Board of Supervision. Edinburgh and London: WILLIAM BLACKWOOD & SONS, 1890.

Both these books are additions to the list of volumes which the Local Government Act of last year has called into existence, and both deal with the subject of public health, though from different standpoints.

Dr. Nasmyth in his Manual treats the subject from a medical or sanitary rather than from a legal aspect. The aim of the author, as expressed in his preface, is to provide "a practical guide to county councillors, members of District Committees, and their officers in their various duties as administrators and advisers in sanitary matters." It may at once be said that the author has fully accomplished his object. The usefulness of a book of this kind depends in a great degree on the arrangement of the information it contains, and the arrangement of this work, as far as sanitary problems are concerned, leaves nothing to be desired. Taking the definition of nuisance in the sixteenth section of the Public Health Act, 1867, Dr. Nasmyth goes over one by one the different conditions that form a nuisance as set forth in the various sub-sections of that section. Under each sub-section he gives the latest scientific information on the points

contained within it, and enumerates the best methods for preventing and abating the nuisance. He then briefly indicates the powers and duties of the Local Authority in dealing with the matters contained in that particular sub-section. For example, under sub-section (a) any "matter or circumstance rendering any inhabited house, building, premises, or part thereof injurious to the health of the inmates or unfit for human habitation or use is a nuisance. Dr. Nasmyth commences with insufficiency of size, stating the amount of cubic space required for each individual in workhouse, in barracks, and in houses regulated under the Glasgow Police Act, and in this connection he also demonstrates by statistics that the death rate of a district increases in proportion to the density of the population, and the overcrowding of the houses within it. He then passes on to defects of structure, and deals with the site of houses, the different soils and the conditions affecting them, the best materials for building, the remedies for dampness, and the construction of roofs, rhones, and floors. Other matters rendering houses unhealthy, such as insufficient ventilation and defective drainage, are fully gone into in a similar manner, and then follows a statement of the powers granted to Local Authorities for the purpose of removing the conditions which render dwellings unfit for human habitation. The other sub-sections are dealt with in the same exhaustive way. Nine chapters of the book, from the second to the tenth inclusive, are taken up with nuisances and their removal. The four concluding chapters are devoted to prevention of disease under Orders in Council. Hospitals, their construction, general arrangement, and management, the disinfection of premises, the notification of infectious diseases, vaccination, common lodging-houses, lodging-houses in burgh, cellar dwellings, and unsound food. With regard to the introduction and chapter first, we think, as the author is dealing with his subject from a medical rather than from a legal standpoint, it would have been better if he had set forth the constitution and general duties of Local Authorities and their officers under the Public Health Act, as amended by the Local Government Act, in a clear, connected summary, instead of by quoting *verbatim* disconnected sections of the Statutes in question. Then why does the author give the rules and regulations issued for the guidance of English medical officers and sanitary inspectors by the Local Government Board in place of the bye-laws recommended by the Board of Supervision for regulating the duties of such officers in both the counties and burghs of Scotland, and recently issued in a revised form to meet the changes introduced by the Local Government Act. The author, indeed, seems to devote too little attention to the Board of Supervision. The Board is the central and controlling body under the Public Health Act, just as the Local Authority is the local and acting body. Yet the Board of Supervision does not appear in the index to Dr. Nasmyth's work, and only casual mention is made of them in the text. In a sanitary manual, should not some notice have been taken of the powers of the Board to institute inquiries into the state of public health in any

part of Scotland; of the inspecting officers appointed by the Board, who go up and down through the length and breadth of the country, objects of terror to indolent and neglectful Local Authorities and their officers, and who annually make reports on the sanitary condition of these districts; and also of the energetic medical officer of the Board, whose sage remarks on the treatment of infectious diseases and sanitary matters in general, are periodically scattered over the land, in the circular letters of the Board? This intrusion, however, only applies to the preliminary chapters of the Manual. The primary purpose of the work—viz., the application of the latest discoveries in sanitary science to the prevention and removal of conditions injurious to public health, is handled by the author in a terse and perspicuous manner. This Manual containing in small compass, so much information, arranged in clear and systematic order, should be in the hands of every medical officer and sanitary inspector, and will also prove useful as a practical guide to every one having anything to do with Public Health administration.

The main features of Mr. Skelton's "Handbook of Public Health," are the same as those of the Manual of "The Public Health Acts" by Messrs. Dykes and Stuart, issued in the spring of the present year. It consists of statutes, and portions of statutes, on the subject of Public Health, with notes, explanations, and relative forms. Mr. Skelton's position as Secretary of the Board of Supervision, gives him exceptional opportunities for the study of these statutes, and for noting cases and opinions bearing on their provisions. This volume shows that he has taken advantage of his opportunities. It is divided into four parts. Part I. is made up of the text of the Public Health Acts proper, annotated, and concludes with practical suggestions. The notes to the sections are numerous and concise; combining clearness of exposition with thoroughness in details. Where corresponding provisions appear in the English Public Health Act, 1875, or in the General Police Act, these are taken notice of. Changes introduced by the Local Government Act are also marked. To show what an exhaustive search has been made for pertinent cases, it may be mentioned that on p. 94 the decision of Lord Ordinary Kyllachy in the important case of *Tolmie* v. *Parochial Board of Urray* is quoted from the *Glasgow Herald* of 12th March, 1890. This decision, which finds that, where the cost of supplying a special district with water is so great that the maximum assessment imposed over the special district is insufficient to meet it, the deficiency may be made up out of the general assessment over the whole district, was adhered to by the Second Division on 21st June last. But we do not see in what connection Mr. Skelton gives a summary of the case of the *Caledonian Railway* v. *Baird & Co.*, 3 R. 839, in a note to section 19. That case deals with a common law nuisance and its author, and with regard to a watercourse polluted by one person, and flowing through another's property, the author of the nuisance under the Public Health Acts is a totally different

person from the author of the nuisance at common law. The author of the nuisance under the Public Health Acts, and, as such, liable for its removal, is the owner of the land through which the watercourse flows; the author of the nuisance at common law is the person through whose act the water is polluted. Part II. contains a selection of important circulars of the Board of Supervision dealing with sanitary matters. In Part III. the rules and bye-laws recommended by the Board for use under the different Acts are set out. Part IV. is composed of the sanitary provisions of eight different statutes, or sets of statutes relating to or affecting the public health, most of them accompanied with notes and explanations. The series is headed by the Local Government Act of last year, and closes with a concise summary of the various statutes dealing with the housing of the working classes. We are afraid a large number of Local Authorities are unaware of the fact that by sections 37 of the Coal Mines Regulation Act, 1887, an unfenced shaft of an abandoned mine within fifty yards of a public road or place, or in unenclosed land, is constituted a nuisance in the meaning of section 16 of the Public Health Act, 1867. In Part V. are printed the forms of procedure under the last-mentioned Act prepared by the Board of Supervision. A voluminous index concludes an admirable, indeed almost model, Handbook of its kind.

J. C. C. B.

Étude sur la Publicité de la Propriété dans le droit Romain. Par Georges Cornil. Brussels, 1890.

This little work was prepared as a thesis on the occasion of the author's admission as an *agrège* in the Law Faculty of the University of Brussels. Its aim is to indicate the institutions in Roman law which contained the germ and fulfilled in some measure the functions of the modern system of registration of title. The points made are familiar to students of Roman law. In the early period the formalities of *mancipatio* and *in jure cessio*, which involved the presence of witnesses and the authorisation of a magistrate, furnished the means both of proving the transfer of property, and of publishing the fact to third parties interested. But the publicity thus secured became more fictitious than real, when the Roman territory extended and the Roman commerce developed far beyond the bounds of Latium. The old forms of conveyance gradually fell into desuetude; and simple tradition became the standard mode of transferring property of all kinds. A short experience proved that the rule that property in immoveables should pass by delivery, or mere agreement to deliver, opened a wide door to fraud. Some more public solemnity was required to bring the transaction to the knowledge of third parties. A constitution of Constantine had ordained that gifts *inter vivos* must be executed in writ-

ing, and registered *apud acta*. The system of registration (*insinuatio*) was carried further by subsequent emperors, till in the sixth century we find that in most written contracts there is a clause providing for registration. It may be mentioned that, nearly a century ago, Mr. Ross described fully and clearly the Roman ancestry of our Scotch system of registration for preservation and publication.(*a*)

A readable account of the method of keeping the registers in various countries would have been an interesting supplement to the historical sketch; but M. Cornil only supplies a formidable bibliography of this subject, in which neither Scotland nor Ireland (both of which countries possess admirable land registers) appear at all.

The continuity of the book is destroyed by the frequency of quotations and references in the text. The reader would more readily condone a moderate amount of artistic plagiarism than the obtrusive parade of authorities to fortify the commonplaces of jurisprudence.

J. Mackintosh.

(*a*) Ross' Lectures, ii. pp. 67 *seq.*

Notes on Decided Cases.

Superior and Vassal—Section 4 of the Conveyancing Act of 1874 — It is not an easy thing to subvert a long-established system of conveyancing without affecting any person's pecuniary rights. The fourth section of the Conveyancing Act of 1874 was intended merely to simplify conveyancing by rendering unnecessary charters by progress, which superiors were already bound, when called upon, to grant in favour of their vassals' heirs and successors. But it has had the unforeseen effect of enlarging the pecuniary rights of superiors at the expense of their vassals. It contains a proviso, which the framers of the statute no doubt thought sufficient to prevent injustice, to the effect that a superior shall not be entitled to demand any casualty *sooner* than he could have done under the old law. But, whereas under the old law the casualty exigible might be only a small sum as relief-duty; it may now, in precisely the same circumstances, be a year's rent as composition. This unexpected and inequitable result is becoming more and more apparent from the decisions of our Courts in the numerous cases which have arisen between superior and vassal since the year 1874. The decision of the House of Lords in *Lamont* v. *Rankin's Trustees*, has authoritatively settled that a purchaser can no longer escape from payment of composition by tendering as vassal the heir of the last entered vassal; and the pecuniary rights of owners of lands and houses are still further injuriously affected by the decision mentioned at page 110 in this volume, in the case of *Stuart* v. *Hamilton*, 4th July, 1889, 16 R. 1030, to the effect that the implied entry introduced by section 4 of the Conveyancing Act creates a new investiture requiring to be enfranchised by payment of a composition, even where the person who is called upon to pay is the heir-at-law of the last person who paid a casualty for his entry. That decision was pronounced in accordance with the opinions of a bare majority of the whole Court—seven judges against six, and the case would have been decided the other way but for the death of Lord Fraser, who had returned an opinion in favour of the heir. His successor, Lord Kyllachy, unfortunately took a different view of the case. It is thus not surprising that, in the more recent case of *Stuart* v. *Jackson* now

to be noticed, the minority adhered to the opinions previously expressed by them to the effect that implied entries, on which no casualties have been paid, are to be disregarded in determining the question whether relief-duty or composition is exigible. The question is so important that it will, no doubt, ere long, be authoritatively settled by an appeal to the House of Lords, unless the Legislature intervene, and, by a short Amendment Act, restore superiors and vassals to the same pecuniary position as they occupied before 1874. But of this there seems but little prospect at present.

The case of *Stuart* v. *Jackson*, decided by the whole Court on 15th November, 1889, 17 R. 85, shows that little if anything has been done by the Conveyancing Amendment Act of 1887. The main purpose of the Bill, as passed through the House of Commons, was to provide a remedy for the grievance arising from the construction put upon the Conveyancing Act by the decisions in *Lamont* v. *Rankin's Trustees* and similar cases. But it will be remembered that the Duke of Argyll persuaded the House of Lords to reject the main provisions of the Bill, and to pass only some minor provisions. Among them is a clause providing that when by any *mortis causa* deed any heritable estate is conveyed to trustees "for behoof of or with directions to convey the same to the heir of the testator, whether forthwith or after the expiration of any period of time not exceeding twenty-five years, or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate," only a relief duty shall be payable to the superior. Now the case of *Stuart* v. *Jackson* seems to show that this statutory provision was unnecessary, and that the same result can be reached at common law, without any limitation as to the period of time within which the conveyance to the heir must be made. The action having been raised before the passing of the Amendment Act referred to, the Court held that it did not apply, but by a majority of nine to four the truster's heir was held liable in relief duty only. The difference of opinion arose from the different views taken of the purposes of the trust. The minority dissented from the judgment, on the ground that the purposes were not solely for behoof of the truster's heir, so that it may be stated as the unanimous opinion of the whole Court that where a trust is solely for behoof of the heir, the infeftment and consequent implied entry of the trustees will not entitle a superior to demand payment of composition. This, indeed, may be said to have been already settled by the case of *Lord Home* v. *Lyell*, 9th December, 1887, 15 R. 193. In the case of *Stuart* v. *Jackson* the truster had died leaving only one son, his heir, but he had contemplated at the date of his death a state of the family which never did exist, and had directed his trustees to hold the estate till his youngest child should attain majority, and then divide it equally among the whole children, with a clause of survivorship, subject to the *conditio si sine liberis*, further providing that in the event of all the children dying without issue before the period of division, the trustees should realise the estate and pay over the proceeds in such manner as he should direct by any writing, and failing

thereof to his nearest heirs. The trustees conveyed the estate to the son and heir on his attaining majority, and he took infeftment before the superior had made any demand for a casualty. In these circumstances, the Lord President and the majority of the judges held that the purposes of the trust having proved inoperative on the truster's death, the character and rights of the truster's heir were not thereby affected, and (following the case of *Mackintosh* v. *Mackintosh*, 5th March, 1886, 13 R. 692) that the mere mode in which the heir had made up his title could not render him liable in composition. On the other hand, Lord Shand and the other judges who formed the minority held that the infeftment of the trustees had created a new investiture—(1) because the trustees held, not solely for the heir, but also for his possible issue, in the event of his dying before attaining majority, and (2) because the trustees had powers of sale under which they might have conveyed the estate to entire strangers. It may be observed that the first of these reasons would have had greater force if the superior had demanded a casualty while the trustees were still holding the estate—the subsequent conveyance to the heir showed that they had throughout been holding for him; and the second reason would have had greater force if the trustees could have exercised the power of sale so as to defeat the right of the heir to the heritable estate, but the power of sale was not absolute, being limited to a particular purpose "for the better enabling my trustees to carry the foresaid purposes into effect." It may further be remarked that the case of *Lord Home* v. *Lyell*, above mentioned, seems to settle that until powers of sale are actually exercised, a trust for creditors is a mere burden, leaving the granter of the trust-deed undivested of the fee of his estate; see also *Marquis of Huntly* v. *Earl of Fife*, 5th December, 1885, 14 R. 1091. So that the mere possibility of using powers of sale to create the relation of superior and vassal between the superior and a stranger cannot be regarded as a sufficient criterion to determine whether composition is due. The matter is of course quite different when powers of sale have been actually exercised.

The decision in *Stuart* v. *Jackson* has been followed by the majority of the Second Division in the two recent cases of *Duke of Athole* v. *Stewart* and *Duke of Athole* v. *Menzies*, 20th March, 1890, 27 Scot. Law Rep. 590 and 595. In the first of these cases, the purposes for which the trustees held the land were to provide for a liferent to the truster's widow, and under burden thereof to convey the lands to the truster's eldest son and a series of substitutes. The trustees had conveyed the lands to the son and heir before the date of the Conveyancing Act, so that they were never impliedly entered. In the second case, however, the trustees had been impliedly entered; but the Court held that neither this fact, nor the fact that the trustees had powers of sale, affected the result. The two cases are remarkable for the dissent of Lord Rutherfurd Clark, on grounds which, as reported, seem hardly consistent with his opinion in *Stuart* v. *Jackson*,

and for the observations made by Lord Lee on the meaning and authority of the decision in the old case of *Grindlay* v. *Hill*, which has generally been founded on by superiors claiming composition from trustees.

The case of *Stuart* v. *Jackson* settles another question, about which, however, there could be little doubt, namely that an action for payment of a casualty may be brought against a liar notwithstanding the subsistence of liferents voluntarily granted by previous proprietors and not expressly confirmed by the superior. The rubric erroneously states that a further question was decided, namely that the expression "casualties of superiority" in a feu-disposition dated in 1701 does not include composition: in point of fact, in the view of the case taken by the Lord Ordinary and the Court, it was unnecessary to determine that question, and nothing was said about it in the Inner House or by the consulted judges.

The case of *Dick Lauder* v. *Thornton*, 23rd Jan., 1890, 17 R. 320, is attended with more difficulty than appears at first. The feu-contracts of the villas on the entailed estate of Grange, in the south of Edinburgh, contain clauses which under the old law had indirectly the effect of making each purchaser pay a duplicand of the feu-duty within three months of the date of his purchase, but they do not contain any clause expressly declaring that a purchaser shall make such payment. The First Division have held that a purchaser who has taken infeftment is now *personally* liable to make such payment, in consequence of the implied entry introduced by the Conveyancing Act. Section 4, sub-section 3, of that Act contains the proviso that "such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to this Act or by the conditions of the feu-right, have required the vassal to enter or to pay such casualty irrespective of his entering;" but there are no words to the effect that where the superior could have required an entry the vassal shall be personally liable for a casualty. The clauses in the feu-contract upon which the superior founded were a clause, in the usual form, taxing the casualty due upon the entry of an heir or singular successor at a duplicand of the feu-duty, a clause prohibiting sub-infeudation, a clause declaring that heirs and singular successors should be bound to enter with the superior within three months of the date of their purchase, and a clause irritating the proprietor's right in the event of any contravention. The superior's summons contained alternative conclusions, the first being in terms of Schedule B. of the Conveyancing Act, and the second being a petitory conclusion for payment. The Lord Ordinary (Kinnear) held that the first conclusion was incompetent, in respect that the last entered vassal was still alive, but decerned in terms of the second conclusion, and his judgment was adhered to by the First Division. The ground of judgment was that under the old law, the superior could by a declarator of irritancy have compelled the defender to enter, or forfeit his right to the feu, so that the pursuer was not attempting to obtain payment of a casualty sooner than he could have done by the law prior to the Conveyancing Act. All this is perfectly

true; but is it enough to justify the judgment of the Court? Under the old law, the superior's right to bring a declarator of irritancy did not render the defender personally liable for a casualty; and there is nothing in the Conveyancing Act expressly imposing personal liability, where such liability did not previously exist.

The case of *Bouverie Campbell* v. *Deans and others*, 14th March, 1890, 27 Scot. Law Rep. 521, exhibits bond-holders in the anomalous position of trying to show that they are singular successors of their debtor. They appear to have done so in order to get the benefit of a clause of allocation of feu-duty in a feu-charter which declared that heirs or singular successors acquiring right to any part of the ground feued should be bound to pay only a rateable proportion of the *cumulo* feu-duty. The feu-charter having been granted after the date of the Conveyancing Act, the bond-holders were not afraid of being held liable as singular successors in payment of casualties of composition. They therefore argued, with a happy forgetfulness of the effect of their argument on bond-holders less fortunately circumstanced, that by the infeftment they had taken on their bonds and dispositions in security they were impliedly entered with the superior by the operation of the fourth section of the Conveyancing Act. The Lord Ordinary (Kinnear) sustained this argument "because the rights confirmed by implication of the statute include all rights requiring and admitting of infeftment duly recorded in the register of sasines." On a reclaiming note, however, the First Division held that heritable creditors were not singular successors in the meaning of the feu-charter, and that it was not necessary to decide whether the implied entry introduced by the Conveyancing Act applies to the case of heritable creditors. This case suggests a new mode in which it may be held that the pecuniary rights of superiors have been enlarged by the Conveyancing Act. If bond-holders are now entered with the superior in virtue of the statute, does not their infeftment create a new investiture, entitling the superior to a composition on the death of the debtor? This would seem to follow naturally from the opinions of the minority of the Court in the case of *Stuart* v. *Jackson*.

Is it not time for the Legislature to intervene, and remedy the grievances caused by the oversights of the framers of the Conveyancing Act of 1874?

J. Henderson Begg.

Correi Debendi—Joint and Several Obligation.—*Nelson* v. *Wilson*, 12th March, 1890, 25 S.L.R. 505.—This decision records a victory for a dubious half-forgotten technicality over precedent, principle, and equity. The circumstances were simple. A solicitor sued in the Sheriff-Court of Argyle three members of one family jointly and severally for payment of his professional account, amounting to £25, 2s. 7d.

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One of them, residing in another county, was not subject to the Sheriff's jurisdiction. The other two defenders appeared, one of them admitting, and the other denying, the employment, but both pleading that the action could not competently proceed against either of them in the absence of the third defender. The plea of all parties not called has usually been considered to rest entirely on equitable grounds. But these defenders were unable to suggest any possibility of hardship or injustice, except that the third defender might have some defence, of which they might have availed themselves if he had pleaded it. This plea the Court of seven judges —dissenting Lords Shand, Young, and M'Laren—sustained, and remitted to the Sheriff to dismiss the action. It is now decided that, where the obligation, in which parties are alleged to be jointly and severally bound, has not been constituted by decree or writing, the whole parties alleged to be so bound must be effectively made defenders, at least if within the jurisdiction of the Court of Session, in any action on that obligation. The reasons of this somewhat startling decision appear to be—(1) that a similar plea has been sustained in actions for a partnership debt against the partners after dissolution; (2) the possibility of the obligant not called having a defence which would benefit the other obligants; and chiefly (3) that this distinction between constituted and unconstituted obligations was laid down by the judges who decided *Zuill*, 1 D. 871.

With regard to the first of these, it was pointed out that, as partners are not joint and several obligants with the firm, that class of cases afforded no useful analogy. To the second, several answers may be given. The hardship is imaginary, for the obligant sued has as ample and effective means of proving any defence arising to him out of the creditor's dealings with a co-obligant, as of proving any other defence whatever. If not, why is not the same rule applied, where the supposed hardship equally occurs, in actions on obligations constituted by writing or by decree, or arising independently of contract, such as actions against trustees for making illegal loans or improper investments, or taking insufficient securities? (See *Croskery* v. *Gilmour*, 14th March, 1890, 27 S.L.R. 491.)

As for the obscure subtlety unearthed from the opinions in *Zuill's* case, it has no merit except that of age, and no utility that any mind, judicial or otherwise, has discovered. It is inconsistent with the civil law, and the view of Erskine. It was ignored in the later case of *Richmond*, 9 D. 633, and the subsequent practice of the Court. We think that it is also contrary to the earlier case of *Walker*, Nov. 23, 1803. Certainly it defeats, as far as nominate consensual contracts are concerned, the essential purpose of an obligation being joint and several. "Joint," denotes the community of interest between the co-obligants; "several," measures their liability to the creditor. The creditor's sole advantage is, that, as each is liable to pay or perform the whole, he may select whom he thinks fit, leaving the obligants to settle their respective rights of relief among themselves. But, according to this decision, though each obligant is bound to

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pay the whole debt, the creditor cannot enforce the obligation. The creditor cannot sue his debtor for what the debtor agreed to pay, if the agreement was not committed to writing. This is to inflict on the creditor the very hardship and risks of litigation and costs, which it is the object of this obligation to avoid. It makes the action incompetent when the ground of action is to be proved by one of several equally competent modes of proof. Surely this is a confusion of two entirely distinct things. The case of a solicitor's account is as good an illustration as need be figured. The solicitor's right to remuneration arises out of fact of employment. The employment is joint when it relates to the same suit or other matter of common interest. It is settled law that parties employing a solicitor are each liable for his whole account. Suppose four employers in a matter of joint property. The proofs of employment all equally sufficient, are written mandate, verbal engagement, circumstances inferring employment, and admission on record respectively; the obligation is exactly the same; why should the right of action and the persons to be sued differ in each case? Nor is it clear how far this decision extends. Is the creditor, thus obliged to call all the co-obligants, also obliged to take decree against all, or if not, is he liable in costs to those against whom he does not take decree? Would it make any difference if, poinding on an obligation of a joint and several nature, the summons concluded only "severally" against the defenders called, not being the whole co-obligants?

It is greatly to be regretted that this decision has introduced into procedure an inequitable anomaly, which will probably subsist until abolished by Act of Parliament. The Court has the power of regulating its own procedure, and, even had *Zuill's* case been the most direct and weighty of precedents, and had the rule and practice been entirely in accord with it, there seems no reason why the Court should not have laid down the rule which prevails in England and most other civilised countries, that a pursuer may sue all or any of parties severally, or jointly and severally liable to him, and that the Court will deal with the matter in controversy as far as the rights and interests actually before it are concerned.

N. J. D. K.

Local Custom—Essentials to its Validity in Law—Right to Captured Whales in Shetland.—A whale hunt in Shetland has hitherto been associated in most minds with the fortunes of "The Pirate." In future, those desiring information on the subject will do well to consult the pages of Rettie rather than those of Sir Walter. The rights of the different parties interested in the capture of whales in these Northern isles have recently been anxiously inquired into by the Second Division of the Court of Session, and legal effect given to the *obiter dictum* of

Magnus Troil that "by the martyr's bones, you shall have no law of partition, but that of God and St. Olaf. . . . All shall share that lend a hand, and never a one else."

This case—*Bruce of Sumburgh* v. *Smith and Others*, 4th June, 1890,—is one of the most interesting and important recently decided. It has a double interest and importance. It is of local importance, for it vitally affects landowners all over the Shetland islands. It is of general interest, for the opinions are a valuable contribution to juridical literature. It is thus not merely a decided "case." It contains learned disquisitions by a Sheriff-substitute and by four of the judges of the Supreme Court, upon the principle underlying and controlling the adoption and recognition of custom as regulating the legal relation of parties or as an equivalent to enacted law.

The facts and circumstances leading up to and resulting in this case may be shortly stated. Whales of a small size and of various species, frequently visit the Shetland Islands in shoals. These the islanders call "caaing" whales, because they allow themselves to be "caaed" or driven on shore, where they are cut up for the sake of their blubber. From time immemorial the division of the proceeds seems to have been tripartite—one-third going to the Crown, another third to the owner of the lands upon which the whales were stranded, and the remaining third to the captors. The Crown, or its representative, has for more than a century renounced its share. The landowners' portion has frequently been claimed, and—except where surreptitiously withheld—handed over, but with a bad grace and a good deal of grumbling. The title to this share has always been based upon immemorial custom, and if some reason for the custom was demanded, a vague reference made to "parts and pertinents," or to the Norse law, which ruled the islands before they were pledged to the Crown of Scotland. The foreshore in Shetland probably belongs to the proprietors of the adjacent land, but the use of the shore for stranding and flensing the whales has never been regarded as the *quid pro quo*, in consideration of which the landlord has claimed a third of the spoil. The claim has been made independent of whether the stranding took place above or below low-water mark. The failure of captors of whales to resist such a claim has been explained by the fact that they were usually the tenants of the landowner making it, or of a neighbouring landlord whose displeasure it was their interest not to incur, as they might have been turned out of their holdings, or had their rent raised, if they refused to submit. In September, 1888, a large shoal of whales—the first since the Crofters Holdings Act of 1886 has given the tenants there fair rent and security of tenure—was driven ashore at Hoswick, cut up, and sold by auction. The landowner, who had in no way aided in the capture, made a claim for more than £60 as his third of the clear proceeds of the sale, and brought an action in the Sheriff-Court to enforce it against those acting for the captors, who were in possession of the money.

The only previous judgment dealing with this question was one pronounced on 11th July, 1838, in the case of *Scott and Others* v. *Reid and Others*, by Lord Cockburn, in the Outer House, which is unreported. In that case Lord Cockburn found that the landowners had right to one-third of "caaing" whales stranded and killed on the shores of their respective lands. The principle upon which his Lordship proceeded is important, especially in the light of the recent adverse criticism. "Whatever," he says, "be the origin, or the policy, or the likelihood of the usage, what the Court has now to ascertain is the actual fact of its existence. It may be an unfair and barbarous thing, and contrary to general legal principle, that captors, who have all the trouble and risk, should be obliged to share the spoil with landowners whose proper soil they never touch; or it may be a remnant of the ancient northern rule; and it may be politic because, though at first brought to the public shores, the adjoining land is always practically used in saving and disposing of the animals; and because, if matters were not accommodated by a fixed division, the heritors might ruinously compete with their people, or prevent them taking the fish at all. These are considerations which, if we were to speculate on the subject, might deserve to be weighed; but they are of little use as *evidence*, when we must look to the *fact*, and not to its causes or its consequences."

The Sheriff-substitute, while giving weight to that judgment, held that it must be taken along with the other evidence which had accrued during the fifty years that had passed since its date, and after a very ample proof, both oral and documentary, he found that the custom alleged by the pursuer was not sufficiently inveterate, uniform, or uninterrupted, and was not of a kind to derogate from the ordinary rule of law with regard to wild animals, and assoilzied the defenders. The case was appealed direct to the Court of Session, where it acquired new and increased importance. The Second Division agreed with Lord Cockburn, and disagreed with the Sheriff-substitute to this extent, that they were of opinion that the fact of the custom having existed in the Shetland Islands from time immemorial had been proved, but after narrowly scanning the nature of the custom, they held (Lord Lee *dissenting*) that it was not such a custom as should receive judicial sanction. The Lord Justice-Clerk held that "no local custom can be proved to have the force of law merely by proof of its existence unless it be itself thoroughly consistent with the principle of justice, . . . or be so plainly the outcome of the consent of the local community, that there is absolute presumption that in the circumstances of the locality it was a custom based on just principles." His Lordship thought the custom here was clearly unreasonable, as seeking to establish a thoroughly one-sided arrangement.

Lord Young preferred to put his judgment upon a somewhat different ground. He held that the rule of the law of Scotland which allowed particular or special customs to govern was limited in its application, of which he gave illustrations, did not touch a case like the present, and was not to

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be extended to such cases He remarked that in the law of Scotland local custom had its effect almost if not exclusively within the region of contract, where it frequently furnished an implied term, in contemplation of both parties—*e.g.*, as to the form of tenure, the manner of delivery, or the date of payment. He pointed out that no allegation was made, that the custom here founded upon formed an implied factor in any contract, either of tenancy or of use of lands, for that no legal relation existed or ever had existed between the pursuer and the defenders. Lord Rutherfurd Clark in an exhaustive opinion (which makes us wish he would more frequently give the reasons leading him to say "I agree") supported the view of the Lord Justice-Clerk that reasonableness is essential to confer legal efficacy upon local custom. He admitted there were few examples of local custom having the force of law in Scotland, and that it was but slightly dealt with by the exponents of our own jurisprudence, but he justified his opinion by the following legal definitions, maxims and opinions culled from various quarters of high authority:—"A custom is lex non scripta—diuturni mores consensu utentium comprobati":—"Next unto equity, nations," says Stair (i. 1-16), "were ruled by consuetude, which declareth equity and constituteth expediency."—"Consuetudinis ususve longævi non vilem auctoritatem esse: verum non usque adeo eam sui valituram momento ut aut rationem vincat aut legem. . . . Non minus autem in consuetudine quam legibus justitia desideratur et rationabilitas" (Voet on the Pandects, i. 3, 27, 28);—while Chief Baron Pollock in *Cox* v. *Mayor of London*, 10th June, 1862, 1 H. & C. 388, in an opinion approved of by the House of Lords, says: "Is the custom set forth valid in law, assuming it to exist in fact? . . . Unless customs are found consonant to reason and in harmony with the principles of law, they have always been rejected as illegal;" and Blackstone gives seven characteristics of a valid local custom—*i.e.*, existence from time immemorial, uninterruption, peaceable enjoyment and acquiescence, reasonableness, certainty, compulsion, and where more than one in the same place, consistency, for which Broom supplies illustrations in his work on Legal Maxims (pp. 872 *et seq.*).

Applying those principles which he thought Lord Cockburn had disregarded, Lord Rutherfurd Clark held this custom had not the force of law, as it was plainly unreasonable from lack of consideration.

Lord Lee was of opinion that the judgment of 1838 ought to be followed, and that it was by no means clear, looking to the past history and peculiar land tenure of the Shetland Islands, that this custom was unreasonable. This plea had not been raised upon the record, and it lay with the defenders to maintain it.

It will be seen that this action occupies a unique position. Comparison with other judgments is of necessity excluded, and the only question is as to the soundness of this one. The necessity for a local custom being reasonable may be conceded without foreclosing argument in this case. While the particular result arrived at is perhaps not to be regretted, it is

possible to regard some of the expressions used on the Bench as unnecessarily strong. There may be a false jury-like sentimental sympathy with crofters, as well as with the wives and children of workmen injured through carelessness. The landowner has admittedly got a claim for any damage done to his lands by the passage over them of the crowds who always assemble on such occasions, while a certain amount of use is generally taken of them in disposing of the whales. Whether a custom which treats him as having an interest, and a fixed interest to the extent of a-third, in their capture, leading him to promote rather than to prevent it, and discharges (we presume) his other claims, is grossly unreasonable, is not beyond the region of doubt. We could have imagined that it might even tend to promote goodwill, although this it has certainly failed to do in the past. We doubt whether any other similar local customs exist in Scotland. In case they do, it may be useful to point out that the reasonableness desiderated by this judgment does not fall to be determined by the people of the district where they prevail. There is a growing tendency for every one to be his own lawyer in the sense of being willing to submit only to those laws which he or she considers just. But as Blackstone says: "Customs must not be unreasonable, which is not always to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law."

S. M. P.

Divorce for Desertion.—In the case of *Watson* v. *Watson*, 20th March, 1890, 27 S.L.R. 598, a point of some interest in the law of divorce for desertion was made the subject of consideration by a full bench of judges. As is well-known, the remedy of divorce for desertion is in Scotland purely statutory, being based upon the Statute 1573, as modified by the Conjugal Rights Amendment Act, 1861. Prior to the passing of the latter Act, the pre-requisites to decree under the old statute were of an elaborate and troublesome character. It was necessary, in the first place, to raise an action of adherence, and on decree being obtained, to charge the deserter to adhere; this not sufficing, the deserter was to be denounced as a rebel, and put to the horn; that failing, application was made to the spiritual jurisdiction to admonish the deserter privately, and if that proved futile, the minister of the parish admonished him publicly to adhere, and, on his refusal, excommunicated him; and, if after all that, the erring spouse persisted in desertion, decree of divorce was granted. But the Act of 1861, in sweeping away all this cumbersome procedure, left it uncertain whether the "privy admonition" spoken of in another part of the statute remained a pre-requisite to decree, and in the cases in which the point has been raised, the views of the two Divisions of the Court have conflicted. Thus in the cases of *Bowman*, 4 Macp. 384; *Chalmers*, 6 Macp. 547; *Barrie*, 10 R. 208; *Auld*, 12 R. 36; and *Lilley*, 12 R. 145, the

First Division refused to grant decree without proof of willingness on the part of the injured spouse to adhere during the period of desertion, while in the cases of *Muir*, 6 R. 1353; *Winchcombe*, 8 R. 726; *Willey*, 11 R. 815; and *Gould*, 15 R. 229, the Second Division, without insisting on proof of the state of mind of the pursuer, granted divorce on being satisfied that there had been "malicious and obstinat defectioun" on the part of the defender for the statutory period.

In these circumstances it was clearly desirable that there should be an authoritative exposition of the law, and the case of *Watson* was one eminently adapted for raising the question sharply. The material facts are few and simple. An action of divorce for desertion was raised by a husband against his wife. It appeared from the proof that the defender, who was a person of irritable temper, had, more than four years before the raising of the action, left her husband's house, taking with her their furniture, and that she had not returned and did not propose to return to him. The pursuer, in the course of his evidence, deponed that he had been quite willing to receive his wife back, but there was no evidence that he had made any effort to induce her to return, although both parties were resident in the same county. Lord M'Laren reported the case to the Inner House, and the First Division, after hearing counsel, appointed it to be heard and judged by the whole Court. As was natural, looking to the previous current of authority, the Court was far from unanimous in its opinion, but although there is a good deal of apparent conflict, a closer examination of the judgments shows that while the judges were divided in opinion as to the necessity of remonstrance as a formality, yet on the broad issue they occupied to a large extent common ground. Briefly stated, the result of the judgment is this:—A large majority of the Court was of opinion that, as a pre-requisite to divorce for desertion, it must clearly appear that the pursuer throughout the period of desertion was desirous of cohabitation, and ready to renew it. A majority, while admitting that proof of remonstrance was of the greatest value as indicating the state of mind of the pursuer, would not admit that it was a statutory requisite, or that the want of it might not be supplied by other evidence. A large minority on the other hand was of opinion that "privy admonition," or a manifested desire for adherence, was a statutory pre-requisite, although agreeing that it would not be insisted on in cases where it could be shown to have been impossible, or that it would have been unavailing if attempted. A minority of two judges finally held that the facts proved in this case showed that the desertion was in its origin without reasonable cause, and that during its continuance it had been maliciously persisted in. They were of opinion that, under the statute, nothing further was necessary, and would have granted decree.

While it is satisfactory that the case should have received the consideration bestowed upon it by the bench, it cannot be said to have established any very definite rule as to the circumstances under which remonstrance

will be held to be an unnecessary formality, and looking to the strength of the minority opinion divorce is not likely to be granted in future without proof that admonition, where practicable, has been attempted. The question is entirely one of the municipal law of Scotland, and little help is to be gained from English or foreign authorities. In England, indeed, divorce is not granted for desertion alone, and the remedy there is either a suit for the restitution of conjugal rights, or if the desertion has lasted two years, a petition for judicial separation under the Matrimonial Causes Act, 1857. In America, however, desertion is a statutory ground of divorce in most of the States of the Union, but the conditions under which it is granted vary greatly. In Louisiana, where the statute follows the old Scots Act very closely, the abandonment must be made to appear by three successive summonses followed by decrees ordering the deserting spouse to return to the matrimonial domicile. [Bishop, § 775.] This, however, can hardly be called "privy admonition," the object of which, as the Lord Justice-Clerk said, is not to test the defender's state of mind, but to cure it—by holding out the olive branch. The importance of the case of *Watson* rather lies in the affirmation by a large majority of the Court of the principle that, in cases of divorce for desertion, the state of mind of the pursuer is of no less consequence than that of the defender. He or she must during the period of desertion have been willing to adhere, and must, wherever practicable, have manifested that desire. While this is no doubt in accordance both with the spirit and the letter of the statute, it is open to question whether, as matter of policy, so much forbearance on the part of an injured spouse should be insisted on. It seems almost too much to expect of a long-suffering husband who, after enduring a course of maltreatment, has been ultimately deserted by a violent and irritable wife, that he should continue for four years to lament the act by which tranquillity has been restored to his household, or to pretend to bewail as a misfortune what he inwardly recognises as a blessing. But the answer no doubt is that any relaxation of the rule would at once open the door for divorce by mutual consent, on which the law of Scotland has always looked, and is apparently likely to look, with great jealousy.

J. J. C.

Duty to Fence Pitfalls on Lands.—*Prentices* v. *Assets Company* (*Limited*), 21st Feb., 1890, 17 R. 484. Prior to the decision of this case the law of Scotland applicable to dangerous openings on the surface of lands was that a person accidentally and innocently straying from a public road, or a road on which he had an unqualified right to be, had a remedy against the proprietor of the lands if he was hurt by falling into such an unfenced opening in the vicinity of the road. The law of England is that a person so injured has no remedy unless the peril is substantially adjoining the

way, which means practically that the pit is so close to the way that by misadventure a person may be thrown or fall from the one into the other without having time to pull up. Wandering from the path, though in the darkness of night, and in the absence of indication as to its boundaries, operates as a bar to recovering damages. Thus in *Binks* v. *South Yorkshire Railway*, 32 L.J., Q.B. 26, a path was twenty-one feet from a canal, but there was nothing to distinguish at night the path from the ground intervening between it and the canal, and a man in the dark strayed and fell into the canal and was drowned; but it was held that there was no action because the canal was not adjoining the way. And in *Hardcastle* v. *South Yorkshire Railway*, 28 L.J., Ex. 139, where the path turned to one side, but a man walked straight on in the dark from twenty to thirty feet on level ground, and fell into a reservoir, it was held that the danger was not substantially adjoining the path, and the unfortunate man was considered to be a trespasser before he reached it. There can be little doubt that the law of Scotland was different from this. A man who wandered in the dark was not barred by the mere fact of being off the path, and though, no doubt there was always understood to be a limit at which a pitfall would cease to be dangerous to those using a path, this line had not been drawn, and it would have been drawn only with reference to the actual danger, and not, in circumstances like the above, upon considerations of trespass (*M'Feat* v. *Rankin's Trs.*, 6 R. 1043; *Mack* v. *Allan*, 10 S., 349). It is probable that the stricter law of trespass in England has influenced the judges to take this severe view of the rights of a wanderer from the path. It is to be hoped that Prentice's case has not imported these principles into the law of Scotland. They are certainly not necessary to support the judgment, which is sufficiently grounded otherwise. Prentice walked 184 yards from a public road over ground which, from its rough nature and obstructions, must have told him that he was off the road, and at the end fell into a quarry. In these circumstances there can be no doubt that Prentice was not a *bona fide* wanderer, and was knowingly where he had no right to be, and was therefore barred from recovering. Lord Shand, however, objects to allowing a wide latitude in sending the question to a jury, whether the pitfall is to be considered dangerous, and applies the English test above referred to in cases where the injured man is "neither trespassing nor taking use of the ground by permission or tolerance." This means the case of a person innocently straying. Thus his Lordship applies the law applicable to trespassers in England to a class which he considers distinct from them in Scotland. It is submitted, with deference, that this is not a fair use of the English authorities. His lordship's desire to formulate a rule which will prevent cases like Prentice going to a jury is most intelligible, but it is not desirable that such a test should prevent a case like *M'Feat* being tried. Before a satisfactory rule can be laid down, a case intermediate between *M'Feat* and *Prentice* will have to occur.

The decision in Prentice is valuable in qualifying the use to which *Black* v. *Cadell*, M. 13,905, 5 Pat. App. 567, may be put, and in repudiating the law contained in the report of *Hislop* v. *Durham*, 4 D. 1168, but it is not necessary to go to the other extreme and adopt the English authorities.

In *Prentice's* case questions were raised as to whose duty it was to fence. The answer to that must be that it is the duty of the person creating the danger. If a road is made close to a danger, whether natural or an *opus manufactum*, it is the duty of the person making it, individual or public body, to see it properly fenced. If, on the other hand, a person creates a danger near a pre-existing road, it is his duty to fence it, and not that of the proprietor of the road. A public right-of-way is used with the risk of all the natural perils of the land, and there is no duty on the proprietor to take precautions for the public safety, but the proprietor will not be entitled to open a new danger and leave it unprotected. If a private road lead up to an unfenced danger, that road should be distinguished from the public road by some unmistakable sign, for unless Lord Shand's view is adopted, it should be no answer to a man innocently using a private road that he was barred by his trespass from recovering.

A. T. G.

Vesting subject to Defeasance.—The decision of the House of Lords in *Gregory's Trs.* (16 R., H.L. 10, rev'g. Court of Session, 14 R. 368), though it does not by itself introduce any novel principles into the law of vesting, still by restoring in effect the judgment of the minority in *Haldane's Trs.* v. *Murphy* (9 R. 269) explains and extends in a very important way the application of principles which were already familiar. The leading rules upon the law of vesting, derived originally from the Civil Law and resting in Scotland upon the unassailable authority of *Young* v. *Robertson* (22 D. 1527, rev'd. 4 Macq. 314), have not been in the slightest degree questioned in either of these cases. According to these rules, conditions in the destination of a fee which hinge on an event that must occur—the termination of a liferent being the commonest instance—do not suspend vesting in the beneficiary called to take the fee; while conditions which hinge on an event that may or may not occur—survivance (including attainment of majority) on the part of the beneficiary being the commonest instance—do have that effect. In the former case, vesting takes place *a morte testatoris*, in the latter, not until the condition is purified by the beneficiary's survivance: in other words, it is in the latter case only that the condition has a suspensive effect. Exceptions to these rules are admitted when the result of their application would be to defeat the intention of the testator, as unequivocally evidenced by the tenor of the whole deed: *Nolan* v. *Hartley's Trs.* (5 M'P. 153), belongs to this category. The effect of a destination-over (to a conditional institute), in suspending vesting in the person first called to take as fiar, is truly referable to the

same principle as that which gives to a clause of survivorship a like effect. In a destination to A in liferent, and to B in fee, but if B should predecease A then to C, the condition upon which B is to take the fee hinges upon his survivance of A—an event which may or may not happen—and is therefore suspensive of vesting in him. It follows that in destinations-over which do not turn upon the contingency of survivance the vesting of the fee will not be suspended, but will occur *a morte testatoris*. This clearly appears from the case of *Carleton* v. *Thompson* (3 M'P. 514, affirmed 5 M'P., H.L. 151), where the destination was to A in liferent and to A's children in fee, but "in the event of A's decease without issue," then to the truster's nieces. A afterwards had children, and they all predeceased A; but nevertheless it was held that the fee had vested in them at birth, their right to take not having been clearly made conditional upon their surviving A, as it would have been by the expression ordinarily used in such cases—"in the event of A's decease *without leaving issue*." *Scott's Trs.* v. *Brown* (9 R. 798) is a good recent example of vesting suspended by the effect of a destination-over. In all cases of destination-over, however, the conditional institute in whose favour the destination over is conceived takes a defeasible fee *a morte testatoris*, which passed (subject always to its defeasible quality) to his heirs either by will or by operation of law. Exceptions to this rule occur whenever the destination-over is so framed as itself to suspend vesting in the conditional institute. Thus, in *Carleton's* case the destination-over was in favour of the truster's nieces, with a survivorship clause: this clause would have delayed vesting even of a defeasible fee in the truster's nieces. A defeasible fee is extinguished whenever the condition attached to the leading destination of the fee is purified, and it becomes indefeasible whenever circumstances make it impossible that that condition ever should be purified. Thus, in a destination to A in liferent, and to B in fee, but if B should predecease A, then to C, C takes a defeasible fee *a morte testatoris*, which will be extinguished in the event of B surviving A, and will become indefeasible whenever, during A's life, B dies. The principle of defeasible vesting, involved in decisions as old as *Balderston* v. *Fulton* (19 D. 293), has long been familiar in such cases as those of a fee destined to "the children of the marriage" in an antenuptial contract—the first-born taking a fee which is subject to defeasance to a certain extent on the birth of each younger child. It was given a more extensive application in *Robertson* v. *Robertson* (7 M'P. 1114), and again by Lord Shand in the Outer House case of *Snell's Trustees* (4 R. 709), but the first authoritative and express recognition it received in the case of a conditional institute called under a destination-over was accorded to it in *Haldane's* case by the judges who were in a minority. It has been very commonly supposed that the conflict of opinion in that case showed disagreement among the judges upon the leading rules explained above—at least as regards vesting subject to defeasance—and the contra-

dictory results at which they respectively arrived lends colour *prima facie* to the idea, which is nevertheless without foundation. It is true that while the minority of the judges dealt expressly in their opinions with the principles of vesting subject to defeasance, the majority, in deciding the case on other grounds sufficient in themselves, passed them by in silence. But the Lord President has quite recently taken an opportunity (*Steel's Trustees*, 16 R. 204) of pointing out that the conflict of opinion in *Haldane's* case arose, not at all over the general principles of vesting applicable to testamentary deeds, but over the construction of the words "nearest heirs in moveables," occurring in the settlement; the question being whether these were to be taken to mean "those entitled to succeed *provisione legis* in case of intestacy," or whether, occurring as they did in a will, they must be read as excluding any reference to intestacy, and as meaning "those who, at the date of a certain event contemplated in the will, would have been the testator's nearest heirs, if his life had been prolonged till then." Much the same difficulty occurred in *Gregory's Trustees*, which the Court of Session (*diss.* Lord Shand) decided expressly on a distinction between "nearest of kin" on the one hand, and "heirs-at-law" or "heirs *in mobilibus*" on the other, holding that while the latter were a class necessarily ascertained at the testator's death, the former were a selected class of relatives varying from time to time the members of which were to be ascertained at any period indicated in the deed—in particular, the date at which the testamentary provisions in their favour became operative. This distinction the judgment of the House of Lords (*per* Lord Watson) has brushed away. According to it, "nearest-of-kin" is to be construed like "heirs-at law" by reference to the state of matters at the testator's death. In *Gregory's* case the destination, reduced to skeleton form, was as follows:—By A to B in liferent, and to B's son in fee, but if the son should predecease B, then to A's nearest-of-kin. The peculiarity of the case was that B's son and A's nearest-of-kin were one and the same person; so that while upon A's decease nothing—strictly speaking—vested in that person, *quâ* B's son, he yet took a fee under the destination-over, *quâ* A's nearest-of-kin. And since the condition upon which that fee might suffer defeasance did not hinge upon the contingent survivance of the life-renter by any one *other than himself*, *quâ* B's son, the fee he took upon A's decease was held to be an indefeasible one, vesting *a morte testatoris*. There is, it should be added, one sentence in Lord Watson's opinion (16 R., H.L., see p. 12, beginning of third paragraph) which might suggest that the beneficiary in *Gregory's* case took a fee of some sort at A's death, *quâ* B's son, but this must be read along with what follows, where his lordship clearly states that the nature and extent of the right vesting in him must be ascertained by construction of the destination-over to the nearest-of-kin.

J. A. C.

Defamation — Is a fair Report of a Judgment necessarily privileged?—*MacDougall* v. *Knight & Son.* This indomitable plaintiff took the defendants through all the English Courts, from Nisi Prius to House of Lords. He lost in each, but having got some encouragement from *dicta* of certain judges in the House of Lords, he began again; and the renewed litigation attained the penultimate stage on 17th April last, when judgment was given, still against the plaintiff, by the Court of Appeal. And the subject-matter of litigation, in both these rounds of the Courts, was a judgment pronounced in a yet earlier suit between the same parties. That judgment, certain passages in which were injurious to the plaintiff's reputation, was published as a pamphlet by the defendants, who are auctioneers at Bath, and circulated among their customers. The pamphlet contained no account of the evidence led at the trial, but merely a verbatim report of the judgment, headed by an explanatory paragraph. The plaintiff sued the defendants for damages in respect of the publication, and the action was tried before Baron Huddleston and a jury. The jury found—(1) that the pamphlet was in fact a fair, accurate, and honest report of the judgment, (2) that it was published by the defendants *bonâ fide*, and with the honest intention of making known the true facts of the case, and in order to protect their reputation, and in reasonable self-defence, and (3) that there was no malice; and on these findings the verdict and judgment were entered for the defendants. The first of these findings was a simple affirmative answer by the jury to the question left to them by the judge; and the plaintiff applied for a new trial on the ground that the question put to the jury should have been—not, whether the pamphlet was a fair report of the *judgment*, but whether it was a fair report of the *trial*. The application was refused by the Divisional Court and the Court of Appeal, who held that the right questions had been put to the jury, and that an accurate report of a judgment is privileged (17 Q.B.D. 636). The House of Lords, on appeal, also refused a new trial, but on a different ground—viz., that the plaintiff should have taken objection at the trial, either to the questions as left to the jury, or to the verdict as given being entered for the defendants, and that, having acquiesced then, he could not competently urge his objection as a reason for granting a new trial (14 App. Ca. 194). This ground was adopted by all the judges of the House of Lords as sufficient for the decision of the cause; but the Lord Chancellor and Lord Bramwell expressed doubts as to the doctrine of the Courts below in regard to the privilege attaching to the report of a judgment. The Lord Chancellor said he was "not prepared to admit that the judgment of a learned judge must necessarily be privileged. . . . If a judge's judgment or summing up to a jury did not, in fact, give reasonable opportunities to the reader to form his own judgment as to what conclusion should be drawn from the evidence given, the publication of such partial, and in that respect inaccurate, representations of the evidence might be the subject of an action for libel, to which the supposed privi-

lege in what was said by a judge would be no answer. Nor do I think there is any presumption, one way or the other, as to whether a judge's judgment does or does not give such a complete and substantially accurate account of the matters upon which he is adjudicating as to bring it within the privilege. If it be so, it must be proved to be so by evidence, and certainly not inferred as a presumption of law." Lord Fitzgerald, on the other hand, indicated agreement with the views expressed in the Courts below; while Lord Watson and Lord Macnaughton carefully guarded themselves from expressing any opinion on the question of privilege.

As has been already mentioned, the plaintiff raised a new action, in respect of the same publication, but selecting different passages in the judgment from those previously founded on. The Master and Judge in Chambers dismissed this new action; but the Divisional Court made an order, giving him liberty to proceed with it, on paying the costs of the former action. This order, however, was reversed by the Court of Appeal, and the action was struck out as vexatious, on the ground that the plea of *res judicata*, if raised by the defendants, must succeed, the cause of action being the same as in the former suit. In regard to the question of privilege, the Court of Appeal unanimously adhered to their former judgment, and the Master of the Rolls strongly protested against the view taken by the Lord Chancellor and Lord Bramwell.

This important question, therefore, is at present in an unsatisfactory position of uncertainty. The Court of Appeal has twice pronounced its opinion unanimously and emphatically; but the matter can hardly be regarded as conclusively settled in the face of the adverse opinions, distinctly expressed, of two members of the supreme tribunal so eminent as Lord Halsbury and Lord Bramwell. Some deduction should perhaps be made from the weight otherwise due to their opinions, in respect of the fact that they were pronounced without counsel having been heard for the defendants. But they derive support from the opinion of Lord Justice Mellish, and even from passages in the opinion of Lord Justice Brett, now Lord Esher, M.R., in the case of Milissich, 16 L.J.Q.B. 404.

A good deal may be said on both sides. On the one hand, it is conceivable that a judge might grievously err in emphasising an injurious piece of evidence, and failing duly to point out other evidence which might neutralise it, or destroy its credibility. Or even without error, a judge, in summing-up at the end of a trial, might present to his hearers a statement which would be sufficient for their requirements, the evidence being fresh in their minds, but which, if published alone, would be far from conveying an adequate or fair representation of the evidence. And it may be urged with much logical force that the question whether a judgment constitutes a fair abstract of a trial is one of fact, to be left to the jury, with no presumption at all. But, on the other hand, there is the powerful argument of public convenience and public usage, to which,

as Lord Campbell said in *Lewis* v. *Levy* (E. B. & E. 537), the law on such subjects must bend. If the plaintiff were to succeed in obtaining from the House of Lords a judgment in the sense of the Lord Chancellor's observations above quoted, he would only secure the right to lay before a new jury the judgment complained of, and the five days' evidence which it purports to summarise and digest, and to submit to that jury the question whether the judgment fairly represents the evidence. On this the Master of the Rolls says:—"I do not for a moment admit that a jury can be asked whether the summing up of the judge or his judgment in the case of which the report is published, was fair or accurate. To hold so would, in my opinion, be most mischievous, for it would tend to destroy the independence of the judges."

In any case, we do not apprehend that any doubt exists as to the privilege of a newspaper reporting, in daily course, a judgment such as that in question, after publishing in previous issues fair abstracts of the evidence led from day to day. Apart from the Newspaper and Libel Act, 1881, which does not apply to Scotland, the privilege of a newspaper in so doing is, we conceive, settled by the case of *Lewis* v. *Levy* (*supra cit.*).

G. W.

COLONIAL APPEAL.

Ocean Steam Ship Co. v. *Apcar & Co.* (30th Nov., 1889, L.R. 15, App. Cas. 37).—This was an appeal from a decree of the Vice-Admiralty Court at Singapore. Two vessels, the *Hebe*, and the *Arratoon Apcar*, came into collision in the Straits of Malacca. The *Hebe* was being navigated with reckless negligence. The *Arratoon Apcar* had committed, without necessity, a comparatively venial error in not slackening speed in good time. It was held by the judicial committee, *on the advice of nautical Assessors*, that a regulation for preventing collisions at sea having been infringed by the latter vessel without sufficient excuse, she could not be absolved from the consequences prescribed by statute, and must be held to be liable.

Perhaps the most interesting point in this case is the incidental declaration by Lord Macnaghten, who delivered the decision of the judicial committee, that, on a question of admiralty law, their lordships would be slow to differ from their nautical assessors. It may perhaps be doubted whether the legal profession itself is fully alive to the completeness with which, in theory, our law provides for the trial of technical cases with the aid of scientific experts. That questions of admiralty law are, and have long been determined by the Courts of competent jurisdiction in London, with skilled nautical assistance, every lawyer is aware. But there are other

precedents than that of the brethren of Trinity House. The 56th section of the Judicature Act, 1873, empowers any judge of the High Court (and requires him on the request of either party) to call in the aid of an assessor, specially qualified, in any cause or matter *other than a criminal proceeding by the Crown*, so that the judge may try and hear the cause, wholly or partially, with the assistance of such assessor. It may be doubted, however, whether, notwithstanding the terms of the Arbitration Act, 1889, the right to a jury is not saved in certain cases. The Patents Act of 1883, section 28, sub-section (1), enables any Supreme Court of the United Kingdom, the English Court of Appeal, and the judicial committee of the Privy Council, to summon a specially qualified assessor to their assistance in dealing with letters patent for invention;(*a*) and section 11, sub-section (4), of the same statute enables the law officers of the Crown to obtain the assistance of an expert. Under the existing adjective law of England there is nothing, therefore, to prevent an assessor from being summoned to assist in the trial of any *civil* action in which any scientific, or technical, or for that matter, medico-legal issue is raised or arises. The extension of the same power to *criminal* cases is a logical as it is a practical necessity. This, however, raises the serious difficulty of the relation between the expert and the jury. Looking to the character of the questions that have often presented themselves to the Home Secretary, it seems an omission in the Bill to establish a Court of Appeal in criminal cases (introduced by Sir Henry James and Mr. Asquith), that power is not explicitly given to obtain scientific aid. The problem of how to adjust the relative functions of judge and assessor has already been solved—by the present Master of the Rolls. In the case of *The Beryl* his lordship said (1884, 9 P.D., at p. 141)—"In the Court of Admiralty the application of the rules is to be by a mixed tribunal. The tribunal which has to try the case is the judge himself, and the judgment is his and his alone. The assessors who assist the judge take no part in the judgment whatever: they are not responsible for it, and have nothing to do with it. They are there for the purpose of assisting the judge by answering any question, as to the facts which arise, of nautical skill. . . . The judge is bound to give great weight to the opinion of the assessors, but at the same time, if he does not think their view right, he is not bound to follow it. Still, it would be impertinent in a judge not to consider, as almost binding upon him, the opinion of the nautical gentlemen, who, having ten times his own skill, are called in to assist him." As regards an important class of cases, involving geological considerations, the inconvenience of having no general

(*a*) This section has, upon at least three occasions, been acted upon in the Scottish Courts,—*The United Horse Nail Co.* v. *Stewart & Co.*, 1885, tried before Lord Kinnear and the late Mr. Fleeming Jenkin, Professor of Engineering in Edinburgh University, (2 Culters' Reports of Patent Cases, 127; 11 Rett. 266, and 15 Rett., H. L. 45); *Mackie* v. *Berry*, *ib.* 116; *Gwynne* v. *Drysdale*, *ib.* 160.

power to consult assessors in Scotland was strongly illustrated in the unreported case of *Lindsay* v. *Clark's Trustees*, where the Judges' conduct in consulting a specialist as to earth-treasures was animadverted on in the House of Lords.

A. W. R.

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The Right Hon. Lord Moncreiff.

LATE LORD JUSTICE-CLERK OF SCOTLAND

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THE SCIENCE OF POLITICS—ITS METHODS AND ITS USE.

Part II.

IN a former number of this *Review* (*a*) a plea was advanced for a more systematic study of politics as a science or organised branch of knowledge than has been common in a country in which politics too often become an equivalent for party. Without any desire to disparage the importance of party politics under the existing conditions of modern English life, it may be enough to say that they are not the subject of the present paper. Our inquiry, after describing the science of politics as the knowledge of those parts of the science and practice of government which are admittedly independent of party, proceeded to take a rapid survey of the contents of the science as so understood.

We may now complete what remains to be said of these contents, and conclude a brief essay on a large subject by indicating the Methods and the Use of this department of knowledge.

Besides Public Law, or, as it might be called, the law of the State and of the relations between independent States, (Constitutional Law, Administrative Law, and International Law), and Political Economy, which treats of the production and distribution of wealth and its equivalents, there is a department of political science which has not yet received a specific name, and which, although the subjects belonging to it

(*a*) *Supra*, Vol. II., p. 1.

have been sometimes treated under public law and sometimes under political economy, appears to deserve a place of its own. This is the science of the positive as distinguished from the merely regulative and prohibitive functions of the State, which are to be found, generally speaking, in its laws. Its subject-matter is the knowledge of the things which relate to the well-being, or, as some philosophers have not so well called it, the happiness of the persons who are members of the State. Here, again, as in the case of International Law, there have not been wanting those who have denied the existence of such a branch of politics. The theory that the State has no other duties than those of an elevated and enlightened police, the protection of life, property, and freedom, and that everything beyond this should be left to the free action of individuals, is not so old that it can be deemed antiquated. Many politicians still preach *laissez faire*, and are alarmed at the denial of it in recent legislation. But practically this view is not acted upon. Nor perhaps were there ever a time or country in which it was consistently carried out. A politician who a few years ago preached this doctrine is a member of a Government which has passed several laws in direct contravention of it. All, or almost all, statesmen have preferred to aim at more than a merely negative policy, although there has been, and still is, great variety of opinion as to how much may be attempted in the direction of positive statesmanship. This may be seen by comparing the politics of the States of ancient Greece with those of modern Europe, or of the German with the British Empire, or of the British Empire itself now and fifty years ago, or now and in the time of the Plantagenets, or the Tudor sovereigns, or of Cromwell. It is, indeed, one of the problems of political philosophy which has been treated by William von Humboldt in a masterly but one-sided essay to define the limits of the action of the State. This is a problem to which, like the kindred problem of the limits of central and local government, no general answer can be given. The true answer will vary according to the

circumstances of particular States. It would be quite beyond the scope of this paper to enter upon it or any other of the questions of political philosophy. The object in view is not to solve any of the problems of political science, but to explain its contents and its use. Assuming, therefore, that a State may have positive functions, because many States in the past, and some in the present, attempt, with more or less success, to discharge them, we may point out a few of the more important subjects which would fall within this branch of political science. One of these is public education, which in its higher or lower branches, directly or by delegation to others, has always been attempted from the day when Plato made it a central doctrine of his Republic to that when an English cynic, with a mixture of conceit and humility, declared to the House of Commons that they must educate their masters. Had his humility been a little greater, Mr. Lowe might have first asked the question whether he did not require to be politically educated himself. Such, again, is the constantly recurring, and at times urgent, subject of the relation between the State or community as a whole and the poor. This is imperfectly treated when it is regarded only in connection with any existing system of Poor Law which might be deemed a part of national public law, or if regarded only in connection with the questions of population, wages, or land, which might be deemed part of political economy. It is really a matter which belongs to the science of the positive functions of the State. Such, to give a third example, is the subject of the treatment of criminals, or a fourth is the important and neglected subject of public amusements. No attempt need be made to furnish an exhaustive list. It will probably be allowed that all these and like matters deserve to be systematically and carefully studied by the statesman, without prejudice to the question how far, or even whether at all, the State should act in regard to them.

Over and above the special departments of political science which have been briefly indicated, there is the

general subject of the theory or philosophy of the State. This is a branch of philosophy just as much as moral philosophy, and has been so treated by all philosophers, both ancient and modern, of the first rank. But it cannot be left out of sight by the students of political science, of which it is, indeed, the basis. It has in recent times been too much restricted, as by Kant and Hegel, to the philosophy of law, an important part, but by no means the whole, of political philosophy.

The chief divisions of the science of politics as now explained may then be thus stated:—

I. The Philosophy of Politics, sometimes called the Philosophy of Law.

II. The Public Law of Particular States.

III. The Public Law recognised between Particular States, sometimes called International Public Law.

IV. Administrative Law, or the Law of Government in its Administrative Departments.(*a*)

V. Political Economy, or the Science of the Production and Distribution of Wealth.

VI. Social Politics, or the Science of the Functions of Government with reference to the Well-being of the People.(*a*)

Having thus seen what are the main contents of the Science of Politics, we may now pass to its Methods. Three Methods have in point of fact been pursued in its treatment. the Philosophical, the Historical, and the Positive or practical. It has perhaps been largely due to too exclusive attention having been paid to one or other of these to the neglect of the other two that political science has not yet gained in this country the position to which it is entitled. In a subject admittedly so complex and difficult, it is necessary that it should be approached from different sides, and that the results arrived at should be checked by the different views thus

(*a*) A further explanation of these divisions is necessary, and especially as to the mode in which the subjects included in them may be best taught. But this cannot be given in the present paper.

obtained. It is irrational in the philosopher to despise or neglect in such a subject the lessons of history. It is as unwise in the historical student of political science to despise or neglect philosophy. Further, if either of these disregard the conditions of states as they now exist, they may form an ideal republic or a theory of civilisation or culture, but they will neither gain nor deserve the attention of the practical politician or statesman.

The Philosophical method examines what the state or political society is, upon what foundations of the nature of society and the individual it rests, and what end it aims at. This is the inquiry pursued by Plato in the Republic. The first master of political philosophy has been followed but never equalled, as by Cicero in the "De Republica," by Hobbes in his "Leviathan" and the tract "De Cive," by Spinoza in his "Tractatus Theologico-Politicus," and by more than one English, Scotch, French, and German philosopher.

The Historical method, on the other hand, traces by the aid of archæology and history with very variable results corresponding to the different stages of knowledge of these subjects possessed by those who follow it, the origin and progress, the rise and the fall of particular states, or of political society in general. This is at the present moment the favourite, it might almost be said the fashionable, method. It has been followed by some writers, commonly called philosophers, but who use so much of historical matter, either by way of basis for, or as illustrations of their theories, that they may more justly be deemed to belong to the historical school. The chief names of this philosophical branch of the historical school are Vico in his "Scienza Nuova," who has by some been called its founder, Hegel in his "Philosophy of History," and Comte in his "Positive Philosophy." But there are others who make historical data not merely the foundation of their theories, still less merely illustrations of them, but the substance of their works, which are directed primarily to a comprehensive view of social

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and political phenomena, and secondarily to the ascertainment of general rules of political science. Leaving out of account the many books which have been written on isolated parts of this wide field, of which those of Fustel de Coulanges, Mr. M'Lennan, Sir Henry Maine, Sir J. Lubbock, Mr. Tylor, Mr. J. G. Frazer, and others who have attempted to trace the remote origins of society, are recent samples, the following writers may be said to have tried to treat political science as a whole according to the historical method:— Montesquieu in his "Spirit of the Laws" and "Observations on Livy," Guizot in his "Lectures on Civilisation," Buckle in his project of a "History of Civilisation," and Herbert Spencer in his writings on "Social and Political Science." Such writers regard chiefly what, in a phrase of the present day, is called the evolution, and formerly was called the development of political society. This is a distinctly modern school of political science. Neither the Greeks nor the Romans had a sufficiently wide knowledge of history to attempt it. Those who have attempted it in modern times, especially Comte, have themselves, in the opinion of many critics, gone beyond the record and formulated wide theories on very insufficient data.

The third, or Positive method, though it does not neglect either philosophical theory or historical observation, deals with political science mainly from the standpoint of the present. It examines states or political societies as they actually exist, analyses and compares them. It has sometimes been called comparative politics, a name at least as appropriate as comparative philology. The founder of this method was Aristotle, whose work on politics, though often considered a purely philosophical treatise, is really the result of a survey of the actual condition of the states known to the Greeks in his age. This would be still more evident if his lost treatise on the Greek states had been preserved, for that treatise was in fact the prolegomena to the extant work commonly called "The Politics." It has been followed by so many writers since that we can only refer to one or two of them, as

De Tocqueville in his treatise on "Democracy in America." Mr. Bryce in his recent work on the same subject, the late Mr. Bagehot in several short but suggestive essays on the British Constitution, the more elaborate works of Robert von Mohl, Bluntschli, and Gneist, too little known in this country, and the equally neglected work of almost the only British statesman who has also been a political philosopher, the treatise of Sir G. Cornwall Lewis on "The Methods of Observation and Reasoning in Politics." We shall not venture to express any preference for one of the three methods. The view suggested rather is that all should be pursued by men of different kinds of talent, the abstract reasoner, the historical student, the scientific observer of political phenomena, and that only by combining their results will a sound philosophy of politics be attained.

The question remains, What is the use of the study of political science? As regards some of its parts, Political Economy or Constitutional law, for example, their value has been practically conceded. They now form integral parts of a liberal education. Their knowledge is admitted to be of service not only to the professional politician, or the professional lawyer, but to the citizen of the civilised community. International Law has, though with less unanimity, reached the same position in most countries. But what is urged is that the study of political science should not be partial but so far as may be complete. This is acknowledged as regards all other sciences, and the burden of showing that politics is an exception properly rests on those who assert it. For in every science a study of particular parts is apt to lead to error by exaggerating their importance, and by omitting to notice the effect of other parts of the same subject upon those studied. The field of knowledge is so wide, and daily grows so much wider, that we must have specialists. But the best specialist is one who has been first trained in a knowledge of the whole before he devotes himself to a part. The illustration is trite but true that the oculist must know not merely the nature of the eye but of the body for which it

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exists, and with reference to which it acts. The state or body politic is certainly not less complex, nor are its parts less inter-dependent on each other than the physical or individual body. While there are many others to whom the study of political science may be of indirect and occasional utility, as indeed some knowledge of it may be deemed useful to every well-educated citizen in a self-governing community, there are two large classes for whom it may fairly be deemed necessary. These classes may be described as the professional politician, and the members of the public service. It does not materially affect this classification that the professional politician aims at, and sometimes obtains, employment in the higher branches of the public service. By the professional politician, so far as this country is concerned, it is intended to denote, not only all present or prospective members of either House of Parliament, but also those persons who take an active part in public affairs in the different localities, whether urban or rural, in which they live. By public servants in like manner are intended all who enter the service of the State or of the public, whether imperial, colonial or local. This class embraces the prime minister and other temporary as well as permanent officials of the central Government, legal as well as municipal, and other local officials, from the highest to the lowest ranks.

With regard to politicians, it will be scarcely disputed in theory that they should have a sound knowledge of political science. Politics is their profession. But the practice in this country, at least, is very different from the theory. What at present is the general character and the previous education of an ordinary member of Parliament? The ordinary British Member of Parliament is frequently a person who has had no direct or systematic training in politics. He is a successful business man, or professional man, or a man with large private means, who desires social distinction, or with small private means, who desires, quite legitimately, to make a reputation, or, less legitimately, a fortune by political life. The same description, *mutatis mutandis*, is

applicable to the class conveniently called Local Politicians, who manage the public business in towns and counties without in general aspiring to Parliament. Leaving the political adventurer out of view, as not a fair, although not altogether a rare variety, the other kinds of the British politician have many advantages. They are always men of energy, and generally men of ability, which has been proved by success in their own business or profession. They are generally also, apart from the necessary demands of party, of independent character. If any form of political training necessitated the sacrifice of these advantages it had better be dispensed with. But the present point is, what is their political knowledge? Is it an exaggeration to say that when they enter public life, as it is called, they are often almost destitute of such knowledge? They require indeed, with a view to their election, to get up some of the elements of it to be able to discuss the questions more immediately before the electors, and to repeat the cries or swear by the names of political leaders. It is comical to observe the different methods they follow. One adopts a professor, another has his speeches prepared by a lawyer, a third makes large demands upon the knowledge and time of his friends, a fourth relies on his wife. Afterwards, if their ability lies in that direction, the successful aspirant to a seat in Parliament, or in a Town or County Council in the case of Local Politicians, has and often takes advantage of the opportunities of acquiring such knowledge afforded in these useful schools of politics, and in a few cases receives the still better training of the business of office. Here, again, the value of being taught by experience, and experience of a practical kind, must not be underestimated. But the question occurs, Might not politicians, without any sacrifice of this experience, and without detriment to the ability which they have proved in their several vocations, be the better of some training in political science? Let it be assumed that they have had a good general education, not necessarily at school or college, but it may be acquired by their own

application in the intervals of business. What can scarcely be gainsaid is that political science, does not yet form part of any system of education in this country, and can with difficulty be obtained by any process of self-education, because the means for obtaining it do not exist in an accessible form. There is no school, and there are few books which give the necessary instruction in the systematic knowledge of political matters. We do not forget that attempts are being made in this direction by the young and vigorous schools of law, especially in the universities of Oxford and Edinburgh, but these are comparatively novel, not yet well organised or fully taken advantage of, nor do we leave out of sight that many useful guides to parts of political science have been and are being published, but these are occasional rather than systematic. Let us contrast what is done in this respect on the Continent for the training of politicians. We are not of the number of those who have any pleasure in praising foreign institutions in comparison with our own. But it is necessary to take facts as they are. The Romans thought it lawful to learn from their enemies. It is not less legitimate to learn from our friends. Take Leipzig as an example. In that university, in addition to all the branches of the civil, criminal, and ecclesiastical law of Germany, the following subjects are taught :—The Philosophy of Law; the Constitutional or Public Law both of the German Empire and of other States; Penal Law or the Law of Crimes and Punishments; Medical Jurisprudence; Economics; Finance Administration; the Management or Administration of Forests; the Management or Administration of Mines; the Principles and Practice of Agriculture: the Valuation of Land; the Principles and Practice of Education. A similar, though perhaps not quite so extensive a series of subjects, is to be found in the universities of other continental countries, not only those of the great States, as Germany and France, but the States of second rank, as Norway, Sweden, Switzerland, Italy, and Spain. The students who attend these classes are the persons who

intend to devote themselves to the service of the State. Of course a selection is made according to the particular destination of the student. But in the classes of the more eminent professors in Germany, there may be observed sitting side by side princes of the blood royal or of the States now mediatised, and representatives of the nobility, the gentry, the professional classes, merchants, and tradesmen. The rural population is less fully represented than in the universities of Scotland and America. In addition to the work of oral teaching, most of the professors, so great is the literary production of the Continent, have published standard books on the subjects they lecture on. It is as possible to be over-lectured as to be over-governed. Germany has not escaped both errors, and a better organisation of the curriculum of political education might be easily devised. Some of the subjects taught are better adapted for books on practical training than for oral instruction. But, at all events, a serious and effective attempt is made to cover the whole sphere of political science. Such an attempt has scarcely yet been made in this country. When we hear it said that England loses by diplomacy what she has gained in war, or when Sir Henry Maine suggests that since the abolition of Doctors Commons England has neither civilians nor international lawyers (an exaggerated but plausible view of its present condition), or when we notice the ignorance of public men as to the elements of international law, or other branches of political science, we feel that such matters are very differently treated in this country.

With regard to the members of the public service, both at home and abroad, a marked distinction must be drawn. To that service, whether we regard it as a whole, or in its great departments in the Central Government, in India and in the Colonies, from its highest members, the permanent secretaries, through all grades to the ordinary clerks, full justice has rarely been done. The attitude towards it of the ordinary Member of Parliament is very remarkable. He is never better pleased with himself than when he can reduce a salary,

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abolish a pension, or scent a job. He regards the members of the Civil Service as his servants, rather than, as the fact is, servants of a common master. But he appears to be wholly unconscious of its great merits, of which any country in the world might be proud and of the devotion to the service of their country which its members display, with little recognition (though some improvement is observable on this point as to the higher grades), through the greater part of their lives. It is true that there are abuses, and the hunter for abuses discharges, although not the function of a statesman, yet a useful and necessary function in the body politic. He is a member of the detective service.

But our present object is to inquire how these servants of the State in the various branches of the public service are educated. What is the nature of their political training? They are now almost universally selected, after trial of their qualifications, for the particular service in which they are to be employed. They are trained in a much more thorough way than the political or occasional servants of the State by experience in their respective offices. Their promotion, though not always, is now generally regulated by merit. The leading members of these services have, at home, kept the machinery of Government in excellent working order. In India, they have solved the problem of ruling people of the most varied races and religions. In the Colonies, they have guided the difficult experiment of organising new self-governing communities. But it has been often observed that they have the fault which Burke pointed out as natural to all officials. Their view is contracted to their particular offices, departments, or sub-departments. The Indian Civil servant, perhaps the most highly-educated member of the class, sometimes can see nothing but India. The Treasury official, nothing but the reduction of votes of money. The clerk in the Education Office, nothing but the Code. The less enlightened members of the service are apt too to become the slaves of red tape, routine, and circumlocution. We have been told, by persons well qualified to express an opinion,

that any indication of knowledge beyond the particular task in which he is, for the time, engaged, is frowned upon in a public office, and forms a barrier to promotion. Without pretending to propose any complete or infallible remedy, and fully admitting that such faults will, to some extent, be generated by any system of merely office training, we venture to suggest the question whether some knowledge of politics as a whole, of political science, in its different departments, though, of course, mainly of the department to which they are destined, might not be of some use to persons entering the public service. Such knowledge teaches, at least, the just proportion of things, and enlarges the horizon of the official beyond his desk and his pigeon holes and their contents. If acquired as real science, it would also check the evils of competitive examination and cram, to which we are beginning to open our eyes. It is singular that, while every profession is striving to make its education more and more scientific, the profession of the Public Service should be left, as regards its education, almost exclusively in the hands of the crammer, the grinder, or the coach.

It is not anticipated that the views here advanced will please any politician whose chief interest is in counting votes, in pulling wires, in the dexterous movements of the older or the younger hands in the game of party politics.

But the number of persons is steadily increasing who look on such arts and practices with no interest, and, if they are used for selfish or private ends, with aversion. Such persons are to be found in all parties and outside of all parties. To these, the leading interest in British politics is that their country should not fall behind other countries, and that the conditions of the life of their fellow-citizens, especially of the classes who live by labour, and even of those who make the vain attempt to live without labour, should be improved and elevated.

They do not disguise from themselves how many of the ills that men endure, are not caused and cannot be cured by

political conditions. But their belief is that, if political science were studied with the same care as sanitary science now is, it would be for the permanent benefit of the commonwealth and its members. Neither do they forget that political parties must be organised and disciplined. But they plead that political science should also be allowed to organise itself. The watch words which political leader after political leader has parrotted, register, organise, poll, may for once in a way be applied to a different subject-matter. Instead of saying, register every elector, organise every electoral district, poll every man, they ask leave to say, Register the results of human knowledge as regards the affairs of the State, Organise the education necessary for political science. Poll the best heads of the past and the present who have studied politics.

It matters little should the nicknames of doctrinaires, un-English, or academical politicians, be applied to them, if the good of the commonwealth is in some degree promoted. They may learn from such names their faults, and endeavour to cure them. Let them avoid, especially, a certain pedantry, apt to attach itself to experts in all professions, even scientific professions, and an opposite error thoroughly unprofessional, the absence of business habits and practical knowledge. The science of politics, though it may be injured by the faults of its disciples is, like other sciences, in the end independent of individuals. It rests on the nature of man and society, and must sooner or later be recognised. It has been claimed for the century in which we live, that it has advanced more than any of its predecessors the bounds of natural science. There is still time, though not long time, for it to gain the additional credit of not being one-sided in its view of science, by strengthening the foundations and enlarging the bounds of political science.

This paper was written before Sir F. Pollock's excellent introduction to the "History of the Science of Poli-

tics"(*a*) came into my hands. It appears that the substance of it was delivered as lectures to the Royal Institution, eight years ago, and some of the views here stated will be found better expressed in this valuable essay. It approaches the subject, however, from an historical instead of a demonstrative point of view, and there may be gain in the same subject being treated from different sides, even if with slightly divergent results. We are at one in the desire to see politics treated as a matter of science, and if I were to venture a brief and imperfect criticism on this essay, it would be to carry further the observation made in the essay, that English philosophers and writers on politics (from Bacon, whose name, as well as Adam Smith's, is curiously omitted from Sir Frederick Pollock's survey, down to Herbert Spencer), have really, though using different terms, all along treated both jurisprudence and politics as branches of science. It should not be forgotten that Hume wrote his essay with the title "That Politics may be reduced to a Science," though it must be acknowledged that the title goes further than the contents. It would be unfortunate for the views here presented, if they had not, in some form, been dealt with by the strong and clear English intellect. The real difficulty is to satisfy practical administrators, and party politicians, of the use of this branch of education, and to show how it may be organised. Yet, even while I write these lines, a typical Englishman, neither a philosopher nor a professor, but a practical politician and administrator, comes to the rescue. I cannot better conclude than with a sentence of Lord Hartington's speech at Chatsworth, on 11th August last. "And the view of politics—the view taken by so many—taken, I am afraid, *by most of us*, of politics being a game of strength and skill, does not seem to me to be a system which can conduce very much to the prosperity of the country." The claim of those

(*a*) A learned but ill-digested paper by Sir Rowland Blennerhasset, recently published, shows that this subject is "in the air," but the too free use of German philosophical views might make a practical Englishman desire that it should always continue in the air.

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who urge the study of politics as a science is that they present, for the impartial consideration of their fellow-countrymen, another view of politics from that of a game, and ask that it should be allowed a fair trial. Will Lord Hartington help to secure this fair trial for Political Science, or must his language be deemed only a new move in the game which he condemns, and which he is afraid *most of us* play?

Æ. J. G. MACKAY.

LAND REGISTRY IN IRELAND.

THE great convenience, amounting almost to practical necessity, of some system of land registry is becoming generally acknowledged. In Scotland, since the beginning of the seventeenth century, and in Ireland and a very limited area of England for nearly two hundred years past, systems of land registry have been in operation. The legislature has done much in recent years to stimulate sub-division of the ownership of land, and whenever a large body of peasant proprietors may come into existence, the demand for a simple and complete method of land registry will probably become imperative.

In Ireland legislation in the direction of sub-division of the ownership of land has been largely effective. Down to 1870, the bulk of the agricultural land was held under tenancies from year to year determinable at the will of the landlord by a six months' notice to quit, at the expiration of which the tenant was obliged to leave, and had no title to any compensation whatever. These tenancies were not within the operation of the registration acts, and, even if they had been, they were obviously of too precarious a kind for any person to think it worth while to register them; and the same observation applies to mortgages of, or charges upon, such tenancies. Mr. Gladstone's Land Act of 1870, while leaving the yearly tenant liable to eviction by notice to quit, legalised the custom of tenant right, and created a right of compensation for disturbance and for improvements. The tenant's interest thus acquired a money value recognised by law, and, from this time forward,

dealings, by assignment and by mortgage, with tenancies from year to year began to be registered. By the Land Act of 1881, the yearly tenant further acquired over the bulk of the agricultural land of Ireland, what is practically fixity of tenure, peasant proprietorship subject to a rent-charge. Many of the interests, thus firmly established, are equal to, some of them are greater than, the interests of the landlords in the same holdings, and dealings with the tenants' interests by assignment and by mortgage or charge, have become more frequent; and these, even where registration was not required, have for the most part been registered.

These Land Acts have been followed by the so-called "Ashbourne Acts," which enable the fortunate whilom mere yearly tenant to purchase up his rent or rent-charge on terms which in the history of agrarian laws are almost unparalleled for generosity, and to become the owner of his holding; and in the bill introduced by the Chief Secretary this year an extension of the principle of the Ashbourne Acts, upon a very large scale, has been promised.

A yearly tenant who purchases his holding becomes thereupon, like any other owner, subject to the operation of the Registration Acts. The tenants who have already purchased and who may purchase under the Ashbourne Acts or the bill of the Chief Secretary, should it become law, will represent, in the latter event, a proprietary of £40,000,000 in amount, and probably over 100,000 in number. Of the holdings owned by these 100,000 proprietors, not one in one hundred probably was liable twenty years ago to the operation of the Registration Acts, and it is apparent that an enormous increase has by this means been already made, and is likely to be further made, to the number of registrations under these Acts.

This new state of things has not escaped the attention of the present Government. Two bills have been recently introduced into the House of Commons, backed by the Solicitor-General (now Attorney-General) for Ireland and the Chief Secretary, dealing with the subject of registration in a very

comprehensive way, and providing for the new class of owners lately brought, and likely to be brought, into existence. These bills are, however, only bills up to the present.

It will be seen, then, that, from an Irish point of view, the subject of registration has of late years acquired a very much enhanced importance; and a short outline of the system as at present in operation there, with some notes of the alterations proposed to be made by the above-mentioned bills, may prove of interest for purposes of comparison elsewhere.

Land Registration is of two kinds—(1) registration of deeds, assurances, wills, and other matters affecting land; (2) registration of ownership. For the sake of distinction and brevity, the former will be referred to throughout this paper as registration, the latter as record of title, by which name it is more popularly known.

Practically the former system—registration—prevails exclusively in Ireland, and has so prevailed since its first establishment in 1708. An attempt was, indeed, made in 1865 to introduce a system of record of title side by side with the earlier system; but as the operation of the new system was restricted to lands which had acquired a Parliamentary title (*i.e.*, by having passed through the Encumbered or Landed Estates Courts), and was further dependent upon the willingness of the owner to adopt it or not, record of title may be considered for practical purposes as scarcely in operation at present. We will see presently what is proposed to be done for the future.

Registration is not compulsory, but as neglect to register, in cases within the Registration Acts, may involve loss of priority and infirmity of title, registration is, of course, the rule. Wills may be registered, but inasmuch as the neglect to register them does not, owing to the frame of the existing Acts, involve any of the consequences above mentioned, wills are very rarely registered. Intestacies neither are, nor can be registered. Registration can only be made under the present law when there is a written document to operate on;

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hence equitable mortgages by deposit of title-deeds without writing, and vendor's lien for unpaid purchase money are outside the registration system. There are other excepted cases, also, of less importance. The omission of the above from the Register, of course, makes it incomplete, and deprives purchasers and others of the full information which the register ought to afford.

Registration is effected by means of what is called a "memorial," which is in the nature of an abstract, but where only the statutory particulars are inserted, is a great deal less than an abstract, of the instrument which it is desired to register. This "memorial" contains the day of the month and year when the instrument bears date, and was perfected, the names and additions of all the parties to it, and of all the witnesses; it mentions all the lands and premises contained in the instrument, and the names of the counties, baronies, cities, towns, &c., where such lands and premises are situated, in the precise manner in which such lands and premises are described in the instrument. In certain cases some other merely technical particulars are required. The memorial so prepared is executed under the hand and seal of some or one of the granting parties, or some or one of the grantees in the instrument, and is attested by two witnesses, one of whom must have been a witness to the execution of the instrument itself, and this latter witness must make an affidavit proving the signing and sealing of the memorial, and of the instrument. The memorial and affidavit are then lodged with the Registrar in order to be registered, and with them the instrument is also lodged, in order that the Registrar may compare it with the memorial, and see that they correspond with one another in the particulars required by statute to be inserted in the memorial. The Registrar's duty requires him to have the memorial altered if it does not so correspond; yet although the memorial be accepted by the Registrar, if it fail to comply with the statutory requirements, the registration will be invalid and worthless. When the Registrar accepts and is satisfied with the memorial,

it is filed in the register book and the Registrar then endorses upon the instrument a certificate of registration, with the date and time thereof, and returns the instrument to the person who had lodged it. The last-mentioned certificate also states (for the purpose of reference) in what register book, page, and number the memorial is entered and registered. Registration is now complete, and the instrument takes priority as of the date of registration over all unregistered instruments, and over all instruments subsequently registered, subject only to be displaced by reason of fraud, or on the ground of notice; that is to say, actual notice, either directly, or through his agent, of a previous unregistered instrument deprives the party relying on a registered instrument of the priority which registration would otherwise have conferred.

It will have been observed that the particulars necessary to be inserted in a memorial are of the most meagre description, and afford very little information as to the contents of the instrument. They convey, in fact, little more than notice that on such a date such a person made some conveyance or disposition of specified lands in favour of such and such another person. This, too, is all that the registration system intended; the memorial gives information that a deed has been executed between certain parties; those who desire further information as to the contents of the deed must go to the deed itself, or inquire from the parties who have its custody. In practice, however, the memorial is generally somewhat fuller than as above, stating to whom the lands and premises are conveyed, and occasionally giving what amounts, in the case of a simple instrument, to a short abstract of it; it very rarely, if ever, discloses trusts.

It has now been shown how a party entitled under an instrument obtains for it the advantage of registration; it remains to show how another, and, indeed, the primary object of the Registration Acts is attained—viz., how intending purchasers, other persons interested, and the public acquire by means of the register information as to the deal-

ings that have taken place in reference to particular lands. This is afforded by means of an elaborate set of reference books, by searching which every memorial that has ever been registered in relation to any land may be discovered and read. The books so kept include—(1) A Day Book, in which is entered the time of the reception in the registry of each memorial, and certain other formal particulars; (2) an Abstract Book, which states the year and day when each memorial was registered, the volume in which the *transcript* (see *infra*) of the memorial has been entered, the number of the memorial on the file, and of the transcript in the transcript book, and other particulars; (3) A Transcript Book, in which each memorial is copied in full, in the order of time at which it was lodged. By means of this last-named book, all the contents of the memorial may be read, without exposing the original to the dangers of loss, mutilation, or wear and tear by frequently repeated references; (4) A Names' Index, in which are entered the names of the granting parties in each memorial, and of the grantee or one of the grantees, the county, city, or town, in which the lands comprised in the memorial are situated, the year of registry, and references to the transcript and abstract books; (5) A Lands' Index; one book, at least, of this kind, is appropriated to each county, county of a city, or group of towns ordinarily indexed together. The county books are divided into baronies, and the city and town books into parishes or streets, with alphabetical sub-divisions for the denominations of lands. In these books are entered the lands comprised in the memorial, the names of first grantor and grantee, and the year of registry, and references to the transcript, abstract, and day books. The Names' Index and Lands' Index are kept in quinquennial volumes, for convenience and facility of reference.

All these books are open to public inspection, on payment of certain fees; the public may also employ other persons, called "searchers," to inspect them on their behalf, or, by requisition, may require an official search, and a certifi-

cate of its result. The official searches are divided into two classes—"common" searches, where one clerk only is employed, and "negative" searches, where two clerks are employed in the search; the search is often confined to the index of names only, but, in matters of importance, both the index of names and the index of lands are searched, and two clerks are employed on it. Within his own experience, the writer has never known of any case in which a negative search failed to disclose every memorial demanded by a requisition. It may be said of this portion of the system, that it has worked extremely satisfactorily, except so far as the ground of expense is concerned.

Of the two bills, already mentioned, as having been recently introduced into Parliament, one deals with registration, as understood in this paper, and is entitled, "Registration of Assurances (Ireland) Bill;" the other bill is entitled, "Local Registration of Title (Ireland) Bill," and is, as its name implies, a bill dealing with record of title.

The former bill proposes to repeal all existing Acts or portions of Acts—some twenty in number—dealing with registration, and to substitute, in itself, a registration code. It will bring within the full operation of the registration system, wills, intestacies, equitable mortgages by deposit without writing, vendors' liens for unpaid purchase money, private Acts of Parliament affecting land, and cases in which under any Act of Parliament (*e.g.*, the Lands Clauses Acts), lands become vested in any person or body upon payment of money, or any other act. It proposes to exclude the effect of equitable doctrines of notice, as already briefly explained, in the case of registered instruments, to make the Registrar's certificate of registration conclusive evidence that registration has been duly effected, and to simplify and cheapen the process of registration now in use. The existing registry of judgments is to be abolished, and its business transferred to the registry of deeds. At present, I may explain, there is a separate registry of judgments, in which judgments, *lis pendens*, Crown bonds, recognisances, &c., are required to be

registered and reregistered. All these are a charge upon the lands generally of the party affected by them, and a search in the Registry of Judgments is just as necessary in every transaction affecting lands as one in the Registry of Deeds. The proposed change will thus comprise in one registry all acts and charges affecting land, and will make one search sufficient where two have hitherto been necessary. A supplemental provision requires persons transferring charges from the Registry of Judgments to the Registry of Deeds to specify the lands which the charges affect, and only lands so specified are to be liable to the charge; at present, as has been stated, charges of this class affect the lands generally of the person liable under them.

Though merely a change in a matter of procedure, one of the most useful proposals in the bill is that to compel persons registering to identify the lands in the instrument with some or one of the denominations on the Ordnance Survey maps, thus making these maps the basis of registration. The gain in clearness, simplicity, and facility of reference from this change, if effected, will be enormous. Supplemental clauses of great convenience provide for the cancellation of mortgages, and charges, which have been satisfied, and of leases which have expired or been surrendered; for the compulsory registration of instruments at the instance of parties interested in them, but not having their custody, or otherwise unable themselves to effect registration; for enabling a party who has entered into a contract for the purchase of land to obtain the protection of registration, while his conveyance is in progress, by means of a caveat.

The second bill is drawn mainly on the lines of an English Act, the Land Transfer Act of 1875. It, of course, makes the register conclusive evidence of the title of the registered owner to the registered land, and provides for the issue to him of a certificate of such ownership. The striking features of this bill are—(1), making the Ordnance Survey maps, as in the former bill, the basis of registration; (2), localising registration in a local office for each

county under the control of a County Court official; and, (3), making registration under its provisions compulsory in the large class of cases already described, where land has been sold to tenants under the Land Purchase Acts, but so long only as such land continues subject to any annuity or rent-charge under the same acts. As the titles of the lands to which the compulsory principle is thus applied have all lately passed through a judicial or quasi-judicial examination, these lands form the fittest subject-matter for a system of record of title. This system and the system of registration proper are, of course, mutually exclusive, but provision is made for the free transfer of lands from time to time from the one to the other at the owner's option, except in the cases above mentioned as being compulsorily brought into the record of title. This bill is primarily intended for the newly created class of small proprietors, and for those yearly tenants who have acquired by recent legislation practical fixity of tenure, and whose interests are of so substantial a character, as to make them desirous to obtain for them the protection and advantages of such a system. The local registries will be readily accessible, and the procedure is simple and inexpensive; and, to secure the latter end, the County Court Judge is given jurisdiction in the smaller class of properties when questions arise which necessitate a resort to a Court of law.

There are certain provisions of the bill, however, which, as materially affecting the substantive law, call for special notice. Freehold registered land is made to devolve, on the death of the owner, upon his personal representatives, and this notwithstanding testamentary disposition to the contrary; and, in the event of intestacy, such land is made divisible among the same persons as the late owner's personal estate; and the existing rules of descent, and tenancy by courtesy, and dower, are abolished, so far as the same land is concerned. These are sweeping changes. Whatever view may be entertained with regard to their policy, a mere Registration Act hardly seems the proper place to introduce

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them; if they are to become law they should be embraced in a general Act dealing with the devolution of real property. So far, indeed, as these provisions affect the tenant-purchaser class of owners, there is much to be urged in favour of them. Their holdings were very lately, prior to the purchase, personal estate, and divisible as such; the tenant, now become owner, has often no knowledge of the altered devolution of his property, which is by law involved in that change, and probably would be averse to it; and to create "an eldest son" among the children of a peasant proprietor is a sufficiently ridiculous and reactionary result of the Land Purchase policy.

It is to be hoped that the exigencies of Parliamentary business will allow both these bills, with some modifications, to pass into law within some reasonable time, and especially while they can be under the charge of the present Attorney-General, who at an early period of his professional life devoted special attention to the subject of registration, and whose pre-eminent fitness to deal with the subject is recognised by the unanimous voice of the profession.

J. Walker Craig.

THE ENGLISH COURTS IN RELATION TO SCOTLAND.

BEFORE the union of the Crowns, the English Courts had little occasion to concern themselves with questions relating to Scotsmen. There is some evidence to show that the independence of the neighbouring kingdom was recognised, even at the time when the King of England claimed feudal supremacy over it. In a writ against Edward Baliol, it was held necessary that the King of Scots should be so described, "for that a king is in notice of all countries," or, in other words, because the existence of an independent State is a fact of which the Courts are bound to take judicial notice.

On the accession of James VI. and I., Commissioners were appointed to consider the legal relations of the two countries and their inhabitants; their report was presented to the two Parliaments, and the hostile laws made by the two kingdoms against one another were repealed. The House of Commons would not agree to a general measure for the naturalisation of Scotsmen; but legislation on this point was rendered unnecessary by the decision in *Calvin's* case (7 Coke, 1), decided in 1608. Robert Calvin, an infant, by his guardians, sued Richard and Nicholas Smith, for disseising him of a freehold at Shoreditch: the defendants pleaded in bar that Robert was an alien born; Robert demurred to this plea as insufficient in law. After long and anxious debate (for this, says Coke, was the greatest case that ever was argued in the Hall of Westminster) the demurrer was allowed. It was held that the *postnati*—

Scotsmen born since 1603—were born in the ligeance of the King of England. As to the *antenati*, no question arose; for the House of Commons had refused to legislate, and the English common law looked to the place and time of a man's birth in deciding the question whether he was a subject or an alien.

Since the date of *Calvin's* case, the English Courts have dealt with many cases in which the Scots law has been put in evidence before them. If we endeavour to track these cases through the reports, we shall, I think, be impressed with the general fairness of the methods applied to them. It happens, unfortunately, that the few cases of conflict which have occurred are better known to the public than the long series of decisions which nobody now thinks of disputing. Even the conflicts and controversies of the past may turn out, on a dispassionate survey, to be less serious than the contending champions imagined.

After the passing of Lord Hardwicke's Act in 1753, irregular marriages, contracted in Scotland by persons domiciled in England, became frequent and fashionable. In recognising these marriages, the English Courts were liberal, and even lax. It was right enough that the forms of a marriage celebrated at Gretna Green or elsewhere should be governed by the local law. But where, from the acts of the parties, it was to be inferred that they crossed the Border solely for the purpose of evading the law of their domicile, their marriages might well have been held to be null. This was Huber's opinion, and Lord Mansfield seems to have thought that the English Courts should act on the opinion of that learned civilian. If they had so acted, they would have saved themselves some trouble, and stopped an undesirable traffic. They preferred to take a different line; they made no exception in applying to Scotch marriages the general rule of international law.

Scotch divorces have not met with the unlimited toleration extended to Scotch marriages; of this *Lolley's* case (Russ. and Ry. 237) is a tolerably familiar illustration. The

decision in that case is briefly reported, and has been to some extent misconceived.(a) It has been cited as an authority for the proposition that no foreign divorce can dissolve an English marriage; but no such unqualified rule has ever been laid down. There can be little doubt that an English Court would recognise the dissolution of an English marriage by a Scotch Court, if it were satisfied in regard to certain essential points. In the first place, there must be no fraud or collusion. In the second place, the parties must be domiciled in Scotland, or otherwise *bonâ fide* subjects to the jurisdiction of the Court which decrees dissolution of marriage. Take, by way of illustration, the case already cited. Lolley took his wife to Edinburgh, and committed an act of adultery there, for the purpose of inducing the wife to seek a divorce from the Commissary Court. Even assuming that there was no collusion on the part of the wife, the English Court might well have refused to admit that the parties were *bonâ fide* subject to the Scotch jurisdiction; but this was not the reported ground of the judges' decision.

For, in the third place, the English Courts require that the foreign divorce should be granted on some ground which is deemed sufficient in England. Adultery on the part of the husband, unless aggravated by cruelty or gross wickedness, is not a ground of divorce in England; and this was the reason given for the judgment in *Lolley's* case. If I may venture to say so, the judgment on this point is not founded in reason. Whether mere infidelity on the part of the husband should be a ground of divorce or not, is a question of policy, to which two equally good systems of law may give different answers. At the same time, the English Courts are probably right in taking cognisance of the grounds on which a foreign divorce is granted. If, for example, they have to deal with a case in which an English marriage has been dissolved by a foreign Court on the ground of incompatibility of temper, they would surely be justified in saying, "This is

[(a) See the recent case where effect was given to a Scottish divorce, *Harvey v. Farnie*, 8 App. Ca. 43.—Ed. *Jurid. Rev.*]

not merely a question of policy; it is a question of morals. Divorce on these lax terms would be fatal to the very existence of marriage as marriage is understood in this country."

In dealing with questions of legitimacy, the English Courts accept, generally speaking, the consequences of the foreign rule of legitimation *per subsequens matrimonium*. To this general rule, there are one or two characteristic exceptions, and of these the most important is the rule that no person born out of wedlock is permitted to inherit English land. The rule is too firmly established to be set aside, unless by legislation; if it were seriously proposed to alter it, I do not know that any reason can be given for retaining it. To say that "land must be subject to the *lex loci*" is no argument; the question is, what the *lex loci* ought to be. To say that there is "something inherent in the nature of English land," which prevents it from descending to a person born out of wedlock, is merely scholastic jargon. If a man owns an orchard and ten barrels of cider, it is plainly absurd that his legitimated child should be capable of taking the cider, and incapable of taking the orchard.

Land in Scotland is rigidly left to the local law, except in the cases where an obligation, contractual or fiduciary, relating to Scotch land, can be enforced by the English Courts without trenching on the authority of the local *forum*. It is, I believe, possible to make an equitable mortgage of Scotch land, by deposit of title-deeds in England: If a man chooses to bring his Scotch charters to England, and to raise money on them there, it seems not unfair that an English Court should say on what terms he is to have them back. Much more difficult questions arise when land or other property situate in Scotland is the subject of trusts which are to be administered by or for the benefit of persons residing within the jurisdiction of English Courts. It is a most fortunate circumstance that the final appeal in such cases is to a Court which is both Scotch and English. When we read the judgments in *Johnstone* v. *Beattie*, and in the *Orr*

Ewing case, we may with all sincerity thank Heaven that we have a House of Lords.

In *Johnstone* v. *Beattie*, 10 Cl. and F. 42, the facts on which the Court of Chancery proceeded, were these:—Mary Beattie, an infant, was permanently residing in England with her mother; her property, which was situate in Scotland, was managed by guardians, appointed by the settlement of her deceased father. These guardians had no power over the infant while in England, and it was stated that their authority would come to an end as soon as Miss Beattie should attain the mature age of twelve. Steps might be taken to place her under the protection of curators for a further period; but no such steps had in fact been taken. From the English point of view, Mary Beattie was an inadequately protected person—an infant heiress, residing within the jurisdiction of the Court, and entitled to claim its assistance. The Court was willing to recognise the Scotch settlement, by including all the guardians therein named among the English guardians whom it was proposed to appoint; but in this arrangement the Scotch guardians refused to concur. The House of Lords upheld the jurisdiction of the Court of Chancery, *dissentientibus* Lords Brougham and Campbell.

It is difficult to assign any reason which would have justified the Court of Chancery in refusing to take Mary Beattie under its protection. At the same time, the guardians who objected to, and appealed from, the order, were doing no more than their duty. The estate was already bearing the expense of a Scotch guardianship, and the Court of Chancery decreed that it must bear the expense of an English guardianship as well. The additional cost was rendered necessary and advisable by the fact of the infant's residence in England. What is wanted in such cases is, a simple and rational mode of adjusting the two jurisdictions so as to save expense and trouble. The English Court should say: "We shall make this infant a ward of Court, and we shall keep alive our power over her, so far as may be for her own good. But we do not think it necessary to inter-

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fere with the Scotch property; *that* the guardians may continue to manage as before; we shall not ask them to account to us, unless some definite complaint is made against them."

Lord Brougham and Lord Campbell thought it unreasonable that mere residence in England should bring a foreign heiress within the power of the Court of Chancery; and they succeeded in showing that the jurisdiction claimed might be so exercised as to produce absurd and undesirable results. But *reductio ad absurdum* is a very unsafe method in legal reasoning. There is in all positive law an arbitrary element; the judge or lawgiver permits a result in itself undesirable because the inconvenience caused is less than the inconvenience which would be caused by setting aside a good general rule. And again, any rule of law may be worked out to an absurd result if the tribunal which applies it lacks common sense and right feeling. Lord Campbell suggested that an English Protestant heiress, residing in Spain, might be made a ward of Court there, and educated as a Romanist. If such a case were to occur, I should infer, not that the Spanish Court had no jurisdiction, but that its order was inconsistent with natural justice.

The case of *Stirling Maxwell* v. *Cartwright*, 11 Ch. D. 522, seems to prove that the principle which I have attempted to formulate is the principle on which the English Courts do in fact endeavour to model their proceedings. The testator in that case was a domiciled Scotsman; his will was in Scotch form; his property, except a comparatively small fraction, was situate in Scotland. One of his six executors, acting as next friend of the testator's infant children, applied to a judge of the Chancery Division for the ordinary administration decree. It was contended that the decree must be limited to the property in England; but it is tolerably plain that this contention could not be maintained. For the object of the application was, not that a particular part of the property might be duly administered, but that the whole property should be so administered as to secure the rights of the infant plaintiffs. At the same time, there was no attempt, on the

part of the English Court, to transfer the administration bodily to England. In confirming the administration order, James, L.J. said, "If there be persons in Scotland who desire an administration there . . . this Court, according to the comity of Courts, would adopt those proceedings, according to the necessities and exigencies of the case."

If these words had been duly borne in mind and liberally construed, the unfortunate conflict of jurisdiction in *Orr Ewing* v. *Orr Ewing* might possibly have been avoided. Proceedings were taken on behalf of Malcolm Orr Ewing, an infant residing in England, to obtain an order for the administration of trust property in which the infant had an interest. Some of the trustees were resident in England; the others appeared in the suit, and it was referred to the High Court to decide whether the prosecution of the suit was for the benefit of the infant. This question having been decided in the affirmative, it was no longer in the discretion of the English judge to refuse the ordinary administration decree. The plaintiff, residing within the jurisdiction, asked only that the defendants, who were also within the jurisdiction, should perform their legal duty to him under the supervision of the Court. But in making the decree the Court did not assume to transfer the administration bodily to England. "If," said Lord Selborne, "there had been any proceedings pending in a Scotch Court, equally beneficial to the infant plaintiff, and in which his rights and interests could have been adequately protected, it would have been competent, and probably right, for the High Court in England to stay the further prosecution of this suit, either before or after decree" (L.R. 9 App. Ca. p. 42). The weak point of the English law is disclosed in the sentences which follow. When Lord Selborne said, "proceedings pending in a Scotch Court," he meant proceedings in the nature of an English administration suit. No action having been commenced in the Court of Session, he argues that nothing had happened which would justify the English judge in staying the suit before him. But the administration suit, as we know

it, is not one of these forms of process which are substantially alike in this and other countries; it is a peculiarly and characteristically English institution. The High Court should, therefore, have been ready to recognise and admit that the security for the faithful administration of a trust, which is given in England by means of a suit, may be given elsewhere without a suit. If this be admitted, it seems to follow that the suit on behalf of Malcolm Orr Ewing might reasonably have been stayed, on its being shown that the administration of the trusts was being carried on in Scotland, with a due regard to the interests of the infant plaintiff. And if the English law had allowed this course to be taken, the Court of Session would not have been driven to the use of strong measures and strong language in defence of its just authority.

It is to be hoped that Order XI. of the new rules of the English Supreme Court will help to prevent the occurrence of such conflicts in future. By enlarging the discretionary power of the judges, the Order enables them to consult the convenience of all parties, in cases where one party could formerly have required them, *ex debito justitiæ*, to grant him a remedy which might be really superfluous. They use their discretion to remit to foreign tribunals, cases which cannot conveniently be tried in England; the clear language used—*e.g.*, by Jessel, M.R., in remitting such cases to the appropriate forum goes some way to atone for certain not quite happily expressed observations of the same judge on the use of the term "foreign" as applied to the Scotch Courts.(*a*)

On the other hand, the new rule permits the English Courts to claim some cases *primâ facie* foreign. In *re Lane*, 55 L.J. 149, the testator died domiciled in Jersey, and three of his four executors were also domiciled there. The

(*a*) [The principles on which this discretion will be exercised have been stated by J. Pearson in *Wilson*, 28 Ch. Div. 457; and by L.-J. Lindley, in *Blake*, 29 Ch. Div. 913. The new liability for costs is the most effectual safeguard against useless administration suits.—Ed. *Jurid. Rev.*]

property and the beneficiaries were in England. Leave was given to serve the three executors out of the jurisdiction.

Cases must often occur in which it is hard to decide whether the English Court should interfere or not. Thus, in *Harvey* v. *Dougherty*, 56 L.J. 322, there were three executors of a will, two were domiciled in Ireland, and one in England. An action was brought against the executor in England, for the purpose of preventing the investment of trust-moneys in Irish land, and leave was given to serve the executors in Ireland. In refusing to set aside the order, Kay, J., said:—"I am not justified *at present* in discharging this order." The plaintiff had contended that his readiest and most effective mode of preventing an undesirable investment was by action in the English Court; and the judge was not satisfied that this contention was unfounded, although the matter was *primâ facie* Irish.

I have quoted these cases because they illustrate the meaning of the rule of Court, and also because they indicate the points in regard to which differences of opinion may in future arise. As new cases arise, the English Courts may be trusted to act without any active desire to extend their own jurisdiction, or to interfere with the province of other tribunals. The peculiarities of their own system of law may sometimes prevent them from readily appreciating the merits of unfamiliar institutions; but they are not backward in rendering due consideration and respect to foreign tribunals.

THOMAS RALEIGH.

HOW TO ABOLISH CONTRABAND.

AROUND the name "Contraband" there hangs a certain aroma of romance which no scientific analysis will ever quite dispel. It is a name which diffuses something of a piquant perfume over the mustiest definition of the law. It summons up recollections of tales of night-adventure—the trial of cunning, and the trial of strength, between the "preventive man" who lived by the law, and the smuggler whom the law denounced, but whom nobody would obstruct or betray. It suggests the Scottish fisherman with his ungauged kegs, the Russian peasant with his untaxed tea, the "last of the Contrabandieri," loading his mules in the Parmesan Apennines with the bales that were packed in Havannah and Virginia. But the regulations of the Custom House are merely municipal. We have to do with Contraband of War.

There is happily no need to attempt at this time of day to define the famous term. The definitions of it by the great jurists have generally been empirical and have nearly always been useless. It is easy to state the principle that the usage of nations has conferred on a belligerent the privilege of intercepting on their way to the enemy all articles which are primarily and by their nature suited for use in war, but as long as man's ingenuity continues to render war more and more an art, so long will the list of forbidden commodities continue to vary. It is not necessary to go far afield in history for an example. During the Franco-German war Germany protested strongly against the English export of coal to France. Now the doctrine of Contraband has always

taught that articles appropriate to the arts of peace, and especially those destined for household consumption, shall be held innocent, and trade in them has been usually permitted between a belligerent and the traders of a neutral state. But it is in the case of merchandise like coal, which may be said to lend itself equally to the purposes of peace and of war that the insufficiency of the existing rules becomes most apparent. The British Government at that time took up the position, that coal might or might not be contraband according as its shipment showed that it was probably destined for the homes of France, or for the bunkers of her war-ships. Our traders were accordingly prohibited from sending coal to the French fleet in the North Sea, but were permitted to carry on their trade with French sea-ports. France of course contended that all traffic in coal should be absolutely free, and could point to her own declaration of 1859 as evidence that her view was not a new claim prompted by immediate self-interest. The picture shows us the two belligerents and the Neutral State interpreting the law, each after his own fashion, and giving unseemly occasion to the scoffers who deride the science of international law as a mere collection of arbitrary rules unnecessary in time of peace and ineffectual in time of war.

In a chaos of opinion like this it is not surprising that some thinkers have been found bold enough to venture upon independent voyages in search of the truth. The helm has just fallen from the hand of the latest and bravest of these explorers. Lorimer has left his disciples distressed but not in despair, and one of them would take a "sad occasion dear" to mark the course he steered when he strove to fix the boundaries of that undefined region which is named Contraband on all the charts. He contended that it was useless to attempt any generalisation from the rules adjusted in the innumerable treaties which have imported so much confusion into this subject, and have contributed so little to the credit of the negotiating parties. It is something to leave the port with free sailing orders, and if we must dutifully find a corner

in the chart-room for the old-time maps, let us at least agree to throw overboard all the treaties.

One or two actual transactions, some famous, some only curious, will indicate the direction in which statesmen have wandered in search of a rule. Some have seen in the phrase "Armed Neutrality" a mere index in history pointing through cold Baltic mists to that bad eminence whence the great Empress of the North, sitting between a designing Chancellor and an unprincipled favourite, issued an edict for all Europe. But in the light of the ever-burning question of Contraband we can now discern in that celebrated league not only a political intrigue, but also an unconscious movement towards a truer legal principle. Great Britain had long maintained that all implements of war including articles suited for the purposes of naval construction should be deemed contraband. The practice of the Northern States had varied with the various exigencies of troublous times, but in 1780 all the Baltic Powers, in opposition to England, which was then fighting a single-handed contest with France, Spain, and her own colonies, asserted that trade in pitch, tar, cordage, and sail-cloth should be held innocent. We stuck to our text. By the older practice of maritime war it was, undoubtedly, competent for a belligerent to seize whatever articles he chose to denominate contraband at the beginning of the contest, and he, naturally, took care to include in that category all the goods of which he knew his enemy stood in need. But neutrals, who found their commerce deranged, had begun to assert their rights and to maintain stoutly that all merchandise should be allowed to pass unmolested which was not strictly war-material. They now found an unexpected champion in Russia.

Sir James Harris, afterwards the first Lord Malmesbury, who was our Minister at St. Petersburg in 1780, has left in his Diary a curious record of things great and small at this period. He shows us the dissolute Empress directed both in her pleasures and in her policy by the Prince Potemkin, that strange being who was by turns a Russian

boor and a graceful courtier, who at one time retired into a monastery, and at another led the great campaign in the Crimea, now profligate and again penurious, alternately an idle voluptuary and a brilliant Minister but always the best loved of all his sovereign's favourites. We see the Chancellor, Count Panin, directing the councils of an empire, and yet too indolent to be stirred into action except by jealousy of the Prince, his rival, or by the prospect of rewards from a foreign Court. We get a glimpse of the Asiatic magnificence of the Carnival—the supper table "set out with jewels to the amount of two millions sterling," and the hundred and fifty diamonds distributed to the winners at the Macao tables—a glimpse also of another Asiatic quality in the person of the first magistrate of the Empire, who was to be found sitting by himself playing with a dirty pack of cards at seven o'clock in the morning. With only two courtiers in attendance we are carried on quite a private excursion to the Empress's country-house, La Grenouilliere, for which Wedgewood, we are told, had supplied "a very remarkable service of his ware on which a green frog was painted" and where the conversation between Her Majesty and Sir James runs from English gardening to Blackstone on the English constitution. Our Minister was too astute to let slip such opportunities for recommending the interests of his own country. In private conferences with her, in secret meetings with Prince Potemkin and in little transactions with a very venal favourite of that favourite, he sought to divine and frustrate the intrigues of the Russian party and win support for the English cause. Catherine was not ill-disposed towards us, but she resented and made constant complaint of our pride, our cold reserve, and the high tone of our pretensions to maritime supremacy. Our own affairs were then at such a pass that our pretensions to supremacy of any kind might well seem grotesque. So dire was our necessity that the cession of Minorca was gravely talked of as a fit price to pay for Russia's aid, and the policy which proposed it was perhaps not wholly mistaken, for, two years later, the island

was wrested from us. At this juncture it happened that Spain stopped two Russian vessels bound for the Mediterranean with wheat and confiscated their cargoes—a proceeding amply sufficient to inflame the indignation of an Empress who had passionately declared to our representative that her ships were her children. If Sir James Harris had been tempted to reply that her small family was well cared for since each child had a nurse, he could hardly have claimed the merit of originality for his jest, because Lord Hillsborough with much reason but great indiscretion had already remarked that "Her Majesty's commercial navy was the best guarded in Europe as she had a man-of-war to each merchantman." But Sir James did better. He prepared an elaborate memorial in which he advocated the doctrines held by his government and earnestly urged Her Majesty to embrace them. This he intrusted to Potemkin who undertook to deliver it to his mistress and to support it with his own influence. But the diplomatists had reckoned without the maid. This young woman, Guibald by name, who was in attendance upon the nieces of the Prince, found an opportunity to steal the document from his pocket, and handed it to certain members of the Chancellor's faction, who embellished it with marginal notes in refutation of all the arguments of the English minister. The memorial was then replaced, and when the Empress came to peruse it she was charmed to find that Potemkin, whom she understood to be the author of the notes, was in this matter of the same mind as herself. So, at anyrate, runs the story. But Potemkin was able to do something to redeem his promise. At his instigation, a fleet—crazy enough it is true, but still a fleet of fifteen ships of the line and five frigates —was equipped and actually despatched to aid England, if Spain should refuse redress. This sorry squadron filled its own commanders with about as much disquietude as it could possibly cause to Spain. It had about as much to fear from the waves as from an enemy's broadside. But the Chancellor for his part used the occasion with consummate

skill. He showed his imperial mistress how she might appear as a law-giver to the nations. He perceived that it would be easy to persuade her to issue a manifesto which would flatter her inordinate self-esteem, which would have the appearance of publicly reprobating the enormity of the Spanish offence, which would gain the ready assent of the neutral powers, and which would at the same time save her from the necessity she so much dreaded of entering upon actual war. His own private ends would be attained in so far as the announcement served to ruin the prospect of an alliance with England. He accordingly drew up a Declaration in which the Empress of all the Russias "believing it consonant with her sense of justice to make plain before the eyes of all Europe the principles which she proposed to follow," announced that she would hold as contraband only fire-arms, swords, saltpetre, sulphur, saddles, and bridles, and nothing more, and that she would maintain by force, if necessary, the right of all neutral ships to trade from port to port, and even on the coasts of belligerent states, in all other merchandise. This exposition of the rights of neutrals the Empress in a moment of lofty vanity subscribed and caused to be communicated to the other Powers. Denmark and Sweden at once acquiesced in it, and the famous league known as the First Armed Neutrality, born of the rivalry of two unworthy courtiers, became a fact in history. It is obvious that a declaration derived from a source so notoriously impure could not express the clear and deliberate opinion of Russia. The Empress herself apparently was always unable to understand how it was that the merely formal league resulting from her edict had so deeply offended England. She once asked our representative in a tone of puzzled petulance: "Mais quel mal vous fait cette Neutralité Armée ou plutôt *Nullité* Armée?" In any case the position of Russia in maritime matters was at that time so insignificant, that her opinion was of very little weight. The historical value of the episode lies only in this, that it was the first international state-proclamation of the sanctity of neutral

rights, and that it afforded a precedent to which aggrieved neutrals could appeal as a charter of their trading liberties.

About three-quarters of a century later, the tale of the *Trent*, told by an officer in language merely official, was enough to stir the dust on legal folios, to awaken the dead echoes of forgotten controversies, and to move the indignation of England. The *Trent* was an English mail-packet boat plying between Vera Cruz and St. Thomas, and on 8th November, 1861, carried among her passengers Mr. Mason and Mr. Slidell, two Commissioners appointed by the Confederate States of America to represent them at London and Paris. A Federal war vessel stopped her, seized the envoys, and carried them as prisoners of war to Boston. This was too high a stretch of war-prerogative to be regarded with equanimity by any neutral. France, Germany, and Austria in public despatches proclaimed their amazement at the outrage. Russia was content to pronounce a condemnation of the act through the medium of a letter addressed by her Minister in London to his colleague at Washington. Times were changed, and a simple letter now took the place of the formal Declaration. Catherine, be it remembered, signed the one, the other was approved by Prince Gortschakoff. In England every detail of this incident was minutely canvassed. The question for decision was whether these men and the despatches they bore could be regarded as contraband of war. The American Government, while admitting that it seemed a straining of the term "Contraband" to apply it to persons, yet contended it might include persons no less than property, because the word "meant broadly—contrary to proclamation, prohibited, illegal." This appeal to grammar was certainly beginning at the beginning, and promised a steady course through all the authorities, ancient and modern, a viscous flood of argument broadening slowly down from precedent to precedent. Through page after page of a long elaborate Note, the American Secretary of State laboured to justify an act which his Government ultimately disowned and repudiated, and his thesis terminated with a

remarkable *non sequitur* in the frank statement that the prisoners "would be cheerfully liberated." That was in point of fact the ignoble issue of the inglorious exploit of Captain Wilkes. The vagueness of the word "Contraband" is well illustrated by the fact that the English reply hardly attempted to combat the suggestion that persons may in certain circumstances be regarded as contraband. We relied chiefly on the fact that the vessel was neutral and destined for a neutral port. These contentions of the diplomatists seemed to show that only a subtle distinction separates a Government agent from contraband of war, and that a neutral trader may find his ship and cargo infected with the taint of illegality, because he carries a contraband passenger. The *Trent* case certainly suggests that a rudimentary sense of humour might save diplomatists from some ridiculous situations.

It seems then that this insatiable term "Contraband" has swallowed things so heterogeneous as coal and human beings, and has even found no difficulty in assimilating the dry bones of written despatches. But the defenders of free trade in time of war have made a bold fight for provisions. It is, or was until very lately, an acknowledged right of neutrals to send provisions to a belligerent without running any risk of having their ships and their cargoes seized by the other combatant's cruisers. To do so was held illegal only when the belligerent's ports were strictly blockaded or their territory so invested as to render it probable that famine would anticipate the sword. In a very recent instance we saw a shameless effort made to sweep away this neutral right. The prime necessity of the Chinaman is rice, and when the French in 1885 announced that they intended to treat that article as contraband, they hoped to hit their enemy in his weakest spot. They had discovered that large quantities of rice were about to be forwarded from Shanghai to the north of China. A blockade of Shanghai and the other ports might effectually have stopped the supplies, but it was obviously easier, by a mere interdict laid upon the

trade, to frighten off the neutral vessels which might have been employed in the transport. The announcement was veiled by the thin pretext that this method instead of a blockade *de facto* had been adopted in order to diminish the inconveniences of the war to neutrals. Our own hands, unfortunately, are not clean in this matter. Starting from the doctrine that, generally, provisions are not contraband, but that they may become so under circumstances arising out of the particular situation of the war, we have at various times in the past held corn, biscuit, cheese, and rice itself liable to capture. M. Waddington had, therefore, little difficulty in finding precedents in our own practice which justified his Government's action, and had his researches in our State papers been more industrious, he might have adduced even more damning examples than any of those he cited. In spite, however, of our own evil record, we virtuously protested against all rice cargoes being treated as contraband irrespective of their destination, and the dangers of a rupture were only avoided when the war came to an end. When the Governor of the Imperial Palace at Pekin went laden with gifts to inquire of the god of war what should be the issue of the struggle with France, he might also have consulted the oracle upon the nature of contraband. Although the subject has proved too hard for solution by any of the new systems of the West, it might have yielded to the sublime philosophy of an older civilisation; and, if the perplexed divinity had remembered the maxim, "*similia similibus curantur*," he might have taken refuge in a fine oracular ambiguity to parallel the middle way which Grotius found in his "*res ancipitis usus*."

This, then, is the retrospect—treaties, armed neutralities and armed nullities, declarations, protests, decisions, and the elaborate dicta of the jurists all sailing gaily forth for the grand discovery, and all mournfully gone down. These are the wrecks that strew the coast of the region round about "Contraband." If our Scottish pilot was to reach a safe harbour, he was bound to shun the lights which have so often

proved false. But Lorimer's standpoint was always lofty, and gave him a chance to see what was beyond the horizon of others. "Much as my opinion is at variance both with dogma and usage," he says, "I can make no distinction between munitions of war and ordinary commodities. All objects are munitions of war if a belligerent is in want of them; and no objects are munitions of war unless, or until, he is in want of them. Salt beef and saltpetre are precisely on the same footing in this respect, and steel bayonets may be a superfluity where steel pens are a desideratum. Munitions of war are what war demands, whether it be shot and shell, or shoes and stockings." It was characteristic of Lorimer that, having applied the keenest analysis to ascertain his facts, he never lacked the courage to teach the principles they revealed. It was no less his distinction that the lessons were clothed in a grace of diction that marks him a master of English style. His view of this particular question may be novel, but it cannot be called startling. If the teaching of centuries goes to show that it is impossible to attain agreement upon what is, and what is not contraband, it is surely not a violent assumption to suppose that the vague and fluctuating line which is held to separate them may, after all, be wholly imaginary. But if there be no foundation in nature for the distinction, then traffic in goods of every kind must be free, and this opens up a prospect which is not unlikely to alarm even those who, thus far, are disposed to accept the argument. They may say the trader who supplies weapons, is really making war as much as he who uses them; he is contravening all the duties which bind a neutral to be passive; he is compromising the neutrality of his own State and, as experience has taught us, that way lie claims, arbitrations, and exorbitant indemnities. The answer is that the trader is indeed concerned in a non-neutral act, but its character can never be determined by the mere nature of his exports. Only an accurate estimate of the circumstances of each particular campaign can settle whether he who sends out rifles, or he who consigns clothing, is fighting the more

effectually for the side with which he traffics. Is it to be imagined that when a blockade-runner succeeded in entering Charleston with a cargo of shoes and quinine, the aid rendered to the Confederacy was the less real and substantial because it was difficult to blow out a man's brains with the one, and to cut his throat with the other? The trader is, indeed, a non-neutral, but he is not bound to be anything else. In his private capacity he may favour either side. He may lend or give away his goods or his money to the cause he espouses. As a citizen, it is true he must neither hold to the one nor disparage the other, but, as a private individual, his will is free. Lorimer used to bewail the inability of those who were not jurists to appreciate this distinction. He attributed their difficulty to the fact that they shrank from considering the trader's double capacity, because they regarded that conception as something abstruse and philosophical; but optimist as he was, he looked confidently forward to the time when, under his own municipal statutes at any rate, the merchant's liberty of action would be as ample in time of war as in time of peace, and the already discredited partition set up between goods contraband and goods innocent, would be broken down and abolished.

But to the theoretical argument for the amendment of the existing law may be added the practical objection that it has been found impossible for any neutral Government to supervise the acts of all its merchants. There never yet was a war in which sympathy or profit did not tempt the onlookers, and in which their Government was able to enforce this ideal, but misconceived, neutrality. A Government can no more prevent individuals from sending succour to the side they choose to favour, than it can prevent them from making partial speeches on the platform, or writing biassed articles in the newspapers, and it is a true reform which will relieve the executive of the duties it has consistently failed to perform. Notorious calamities have sprung from the system of espionage, when it was ineffectual; one instance will show that it can be sufficiently mischievous when it is only too

officious. During the war of 1870 an unhappy English firm contracted with the French Government to lay down telegraph cables on the French coast. They shipped the cables in their own steamer, but, before she could sail, the authorities swooped down upon the enterprise. A lost market, a broken bargain, and a vexatious and costly lawsuit with the Crown were the fruits of this conflict between public policy and private industry. When these losses were discounted, it could but little recompense the shippers to learn that the law had in the end decided that the seizure of the goods was unjustifiable.

When Lorimer, at the conclusion of that work which is deservedly entitled the "Institutes of the Law of Nations," deduced the rules which resulted from his thesis, he laid down these two canons: "The neutral flag shall cover both neutral and belligerent property, without distinction between what may or may not possess the character of munitions of war. If neutral citizens in their private capacity convey commodities, including arms and munitions of war, to belligerent citizens or belligerent States, into blockaded ports, they shall do so at their own risk, and no protection shall be extended to them by their own States, which shall incur no liability for their actions."(*a*) Of them and the other laws which he advocated as being only the logical expression of the jural relations existing between acknowledged facts, his last words were: "I am far from imagining that they will ever entirely satisfy any two belligerents at the same time. That is what no neutral laws can hope to accomplish. But over our existing neutral laws they would have, I think, these two great advantages: they would admit of being really observed by neutral Powers, and consequently of being justly enforced by belligerent Powers; and, when so observed or enforced, they would, without interfering with the private

(*a*) This statement of the rule varies from that given at p. 178, vol. ii. of the work referred to. But Professor Lorimer, in the course of last year, intimated to the writer that he preferred the version given above.

rights of private neutral citizens, be impartial in reality, whether they were felt by belligerents to be so or not."

It was Charles Kingsley who said of Carlyle: "His writings are instinct with the very spirit of science. He has taught men moral and intellectual courage; to face facts boldly while they confess the divineness of facts; not to be afraid of Nature, and not to worship Nature." These words aptly describe the teaching of Lorimer. He analysed everything with fearless precision, and men wondered alike at his insight and his courage. He professed himself an optimist, and men loved him for himself.

ANDREW WISHART.

THE WORK OF THE WEST INDIAN COMMISSIONERS.

III.

THE WEST INDIAN COMMISSION AND ITS RESULTS.

IN concluding the present series of articles, I shall give a rapid survey of the West Indian Commission—its constitution, its recommendations, and its results. The whole subject, and especially that part of it which relates to the modern judicial system of our colonies in the West Indies, is alive with interest. But it cannot be adequately treated within the limits of a single paper; and I shall merely endeavour, therefore, to touch upon a number of the most suggestive and important points.

The work of the West Indian Commissioners extended over a period of nearly six years. The original Commissioners were Fortunatus Dwarris, whose treatise on "The Statute Law" was a standard work in its day, and is still to be found in the libraries of the Inns of Court, and Henry Maddock, the author of an "Account of the Life and Writings of Lord Chancellor Somers," and of a book on "The Principles and Practice of the High Court of Chancery," but best known by his six volumes of Equity Reports. These gentlemen were appointed, under instructions issued by Earl Bathurst, then Secretary of State for the Colonies, and dated 1st November, 1822, "to inquire into the administration of Civil and Criminal Justice" in Barbadoes, Tobago, Grenada, and the range of the Antilles down to and including Tortola. This

inquiry commenced at Barbadoes in January, 1823, and ended at Tortola in January, 1824. Meanwhile, the scope of the Commission had been enlarged by the Colonial Secretary. The Commissioners were directed by warrant under the royal sign-manual (29th November, 1823) to proceed to Trinidad. Jabez Henry,(*a*) a barrister of the Middle Temple, who had already, in the service of the British Government, administered Dutch law at Demerara, and Venetian law at Corfu and in the Ionian Islands, was appointed Senior Commissioner by Letters Patent of 19th March, 1824; and these Letters Patent were made to comprise not only all the colonies previously visited by Maddock and Dwarris, but Jamaica, St. Lucia, the Bahama and Bermuda Islands, the settlement of British Honduras, and Demerara, Essequibo, and Berbice—now united into the colony of British Guiana. The Commissioners reached Trinidad on 19th January, 1824. Henry joined them on the 6th of May following. Eight days later, Dwarris returned to England in ill-health, and Maddock and Henry continued their inquiries alone. From Trinidad they proceeded to St. Lucia, where Maddock died on 29th August, 1824. In the meantime, however, Thomas Coneys had been appointed a member of the Commission; but he also died before its labours had been completed, and the final Report is signed by Henry and Dwarris alone (14th April, 1828).

These details explain the otherwise confused arrangement of the Reports of the West Indian Commissioners. There are two series, each consisting of three distinct Reports. The first series includes Reports on—(1) Barbadoes, Tobago, Grenada; (2) St. Vincent and Dominica; (3) Antigua, Montserrat, Nevis, St. Christopher, Trinidad, St. Lucia, and Tortola. The second series comprises Reports on—(1) Jamaica; (2) Demerara, Essequibo,

(*a*) Henry was the author of a little work on "The Judgment of the Court of Demerara in *Odwin* v. *Forbes*, on the plea, in bar of a suit by a foreign creditor, of an English certificate of bankruptcy."

and Berbice, and (3) British Honduras and the Bahama Islands.

The course pursued by the Commissioners appears to have been generally as follows. Upon arriving at each of the islands within the scope of the inquiry, they made themselves acquainted with the preliminary points necessary to be ascertained, framed a list of questions that would elicit the desired information, and furnished the magistrates and the several public officers with copies thereof. When these officials had completed and sent in their answers, the Commissioners went over the whole of the examinations with them, and discussed the questions and answers *seriatim*. They then prepared a comprehensive abstract of all the examinations taken in the colony, "accompanied by such observations as appeared necessary on the principal points elicited in the same, recapitulating, at the conclusion, the several results at which they had arrived, and offering such propositions for the reform of old laws and the introduction of new ones as [seemed] imperatively called for . . . in order to insure the peace, prosperity, and well-being of the settlers."(*a*) While prudently avoiding the temptation to constitute themselves a Court of Error, the Commissioners threw their doors "widely open to receive complaints and representations of every kind, provided only they *did* relate, more or less intimately, to the administration of justice;" (*b*) and the evidence collected under this head is one of the most curious and instructive features in the Reports.

The *general* recommendations of the West Indian Commissioners must now be briefly explained.(*c*) I shall mention them in the order in which the topics that they relate to have been discussed in the preceding papers.

1. *The revision, and, where necessary, the publication of the Colonial Laws.*—It was further recommended that the Act authorising the said publication should contain a clause

(*a*) Third Report, 2nd Series, British Honduras, pp. 1 and 2.
(*b*) First Report, Barbadoes, p. 28.
(*c*) Third Report, pp. 95-116, 1st Series.

providing for the reception of the printed volumes in evidence.

2. *The reconstitution of the Courts of Law.*—The following features of the modern judicial system of the West Indian Colonies were first outlined by the Commissioners:—

(*a.*) *The consolidation of the Courts in each Island.*—All the common law Courts in each island were, whenever it was practicable, to be formed into one combined and extended Court, with revenue, common law, and admiralty jurisdiction, after the model of the Supreme Court that the Commissioners found existing in Grenada. It seems strange that the idea of making the *Courts of Chancery* wings of these new supreme tribunals should not have occurred to such an accomplished lawyer as Dwarris.

(*b.*) *The establishment of Circuits.*—The immediate consolidation of the judicatures of the West Indian Islands was, at this time, beyond the range of practical legislation. "It would not be possible," said the Commissioners, "to administer satisfactorily the laws of one island in another. All these various colonies, settled or ceded at widely distant periods, and conducted still under separate Governments, must not be supposed to have, by any means, an identity in their laws, and it has been abundantly shown that they have a great diversity in their practice. The laws of the different islands have certainly a general resemblance, owing to their common origin from the laws of England. But they have also an infinite variety of distinctions, occasioned by their having been passed by legislatures separate from, and independent of, each other; as at present constituted, too, the judicatures of these islands and the jurisdiction of their respective Courts vary widely. In Barbadoes, the Court of Chancery is differently composed from the same Court in Tobago, Grenada, and St. Vincent. The Supreme Civil Court is also dissimilar in its constitution and practice in many important particulars in all the islands. . . . To mention one striking instance, the islands of St. Christopher and

Tortola are under the same Government; but in one the Attorney-General said, 'It is the practice to sell equities of redemption at marshal's sale under executions at law in this island. It has long prevailed, and very many titles depend on such sales.' 'A levy on an equity of redemption,' said the Crown Officer of the other, 'is not warranted by our execution, and I do not apprehend that it would be sold by the marshal.' It would be superfluous to dwell at greater length upon the futility of a scheme for prosecuting at Barbadoes causes of action arising in Tobago, Grenada, and St. Vincent."

Accordingly, the Commissioners adopted a *via media*. They suggested that the colonies named in the first commission of inquiry should be divided into two *circuits*, one to include Tobago, Grenada, Barbadoes, and St. Vincent, the other to embrace Dominica, Antigua, Montserrat, Nevis, St. Christopher, and the Virgin Islands. For each of these circuits, two superior judges (one an equity, the other a common-law lawyer) and an Attorney-General were to be appointed. In addition to these, a puisne resident judge and a Crown officer or solicitor-general were to be stationed in each of the islands. The two superior judges were to go on circuit at stated periods, and the common-law judge was to sit, first at *nisi prius* for the trial of causes, and afterwards *in banc* with the puisne judge, and with power to call in his equity colleague in case of difference of opinion. The powers that the Commissioners proposed to assign to this equity lawyer are not very clearly stated, but the general scope of the recommendation is sufficiently intelligible.

(c.) *The appointment of properly qualified lawyers to the chief judicial and legal offices in the colonies.*—The Commissioners do not seem to have recommended that candidates for legal appointments in the colonies should have been called to the bar for a prescribed term. Probably they deemed it a sufficient innovation to suggest the nomination of barristers of "some years' standing" only.

(*d.*) *That the Judges and law officers should be independent of the local legislatures, and should be persons that were not subject to local influences.*

"All the judges and the attornies and solicitors-general," say the Commissioners (*a*), "must be rendered independent of the colonies, and should receive salaries only and no fees, except for the private professional practice of the two latter, . . . which fees should be fixed at home, and on no account be allowed to be exceeded under pain of dismissal from office. . . . To guard effectually against that local influence which is at least suspected to have prevailed so largely in these islands, no person possessing any property in plantations or slaves (except menial slaves for domestic purposes), or being managers or overseers of estates, or attornies for absent proprietors, or engaged in trade or agriculture in the colonies, should be qualified to hold the situation of judge or Crown officer, within the district in which such property or interest exists."

3. *A statutory definition of how far, and from what point of time, the Common Law of England should be held to be in force in the West Indies.*

4. With regard to the *Slave Laws* of the West Indian Colonies, the Commissioners made the following recommendations:—(*a*) That an Act should be passed declaring the Common Law to be in force in all the colonies, and that all African or Creole slaves were entitled to its benefits and subject to its penalties; (*b*) that in the construction of Colonial Acts, the Common Law should be considered original and the slave laws supplemental; (*c*) that the Acts of Assembly relating to slaves should in all the islands be consolidated and amended; (*d*) that slaves should, "in all criminal cases, be subject to the same mode of trial as in the case of free persons," and (*e*) that slave evidence ought, at least in all criminal cases, to be received. Upon this last point, the language of the Commission deserves to be cited.

(*a*) Third Report, 1st Series, p. 115.

The following passages are taken from the Third Report (*a*) which is signed by Dwarris :—

"The history of slave countries, in all ages, abounds with examples confirming the strong natural probability that ignorant or profligate slaves would be constantly suborned to establish facts essential to their masters' interests. In the present uninstructed state of the negro slaves in the West Indies, I should certainly regard with considerable apprehension the admissibility of slaves to support contracts entered into by their owners. Yet I am not insensible to the apparent absurdity, and I well know the practical inconvenience, of excluding them even in such cases. 'A medical practitioner,' said a complainant in one of the islands to the Commissioners, 'cannot at the trial prove his being *called in*, for it was by a slave, not known, perhaps, to his own people. He cannot prove the medicines supplied, for there are usually only slaves present in attendance upon the sick person.'

"But whatever rule may be adopted in civil suits, His Majesty's Commissioners have no hesitation in saying that, in criminal cases, we think slave evidence ought always to be admitted. . . . Still, it would be highly proper that such uncertain testimony should be received with the greatest caution; none but persons, certified by their religious teachers to have a due sense of the obligation of an oath, should be admitted as witnesses; the credit of their testimony should be open to observation, and its weight upon all occasions be nicely sifted; it might even be safe in extreme cases not to act upon such testimony, unless it were supported by other proofs, positive or circumstantial, and experienced persons are disposed to attach more importance to the confirmation of circumstances than to the accumulation of testimony. At all events, I should certainly recommend that no execution should take place in any capital case, when the conviction proceeded entirely upon slave evidence, without a careful review of the case before the Governor in

(*a*) Pp. 107, 108.

Council, . . . assisted by the Attorney-General, having before them the notes of the judge who tried the prosecution, and requiring a certificate under his hand that he approved of the finding of the jury."

* * * * *

In the sixty years that have elapsed since these reports were presented to the House of Commons, the main recommendations of the West Indian Commissioners have been "clothed upon" with legislative authority or the not less potent sanction of custom. As regards the slave laws, events moved faster than Dwarris had anticipated, and after the 1st of August, 1834, there were—at least in the eye of law—no slaves in the West Indian Islands (3 & 4 Will. IV. c. 73, § 12; 6 & 7 Vict. c. 98, § 2). The administration of justice, too, was steadily improved (*Cf.* 6 & 7 Will. IV. c. 17). Colonial statutes were made as accessible as imperial. The circuit system was adopted. The symmetrical arrangement of the English judicature is being cultivated.(*a*) Nay, more, "the consolidation of Governments," that the West Indian Commissioners reluctantly declined to consider, has been partially accomplished—*e.g.*, in the Leeward Islands, by the ability and determination of Sir Benjamin Pine, and more recently (50 & 51 Vict. c. 44) in Trinidad and Tobago. Finally, the judicial establishment of the West Indies has been purged and reconstituted. One does indeed occasionally find in the Law Reports a colonial chief-justice converting himself into an unsworn witness against a prisoner: and, from time to time, authentic rumours reach England of puisne judges, whose grammar is defective, and attorney-generals, who are ignorant that an arbitrator may administer an oath. Doubtless the record of these eccentricities might be enlarged if the dead hand of the Colonial Office could be forced to surrender the secrets that it holds. But the competition of the able and not always youthful barristers and advocates, whose names are "down" on the mysterious

(*a*) *Cf.* The Windward Islands Ordinance, 1880.

"list of applicants for legal appointments in the colonies," that is kept in Downing Street, amply secures the efficiency of the West Indian judicial staff; and no deterioration need be feared so long as the Secretary of State can engage the services of lawyers like the present accomplished and liberal-minded Chief-Justice of Barbadoes.

A. Wood Renton.

Current Topics.

Summary of Legislation, 1890.—The outstanding original features of this year's legislation are the Western Australia Constitution Act, the Anglo-German Agreement Act, and the Partnership Act. The last-mentioned Act will be noticed in this Review for January.

1. We have already called attention to the proposals now fairly embodied in the Australian Act. The theory of the statute is that the Queen may be authorised to assent to a bill adjusted and passed by the existing Legislative Council for the colony. The only alteration made at home on the text of that bill relates to the pension of the Attorney-General. The bill was competent to the colony in virtue of the powers given by the Colonial Government Act, 1850, to alter the electoral law, and establish an elective Legislative Council and Assembly. Some points in the new Constitution may be mentioned. A considerable property qualification is retained; an oath or affirmation of allegiance to the Queen is required; being a clergyman or minister is a disqualification; seats are vacated *ipso facto* by supervenient insanity, also by two months' failure to attend; the franchise is that of the £10 householder. After the lapse of six years, the Council will be elective as well as the Assembly, and the Council will elect its President. The functions of Council and Assembly are not defined. The whole body of existing law and the whole jurisdiction of existing Courts are saved by the Act. It is declared that the mother country and the colonies shall be entitled to the best favour in Custom duties. What may be called the Imperial clauses of the new arrangement are these:—(1.) The provisions of the Colonial Government Acts 1842 and 1850, as to reservation of bills for the Queen's assent, instructions to Governors, &c., are expressly applied to the legislation of Western Australia in the future; (2.) The control of the waste lands and minerals is vested in the Colonial Legislature; (3.) Subject to existing contracts and licenses, the power of the Queen, under a statute of 1857, to make land regulations is repealed; (4.) Power is given to the Colonial Legislature to alter the constitutional law in the same way as any other law for the good government of the colony; (5.) Power is reserved to the Queen, by Order in Council, to

divide Western Australia and make a separate colony, or unite the separated portions to another Australian colony.

2. The form taken by the Anglo-German Agreement Act is extremely simple. Certain portions of the agreement with Germany, relating to Heligoland, are scheduled; the consent of Parliament is given to them, and it is declared that the Queen may do everything necessary and proper for carrying the agreement into effect.

3. A formidable illustration of our responsibilities in British India is afforded by the South Indian Railway Purchase Act (c. 6), which authorises the Secretary of State to raise £5,267,556 for the purchase of this railway with the rolling stock, and for the payment of the debenture debt affecting the undertaking.

4. Among the home administrative arrangements, the greatest interest attaches to the Customs and Inland Revenue Act (c. 8), which creates the new Local Taxation Duties, consisting of the additional duties on spirits imposed by the Act, and a proportion of the beer duties formerly imposed. These duties are henceforth to be divided among the three kingdoms, and otherwise dealt with, in the same manner as the one-half of the probate duties applied to local purposes in the previous year. (The Local Taxation Act (c. 60) applies these duties to purposes which are familiar.) The 6d. inhabited house duty is reduced to 2d. for houses under £40, and to 4d. for houses between £40 and £60; and the 9d. rate is similarly reduced for the same classes of houses. This duty is also reduced in the case of lodging-houses, and the assessment is wholly discharged in the case of artisans' dwellings let at not more than 7s. 6d. a-week, if they are in good sanitary condition.

5. The Barracks Act (c. 25) has been passed for the purpose of building and enlarging barracks and camps in the United Kingdom and in certain colonies, and of amending the law as to the acquisition of land for military purposes. The heads of the proposed expenditure are—

Construction and reconstruction of camps, including married soldiers' quarters, .	£1,980,000
Provision of new and enlargement of present barracks and quarters for married soldiers,	1,670,000
Purchase of land, buildings, and expenses, .	450,000
	£4,100,000

As regards the acquisition of land, the War Secretary is entitled to hold a local inquiry by his own officers, but the Parliamentary Bill, afterwards introduced, may be treated as a Private Bill and sent to a Select Committee, if the landowner insists on this by petition. The powers given by the Drill Grounds Act 1886 are enlarged with the view of providing Artillery and Rifle Ranges.

6. There has been a good deal of useful consolidation, notably in the Lunacy Act (c. 5), which finally repeals the Lunacy Acts of 1845, 1852, 1853, 1855, 1856, 1862, 1863, 1882, 1885, and 1889. The Consolidation Statute deals with the whole subject of the reception of lunatics after petition, or on summary order, in asylums and workhouses; their care and treatment, removal and discharge; the judicial inquisition as to lunacy; the powers of the judges and masters in lunacy over the person and estate of lunatics; the jurisdiction of Commissioners and visitors; the legal position of licensed houses and hospitals, and county and borough asylums, &c. The definition of a lunatic given is "an idiot or person of unsound mind." Provision, however, is made for the case where it is specially found or certified that "the person is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or others." There is, of course, a separate definition of "criminal lunatic." It is gratifying to observe the advance of enlightened principle and method indicated by the sections dealing with mechanical restraint, correspondence, visits, boarding out, absence on trial or for health, &c. The Commissoners have power to inquire and report even on cases of treatment in a private family. There are some valuable practical clauses facilitating the recapture of lunatics escaping from one portion of the United Kingdom to another. The maximum charge for a pauper lunatic is fixed at fourteen shillings per week.

7. The legislation relating to the Dwellings of the Working-Classes has also been consolidated (c. 70), much to the discomfort of those who have recently written handbooks of sanitary administration. The principles of compensation for insanitary property are again modified.

8. The Pleuro-Pneumonia Act (c. 14) has excited a good deal of hostile criticism, as being a movement in the direction of centralisation. The subject is so far peculiar that it demands the utmost rapidity of execution accompanied by complete uniformity of regulation. The powers given to the Board of Agriculture are large. On the other hand, a central fund for compensation is provided, not exceeding £140,000 a-year. There is a great deal of intelligent opinion among the farmers as to the policy of Slaughter *versus* Inoculation. This was shown at the county council elections, and it would be a pity if it were ignored by Mr. Chaplin.

9. The Infectious Diseases' Prevention Act, 1890, contains several wholesome and necessary regulations for the prevention of infectious diseases, especially in dealing with dairies, cowsheds, and milkshops.

10. An important group of statutes (cc. 62, 63, 64), dealing with the Memorandum of Association of Companies, the Winding-up of Companies, and the Liability of Directors, will afterwards be noticed.

11. The Colonial Courts of Admiralty Act (c. 27) contains provisions reserving for the Queen's assent all Colonial legislation on Admiralty jurisdiction, and defining the right of appeal to the Privy Council.

XUM

12. The Foreign Jurisdiction Act (c. 37) is an obvious commentary on the recent extensions of the Empire.

13. The Intestate Estates Act (c 29), where there are no children, gives the widow the whole estate (not exceeding £500), or a charge for £500. The Act does not apply to Scotland.

14. The London County Council Money Act (c. 41), although it does not contain the famous Betterment Scheme, illustrates the enormous magnitude of these local interests.

The list of statutes exclusively affecting Scotland is not long. The Herring Fishery Act has been amended so as to make the penalties for the protection of line fishers effectual. The right of householders within municipal boundaries, extended only for police purposes, to vote in council elections has been affirmed. The power of burghs to provide hospitals under the Public Health Act has been extended. The terms of Whitsunday and Martinmas for the purposes of contracts of service have been defined to be 28th May and 28th November, but, apparently, where a house is occupied as part of the contract consideration, warning would still have to be given forty days before 15th May and 11th November. The Factors Act, 1889, has been extended to Scotland. Power has been given (c. 13) to Town Councils and Police Commissioners to appoint their Local Gas Commissioners to be the Local Authority under the Electric Lighting Act, 1882. The Education of Blind and Deaf Mute Children Act (c. 43), creates an obligation on School-boards in case of poverty to provide for the ordinary and industrial education, and in some cases for the boarding of these children between five and sixteen years of age. The census in Scotland on 5th April, 1891, has been made the subject of a separate Act (c. 38), the general supervision of the arrangements being given to the Secretary for Scotland. The enumerators, who serve and afterwards collect and revise the schedules, are provided by the registrar. The particulars to be returned on this occasion are name, sex, age, profession or occupation, condition as to marriage, relation to head of family, and birthplace; whether any person is blind, deaf, dumb, imbecile, lunatic, and whether any person speaks Gaelic only, or both Gaelic and English. Separate provision is made for enumeration in prisons, poorhouses, hospitals, asylums, and other public institutions; and Lord Lothian is directed to do what he can to ascertain the number of houseless persons, and others who on the night of 5th April, 1891, were travelling, or on shipboard, or for some other reason not abiding in any house. The enumerators are directed to note the accommodation in houses being built or otherwise uninhabited. By a well-drawn Act (c. 55), the established principles of law relating to corrupt and illegal practices at Parliamentary Elections have been applied to Municipal (including County Council) Elections in Scotland.

Association for the Reform and Codification of the Law of Nations.—Three conferences of importance, in the history of International Arbitration, have been held in Europe since the last number of this Journal. One was the Universal Peace Congress, held in London, on the 14th to the 19th of July; the second was the Inter-Parliamentary Congress, held in London, on the 22nd and 23rd of July; and the third was the Fourteenth Conference of the Association for the Reform and Codification of the Law of Nations, held in Liverpool, on the 26th to the 29th of August. They were all well attended by representatives from different nations. The discussions held, and the resolutions passed, were full of encouragement for the friends of peace and international progress. We publish a portion of the memoirs read by the veteran publicist, Mr. D. Dudley Field, of New York, at the Liverpool Conference, to show the progress of international arbitration since 1887:—

"At the meeting of this Association, held at London, in July, 1887, a remarkable paper was read by Mr. Henry Richard, since deceased, on the 'Further Progress of International Arbitration.' By way of supplement to that paper, I propose to give a brief statement of the principal occurrences since then which go to confirm his views. I do not enter into the argument about the feasibility of Arbitration, or about its being a better way of settling disputes than bloody war, for the argument upon those questions has been well-nigh exhausted. I confine myself to certain pregnant facts which bear upon our side, and I count upon our side all those who wish for the establishment of a permanent High Court of Arbitration; all those who wish for a permanent Treaty of Arbitration, without a Court; and all those who are content with a General Agreement among men, that Arbitration should always be resorted to instead of War between Nations, but who do not ask for a Permanent Court or a Permanent Treaty.

"War was once called the 'ultima ratio regum,' as if kings were the only persons concerned with international disputes, though the people after all were the ones most affected. There was another maxim, as old and as true as the first, 'Delirant reges, plectuntur Achivi.' Times have changed, however, and both maxims may be dismissed as obsolete. Kings and their cabinets have disappeared from the new world, and from part of the old, while in all that portion where they still remain, there is only one country in which the will of the potentate is supreme. No Christian country, other than Russia, exists where the people do not hold, whether they choose to exert them or not, the issues of war and peace. It is to the people, therefore, that we address ourselves; we turn to those whose suffrages make the Parliaments which give or withhold the sinews of war. In our efforts to find peaceful methods of settling International Disputes, we have not had as yet the answering voice of a single king, or king's cabinet, in all Europe. But what of that? We have heard encouraging voices from many members of different Parliaments, and we have heard the voices of the people, the voices of the busy and toiling millions, whose labours create the public wealth, and whose opinions, when plainly uttered, are more potent than bayonets or cannon. Let us now see what has been accomplished since our last meeting.

"The first most notable event was the presentation, in the autumn of 1887, of a memorial from 234 Members of the British House of Commons, addressed to the President and Congress of the United States, inviting in substance the proposal

by the United States of a treaty between England and America, which should stipulate for submission to Arbitration of any disputes that might arise between the two nations, and which could not be adjusted by diplomatic agency. The memorial was received with respectful attention, and answering memorials were sent to Congress from different bodies in the United States. It excited attention in other countries, and soon afterwards a memorial was signed by a large number of Senators and Deputies of France, expressing the wish that a Treaty of Arbitration should be agreed to between France and the United States. The final result has been a resolution, passed in April of the present year by the two Houses of Congress, and signed by the President, in these words—'That the President be, and is hereby requested to invite, from time to time, as fit occasions may arise, negotiations with any Government with which the United States has or may have diplomatic relations, to the end that any differences or disputes arising between the two Governments, which cannot be adjusted by diplomatic agency, may be referred to Arbitration, and be peacefully adjusted by such means.' Before the passage of this resolution, and in the Session of 1888, the Congress of the United States invited a Conference of all the Independent States of North and South America to consider several subjects of common interest, and among them that of a peaceful method of settling international controversies. The invitation was accepted by every Independent State of the two Continents, and the Conference was held in Washington, in October, 1889, and continued until April, 1890. The result of their deliberations was the passage of Resolutions agreed to by all the States, except Chili and Mexico, pledging their respective countries to submit to Arbitration all controversies between them which did not involve the independence or autonomy of the States concerned.

"Fairness requires me to add that since the adjournment of the Conference, war has broken out between two or three of the Central American States, and a violent revolution has occurred in Argentina, a South American State, but, so far as I understand them—and I must confess that my means of information are very imperfect—neither of these events, however deplorable, was inconsistent with the resolutions of the Pan-American Conference; the fighting in Argentina was no more inconsistent with international relations than was the civil war in the United States, and the war between the Central American States, as I gather from the vague statements in the Journals, arose out of a claim of one of them against the independence of others. Nevertheless, these events have, in the public eye, cast a shadow over the prospects of immediate and universal peace in the Western Hemisphere, and have, it must be confessed, lessened, however unjustly, our respect for the people of the countries where they occurred.

"Another most notable event was the movement begun in Paris in June, 1888, resulting in two Conferences held at the French Capital in 1889, and followed in 1890 by two Conferences in London, one the Universal Peace Congress, convened at the Westminster Town Hall from the 14th to the 19th of July, 1890, and the other the Inter-Parliamentary Conference held at the Hotel Metropole, in London, 22nd and 23rd July, 1890. At the former of these Conferences, strong resolutions in favour of Arbitration and Disarmament were passed, and by the Inter-Parliamentary Conference the following, among others, were passed:—

"'That, as a means of promoting peace and goodwill between nations, the members of the International Parliamentary Conference again urge the conclusion of Treaties of Arbitration, by which, without interference with their independence or autonomy, the nations would engage to submit to arbitration the settlement of

all differences which might arise between them, but where the conclusion of Treaties of Arbitration may for the present be found difficult of realisation, the Conference strenuously urges the reference of disputes to Arbitration or Mediation, the members of the Conference, on their part, pledging themselves to exert their individual and collective influence in their respective countries, both in and out of Parliament, to give practical effect to the views and principles set forth in this resolution. . . .'

"'That this Conference rejoices to learn that an effort is now being made to conclude a Treaty of Arbitration between France and the United States. It welcomes with pleasure the adoption of resolutions in favour of the principle of Arbitration by the Parliaments of Norway, Spain, and Italy, and expresses a hope that other European countries will speedily follow this example. . . .'

"'That as closer relations between the members of various Parliaments would make for peace, the Conference recommends the appointment of a Parliamentary Committee for each country, with a view to the interchange of ideas, and the consideration of disputes as they may arise.'

"'That this re-union shall be continued yearly in one of the various capitals, —the next Conference to be held at Rome.'

"In the Convention just agreed to between England and Portugal, in respect of possessions in Southern Africa, a resort to Arbitration in case of disagreement about its provisions or their execution is five times mentioned. The Emperor of Russia has accepted the submission to him of differences between France and Holland respecting a boundary in Guiana. The new Constitution of Brazil just adopted, contains a clause prohibiting the Republic from engaging either alone or in concert with other powers in any war of conquest. And lastly, on the prorogation of the Parliament of Great Britain by the Queen in the present month, she made this announcement, 'I have offered to the President of the United States to submit to Arbitration the questions of differences that have arisen between us, with respect to jurisdiction in Behring Sea.' Now, in view of all these events, who will say that the cause of International Arbitration has not prospered since Mr. Richard's famous and prophetic memoir?"

At the Liverpool Conference a revision of the York and Antwerp Rules of General Average was discussed and adopted. The rules as thus revised will be found to be of much importance to shipowners and merchants generally, and it is to be hoped that all the maritime nations will incorporate them at an early date into their respective statute books and codes.

A third point discussed at the Liverpool Conference was the claim by the United States for exclusive jurisdiction in Behring Sea—the matter having been introduced by an able paper read by Sir Baden Powell. One can hardly suppose that the United States Government is serious in insisting in its claim. Since the days of Grotius and Selden the doctrine of *mare clausum* has been generally supposed to have been abandoned, and it is rather startling to find the United States, of all nations, disposed to revive it. However, the proposal by the British Government to submit the matter to arbitration is a wise one. A "close time" for seals and whales is quite a different question, and it is to be hoped that some international convention on the subject may be concluded.

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The Boundary Commission.—The work of the Boundary Commissioners appointed under the Local Government (Scotland) Act is threefold:—(1) the formation of electoral divisions; (2) the adjustment in certain cases of county and parish boundaries; and (3) the settlement of differences among authorities affected by the Act—especially differences on financial questions. It is obvious that the second of these branches of their work must be first dealt with and carried through, for electoral divisions cannot be settled until the areas of the counties and parishes are finally determined. Accordingly the draft orders already issued by the Commissioners deal wholly with questions of rectification of boundaries. The first object is to secure that all the areas of local administration shall be self-contained, and with that view the Commissioners are directed to do away with detached parts of counties and parishes. The second object is to make each county a group of whole parishes, and here the Commissioners are directed to place, if expedient, every parish within one county. There were in Scotland above 120 parishes with detached parts, some of these parishes having two, three, five, eight, and even eleven detached parts. There were sixteen counties which either had parts detached, or contained detached parts of other counties. There were above sixty parishes situated in two counties, and two parishes situated in three counties. There were thus above 180 parishes to be dealt with. Up to the end of September, ninety draft orders had been issued, dealing with 129 parishes. Fifteen of these had further been issued as final orders, of which twelve had passed into law, having been approved by the Queen in Council.

It is hardly possible to state any precise principles as having guided the Commissioners, owing to the fact that on account of the varying circumstances it is scarcely possible to point to two cases which stood precisely in the same position. But certain general considerations have clearly guided the Commissioners. They have regarded it as imperatively required of them that they should frame orders dealing with all detached parts. They have regarded themselves as not having the same discretion in this part of their work as they are expressly given when dealing with parishes situated in more counties than one. But even when dealing with parishes of the latter description, they have shown themselves very averse to use the discretion given them. They are anxious to attain the purpose which the Act has in view, and they are therefore very unwilling to leave any parish situated in more counties than one. In dealing with detached parts, they have acted on the assumption that parishes having the detached parts must in any case lose them. But if arrangements have been made by the authorities interested for an excambion, the Commissioners have readily given their approval to such a course, and where the loss of a detached part appeared likely to involve serious loss to a parish, the Commissioners have either adopted a scheme of excambion, or have united the detached part to the main portion of the parish by annexing the intervening portion of a neighbouring parish, or have adopted a scheme partaking of both these

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elements. Local interests have received considerable attention, and there seems to have been more disposition to listen to the arguments offered by parochial authorities than to approve of counties bartering away smaller areas. A word may be added on the dates at which the orders (the later ones at least) are to come into effect. These are—for the purposes of school board elections, 1st January, 1890, and for all other purposes, 15th May, 1890. It has been thought desirable that the ratepayers in districts which are transferred from one parish to another, should have the opportunity of voting in the election of the school board for the parish to which they are transferred. As the register for school-board elections is prepared from the Valuation Roll, it is believed to be possible without great difficulty to give effect to the orders of the Commissioners in this respect before 15th May, 1891.

Extradition—Jurisdiction over a Foreign Ship in a British Port.—The *Times of India*, of 25th July last, gives prominence to a case of murder, which was tried that week at the Bombay Criminal Sessions. The accused was an Italian; so was the deceased; and the fatal assault took place on board an Italian ship, then lying in the Victoria Dock, Bombay, both of the men being members of the crew. The Italian Vice-Consul applied to the Governor of the Bombay Presidency for the extradition of the accused on grounds, which may be summed up under two heads—(1) That the crime was committed by an Italian on an Italian, and in an Italian ship, and, therefore, concerned only the internal discipline of the ship, and did not disturb the peace or the public order of the port; (2) reciprocity—that in such a case in an Italian port, Italian law would have allowed the foreign Government to deal with its own subject. Anxiety for extradition was founded on the fact that, capital punishment being abolished in Italy, a conviction of murder, and the consequent execution of a sentence of death, would have been most revolting to every Italian mind. The Governor declined to interfere with the jurisdiction of the local Courts. The British law on this subject is so clear and so well known that it is absolutely inconceivable that either party to the Extradition Treaty between Italy and this country in 1873 could understand that the point as to jurisdiction in such cases was open. In point of interpretation of the words "crimes . . . committed within the territory of either of the said parties," His Excellency was therefore right. That there is no room for doubt is shown by the hopelessness of the argument of the counsel in support of the technical objections to proceeding with the trial. The question of jurisdiction was one of purely English law, yet the authorities quoted were French and American. It was not correct to say the point was new; it was foreclosed. Nor was the point raised under the Territorial Waters Jurisdiction Act of 1878 any better. The dock was not the high sea, but a part of the municipality of Bombay. The jury found a way out

of the difficulty by finding the accused guilty of culpable homicide, not amounting to murder, and strongly recommending him to mercy. He was ultimately sentenced to one year's imprisonment.

In commenting on this case, the *Times of India* suggests that Great Britain should adopt the French rule, and give up accused persons, in such circumstances as the above, to the consuls of their own country for trial, as this rule has now been adopted by all the foremost European States, and is partially adopted by the United States of America. The authority of Wheaton may be invoked for this proposal, for although in his *International Law* (sec. 101 *et seq.*), he had argued strongly for the British rule, as then accepted in America, yet, in afterwards noticing M. Ortolan's *Diplomatie de la mer*, he admitted that he had changed his views, and that the French rule was the more just. Ortolan (4th ed. vol. i. p. 272) calls attention to this fact. We agree that there is a good deal to be said for a change in our practice. But it must be a question of degree—discretionary power being given to the British Government to accede to the consul's request. Jurisdiction must be to some extent artificial, and if any objection on this ground can be brought against the British rule, the French one seems equally open to criticism. The case under notice is an unfortunate one for the French rule. The quarrel between the two men had been going on in the streets of Bombay for most of the day, a violent assault had been committed on land, and it was by the merest accident that the last act of revenge took place on board ship. How in the face of all this could it be maintained that the tranquillity of the port was not compromised? (Ortolan, i. 270.) There may be hardship personally to a foreigner who knows that by his personal law he may take ultimate revenge without endangering his own life, and forgets that such a right is not universal; but in any case of real hardship, the Royal prerogative would probably interfere and reduce the sentence.

W. G. M.

The Valuation of Deer Forests.—So much is heard just now (much of it either inaccurate or misleading) about land in the Scottish Highlands, and especially about deer forests, that it may be interesting to recapitulate what has been fixed in Court with reference to the valuation of such subjects. The cases are those of *Applecross*, *Dalness*, and *Blackmount*, 10 Ret. 28, 15 Ret. 588, 16 Ret. 793, 27 Sc. L.R. 635, 17 Ret. 837. The following propositions may be regarded as established:—

1. Under the Sporting Lands Rating Act, 1886, land which is occupied exclusively as a forest, although not fenced, or otherwise artificially appropriated for deer, is to be valued at its probable value as a deer forest. The statute does not authorise the assessor to put a separate valuation for grazing purposes on the subject which is valued as a forest. Where, however, as is frequently the case in Argyllshire, both sheep and cattle are

grazed in the lower parts of the forest, an additional valuation may be placed on the subject in respect of that grazing occupation.

2. In the valuation of a deer forest, it must be taken in its actual condition, not as a subject which might or ought to have been let for grazing purposes. In most cases the forest valuation is higher than the sheep rent, but here and there the result might be the other way. The Argyllshire Committee have indeed recorded their opinion that the forest valuation should not be less than the possible sheep rent. But the observations of Lord Fraser in the *Dalness* case point the other way: "Neither the assessor, nor the Valuation Committee, nor the Court have any right to dictate to a proprietor as to the mode in which his property shall be used, provided it is *bonâ fide* used for a beneficial purpose, and without arbitrary restrictions as to use laid on it by the owner." Of course, in the case of unlet forests, this is not inconsistent with the assessor, while valuing the forest, taking some account of the circumstance that at some future time it may possibly be put under sheep.

3. The method of valuation of deer forests is to take the maximum number of stags permitted to be shot, and allow a certain sum, £15 to £20 per head. In the *Dalness* case, it was stated that after exhaustive inquiry, the Inverness Committee had arrived at the conclusion that £15 per stag, and 10s. per brace of grouse, were the right figures. In the *Blackmount* case, however, the Argyllshire assessor made a vigorous attack upon the results of this alleged inquiry, and satisfied his valuation committee (whose decision was upheld upon appeal), that £20 per stag was, as a rule, charged in Inverness, Sutherland and Ross, and that, although Argyllshire forests are admittedly inferior to those in other Highland counties, the same rate should be adopted for Argyllshire.

People are frequently struck by the high rents apparently paid for deer forests, and no doubt some of the finest forests (those which combine sufficiently good pasture with corries on the high level and abundant space within the fences) have commanded great sums. The *Applecross* case, however, is a warning against the rash conclusion, that the sum paid over by the tenant is the letting value of the forest. In that case the apparent rent was £2000, but it included nearly the whole expenses of the establishment (such as wages, keep of horses, &c.,) paid by the landlord, and, when effect was given to these deductions, the valuation was fixed at only £600. It would appear, too, from some of the cases before the Appeal Court, that the grazing rent would often be higher than the forest rent. There are, in fact, two sides to the economical aspect of deer forests. It is indisputable that they have created above the 2000 feet level a large fund of assessable wealth. On the other hand, in certain places and to a certain extent, they have displaced the sheep farming industry with bad results to the local people and to the country. Many deer forests are unsuitable for sheep, though not for black cattle. Nor is it in every case necessary that the forests should descend so far below

mountain level as they usually do, although stags, as well as sheep, must be fed during winter.

August von Bulmerincq.—Since the publication of our last number, the death of Professor von Bulmerincq has taken place. He was Professor of Law successively at Dorpat and Heidelberg, and author of several important works on Public International Law. Of these works, we may mention the following:—"Handbuch des Völkerrechts oder Internationalen Rechts," Freiburg, 1884-87; "Handbuch des Consulatrechts aller civilisirten Lander," Hamburg, 1887; "Die Staatstreitigkeiten und ihre Entscheidung ohne Krieg," Hamburg, 1887. Professor von Bulmerincq was an active member of the Institute of International Law, and President of that body during the year 1887-88.

International Patent Law.—"The International Convention for the Protection of Industrial Property" is fast becoming, in Sir Frederick Pollock's witty language, an "island in an ocean of case law."

The general effect of this novel and important treaty, and of sections 103 and 104 of the Patents Act, 1883, on which its effective operation in England and her Colonies depends, may be stated as follows:—

An applicant for a patent in any one of the contracting States can obtain protection in Great Britain by application there within a period of seven months from the date of his first application. The subsequent application is antedated to the date of the first application, and is consequently not defeated, as otherwise it would have been, by prior publication, or user, in the protected interval.

This statement of the law must now be read in conjunction with the following glosses:—(1.) In *re L'Oiseau & Pierrard* (1887, Griffin's Additional Patent Cases, 36) it was held by Sir Richard Webster, A.-G., that a "foreign applicant" was entitled to have his English patent antedated, although his English application did not disclose the existence of a previous foreign patent for the same invention, provided that there was no positive misrepresentation or bad faith. This decision may, however, be affected by the requirements of the Patents' Rules, 1890, r. 25. (2.) A foreign applicant acquires no right under section 103 *to oppose under section* 11 the grant of letters patent for the same invention to a subsequent applicant (*re Everitt*, 1889, Griffin, A.P.C., 29). (3.) The Order in Council, issued under section 103, has a retrospective effect. An application for a patent made in a country which had not at the time given in its adhesion to the International Union, but which subsequently did so, is "a foreign application" within the meaning of the international patent law (*re Main*, 1890, 7 Pat. Off. Reps., 13). (4.) The importer of an

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invention from abroad has no rights under section 103 (*re Shallenberger*, 1889, 6 P.O.R., 550). (5.) *Semble*, a corporation is "a foreign applicant" (*re Carez*, 1889, 6 P.O.R., 552). (6.) "Application," means an *effective* application. A applied for a patent in America, abandoned the application, subsequently applied again for a patent in respect of the same invention, and was permitted by the American Patent Office, as a matter of convenience, to use upon the second occasion the documents filed upon the first. An English patent granted to A under section 103 (*re Van de Poele*, 1890, 7 P.O.R., 69), will be antedated to the date of his successful application in the United States.

A. W. R.

Reviews of Books.

Annuaire de Législation Etrangère, publié par la Société de Législation Comparée. Paris: Librairée Cotillon, F. Pichon, Sr., 24 Rue Soufflot; 18 francs.

This valuable year-book of contemporary legislation has reached another issue, and the present volume is a thick octavo of 1117 pages, containing annotated translations and summaries of the various laws promulgated throughout the civilised world, outside France, during the year 1888. France and its colonies are provided for by another *Annuaire*, also published by the Society of Comparative Legislation, which issues, in addition to these, a monthly *Bulletin*, containing papers on special departments of comparative legislation and reviews of legal works. The Society, which we take the liberty of again very strongly recommending to the attention of our readers, brings to a focus, by means of these publications, a vast amount of scattered information, which the student of political and legal institutions could hardly hope to bring within his reach by the most assiduous unaided efforts of his own. A glance at the table of contents of this volume—for it is impossible within the limits of a short notice to enter upon any detailed discussion of the contents themselves—will amply suffice to show what a wealth of information and suggestion a comprehensive summary of this kind may contain. We have, for instance, in this volume an account of the new commercial code of Portugal, the mining laws of Chili, the code of criminal inquiry of Buenos Ayres, the Constitutions of Uri and of Servia, the English Local Government Acts, the communal law of Neuchâtel, the Waldensian poor law and neglected children education law, the Norwegian citizenship-acquisition and forfeiture laws, the regulations in force in the Congo State, the Brazilian slavery abolition law, the new anti-usury law and the married persons' property law of Norway, the English and the Swiss modifications in patent law. We have also laws for the Austrian workmen's sickness insurance, law for the suppression of the "Tribunaux de Commerce" in Italy

and in Greece, and the transfer of their functions to the ordinary Law Courts, the re-establishment of the jury system in criminal cases in Spain, the institution of conditional punishment for first offenders in Belgium, the establishment in Denmark of a legal right to compensation in case of miscarriage of justice, Hungarian fishings, Russian forest conservation and a vast number of other interesting topics. The Society is strong, not merely in numbers, but in ability also. The work undertaken in this volume has been thoroughly and conscientiously done; and we not only commend the volume before us, but again recommend our readers to associate themselves with the membership and the work of this Society, which is doing useful international service, and already comprises most of the best-known jurists on the Continent and in America.

A. D.

Federal Government in Canada. By JOHN G. BOURINOT, C.M.G., Clerk of the House of Commons of Canada. Baltimore: 1889.

This book consists of four lectures delivered by Dr. Bourinot, at Trinity University, Toronto, and afterwards published in the Johns Hopkins University Series, to which we owe so many able historical and political monographs. Dr. Bourinot's position and reputation are sufficient guarantees for the excellence of his work on this subject, which he has made peculiarly his own, and which recent political events in this country have invested with strong practical interest. After an historical sketch of the events leading to the settlement of 1867, Dr. Bourinot discusses the general features of the Federal system. In this connection, his remarks on the power of the Colonial Legislature to repeal imperial statutes prior to 1867; on the position of Canadian agents in the negotiation of treaties; on the power reserved to disallow Colonial legislation (as on the question of copyright), are worthy of the most serious attention. It is gratifying to observe that, while it must be admitted that the decisions of the Privy Council on Canadian questions have not always been consistent, Dr. Bourinot discusses their decisions (as on the Scott Temperance Act) with loyal respect. The power given to the Governor-General in Council to refer difficult questions to the Supreme Court of Appeal seems to have worked well in practice. Probably the most interesting part, however, of Dr. Bourinot's lectures to British politicians, at the present moment, is that in which he describes with some minuteness the arrangements for transacting business in the Dominion Parliament, the constitution of the annual committees, the rules of debate, &c. He says that "the Houses have never been compelled by obstruction, as in England, to adopt rules for the closure of a debate." It would appear that "the mother of free Parliaments" is being shamed by her children. This general statement,

however, is scarcely consistent with what follows—viz., that in 1885, in the debates on the Dominion Electoral Franchise Bill, there was a sitting of fifty hours, "the two contending parties simply made a great physical effort to tire each other out!" The fourth lecture is devoted to an analysis of the work of the Provincial administration. Dr. Bourinot is a supporter of the view (so forcibly urged by the Hon. Edward Blake, Q.C., in his argument before the Privy Council in the case of *St. Catherine's Milling Company* v. *The Queen*), that the provinces are not the creatures of the Dominion, but, by their independent existence and agreement, did themselves create the Federation. On the whole, these lectures, together with Dr. Bourinot's little manual of the "Constitutional History of Canada" (published in 1888, at Montreal, by Dawson Brothers), and the able and learned papers which he occasionally contributes to the periodical press of the United Kingdom, are calculated to do real service, not only to the political student, but to those who are endeavouring to find some practical solution for the question of administrative decentralisation.

W. C. S.

The Criminal. By HAVELOCK ELLIS. Illustrated. The Contemporary Science Series. London: WALTER SCOTT, 1890.

This admirable manual ought to be in the hands of every student of criminal jurisprudence, and of every one practically engaged in the administration of the criminal law. It relates to an important department of anthropology, in which the English are more backward than any other nation in Europe, and even than some of the small States of South America, and on which, with the striking exception of Dr. Maudsley and one or two others, they have no writers of much weight. The reason of this unfortunate condition of matters is very obvious. Our judges and jurists, blinded by theological and metaphysical prepossessions, have regarded the criminal (when not, according to their conventional conceptions, insane), as a normal man, or, to use the graphic expression of Mr. Ellis, as a vine fitted to produce grapes, but which yet, by some unaccountable perversity, persists obstinately in bringing forth thorns. The whole attention of the tribunal is therefore concentrated upon the conduct of this supposed "normal person, who has chosen to act as if he were not a normal person," and the necessary object of the judge, upon this theory, is to measure the punishment due to such a wicked and perverted choice. And the punishment is, under such conceptions, logically made to depend on the character of the offence, considered in its mischievous effects upon society. It is the offence that is principally looked to: the character and disposition of the offender is almost left out of view; he is, as it were, the "constant factor" in the problem. But it is very evident that this view is entirely fallacious. The criminal—that

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is, the habitual or "instinctive" criminal—is not a normal man; if he were so he would act as other normal people act. It is clear that there must be something abnormal, either in his own constitution, physical or mental, or in the circumstances surrounding him, to lead him to act as he does differently from other people. Science, which depends upon the necessary and constant connection between cause and effect, imperatively demands this fundamental assumption. It is the province of criminal anthropology to inquire into the natural history of the criminal, and the causes of crime, cosmic, biological, and social, and the book before us gives a brief and excellent summary of some of the results in this new field of investigation. In this department of science Great Britain is nowhere. The International Association of Criminal Law, says Mr. Ellis, includes well-known representatives from twenty-one different countries in Europe and America. England is among the least well-represented of all; the English members rank in number with the Portuguese, Servian, and Argentine members. Germany is more than twenty times better represented. No interest was felt in England in the International Congress of Criminal Anthropology recently held in Paris. At this Congress official delegates came from all parts of the civilised world, from Russia to Hawaii, but although there were two from the United States, there was not one from Great Britain.

In the vast army of habitual criminals a complete uniformity of physical and mental characteristics cannot possibly be expected; it must contain many varieties of character. Accordingly, the necessary mode of procedure is by way of percentage; and it is attempted to ascertain with precision what percentage of anomalous or defective characteristics occurs in the criminal as compared with the general population. There is a difficulty here, however, to which, in our opinion, Mr. Ellis does not attribute due importance. Crime is not a word designating a natural and actual quality in the criminal; it is a conventional distinction, and, in point of fact, a legal term, meaning those anti-social acts which are punished by law, and which may therefore include, in some countries, offences which are not included within it in others. There are many anti-social acts of a most prejudicial kind which, for various reasons, are not punished in this country, and which yet, in the evil effects they produce, are as mischievous as others which are cognate in their nature, and which are selected for prosecution. Thus in sexual offences—seduction and adultery, which are now not ranked as crimes in Great Britain, are as prejudicial to society as many rapes which are selected for criminal punishment. Some slanders are more atrocious and more ruinous to their victims than thefts or assaults, yet they are not punished as crimes in Scotland; and many lies and deceptions are often in their results as prejudicial as frauds, but are not punished at all in any part of Great Britain. Now in inquiring into the characteristics, say of the sexual criminal, it is reasonable to suppose that at least some of those which are found in the ravisher will also be present in the

habitual seducer and adulterer; but yet the latter are ranked with the non-criminal population, and in that way help to reduce the relative percentage of the anomalies found among habitual offenders. Mr. Ellis attempts to get over this difficulty by distinguishing the one set of acts as directly anti-social, while the other is only indirectly so; but this distinction does not seem to be founded on any real difference. Adultery, which breaks up a home, is as directly anti-social as rape. But as this particular difficulty cannot be overcome, since there is no possibility of taking a census of the vicious, we must just be contented with assuming, as a well-founded conclusion, that the relative percentage of certain anomalies and defects is greater in the criminal population than it appears in the statistical investigation.

But whatever difficulties may be in the way of ascertaining the facts, it already plainly appears, as the author observes, "that the instinctive criminal in his fully developed form is a moral monster." Even where he has not reached the climax of maturity, he is more or less abnormal, anatomically, physiologically, and psychologically. As Dr. Maudsley observes—"The criminal class constitutes a degenerate or morbid variety of mankind, marked by presenting low physical and mental characteristics." Mr. Ellis in the book before us gives a clear summary of some of the physical and psychical anomalies which distinguish the habitual criminal. In the course of his work one cannot help noticing to how large an extent the body in all its parts is a complete and connected unity, all the organs of which, however apparently unimportant, are fitted to the whole as well as correlated to each other. Thus crime is found to be connected not only with the brain and more important organs of the frame, but even with those parts and appendages which are regarded as less important, and which seem at first sight to have no natural connection with character at all. Thus, anomalies in the outward parts of the ear, in the teeth, in the shape of the palate, in the nose, in the hair of the head and of the beard, in the fingers and toes, and in many other physical characteristics, which appear at first sight unconnected with moral deficiencies, occur in larger percentage in the criminal than in the non criminal classes. It is only after elaborate inquiry that we come to see how even the mere external appendages of the body connect us more or less closely with the lower animals or with the idiotic, imbecile, and epileptic individuals among mankind.

Thus the abnormally large orbital capacity, which is frequently found among thieves, is characteristic of birds of prey and of some races of savages. The frontal crest is often stronger and more prominent in criminals. Tenchini found it 3-4 millimetres in length in normal skulls, in criminals frequently 5-6 millimetres. "It is also," says Mr. Ellis, "larger in the insane and lower races, and relatively larger in orang-outangs. It may signify precocious union of the two parts of the frontal bone, with consequent arrest of brain development." The presence of a median

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occipital fossa has been specially noted by Lombroso sometimes in connection with hypertrophy of the vermis of the cerebellum, as among the lower apes, in the human fœtus between the third and fourth month, and in some lower races. Flesch studied the brains of fifty criminals, and found that every one presented some anomaly, sometimes of a remarkable character, as incomplete covering of cerebrum by cerebellum. It is well known that the total covering of the brain by the cerebellum is a characteristic of the human race, which does not occur in the animals below him. The lower jaw is often remarkably well developed among criminals, and, indeed, its squareness and prominence are obvious to the eye. In the ordinary Parisian, the average weight of the lower jaw is about eighty grammes, while it is about ninety-four grammes among Parisian murderers. "In this respect," says Mr. Ellis, "the criminal resembles the savage and the pre-historic man." Exaggerated or deficient development of the canine teeth has been found by Lombroso-Zuccarelli and others among criminals, and Dr. Tarnowskaia, in one hundred women thieves, found defect of the bony palate and undeveloped teeth among the most frequent anomalies. The development of the teeth is very closely connected with the evolution of the nerves and brain. The extraordinary frequency of dental and palatal anomalies in idiots has been long known. Dr. Sollier found abnormally small teeth in 13 per cent. of his idiots. There is evidently a process of change going on in the teeth of the human race as their mental evolution becomes higher. For example, the wisdom teeth seem to be dying out; in the lower races they are only absent in 19 per cent. cases, while in the higher races they are absent in 42 per cent. of the observed cases. "Large and outstanding" ears among criminals, are oftener recognised by officers of prisons than any other abnormalities; and they are often associated with other degenerative variations, such as the Darwinian tubercle, the size of the auriculo-temporal angle, a conical tragus, and many other unusual features. Congenital ear deficiencies are frequent among idiots and the feeble-minded, often associated with webbed toes and fingers. The auriculo-temporal angle undergoes a gradual progression from below 90° in the normal person, above 90° among criminals and the insane, up to above 100° among apes. The conical tragus is very frequent among children and apes. Ear-defects are especially frequent in connection with nerve-defects and mental weakness, and are frequent among epileptics, and especially so among idiots.

Among other interesting details in this book, we may mention those dealing with the physical and moral insensibility of instinctive criminals. Their deficient sensibility to pain has often been noticed; and in this respect they resemble the idiot. "Dr. Penta," says Mr. Ellis, "in the course of his elaborate researches found that the majority of his 184 instinctive criminals at Santo Stefano were insensible to the pain of punctures, burns, cuts, and even severe surgical operations. 'I have extirpated tumours,' says Dr. Penta 'of considerable size in the

back and the neck without the necessity of producing anæsthesia, and without causing pain; in a case of feigned epilepsy ammonia to the nose caused no reflex phenomenon, and deep punctures and bruising of the skin produced no painful contraction.'" The moral insensibility of instinctive criminals is notorious, and is one cause of his criminality. Out of more than 400 murderers Bruce Thomson had known only three express remorse. Of the 4000 prisoners who passed through the prison of Elmira, in the United States, 36·2 showed on admission positively no susceptibility to moral impression; only 23·4 per cent were "ordinarily susceptible." Dr. Salsotte, in his study of 100 women condemned for premeditated assassination, or complicity in such assassination, was only able to recognise genuine penitence in six. Yet criminals are by no means irreligious in the ordinary sense. Among 200 Italian murderers Ferri did not find one who was irreligious. Of Marro's 500 criminals 46 per cent were regular frequenters of church; 25 per cent. went irregularly. Among sexual offenders the proportion of frequenters rose to 61 per cent. "Criminals at their last hour," says Lauvergne, "nine times out of ten die religiously." When the criminal is not superstitiously devout, he is usually stupidly or brutally indifferent.

We regret that we cannot give a detailed *resumé* of that division of Mr. Ellis's book which has regard to the treatment of the instinctive criminal. Recognising him as temporarily or permanently in a more or less abnormal condition, the old notion of "punishment" loses much of its foundation, as indeed it has gradually been doing from the days of Aristotle down to our own. This tendency is accelerated by the manifest failure of the whole system. Mr. Ellis does not occupy much space with the question of capital punishment, which, in its present limited application, he regards as of less importance, and indeed as gradually dying out. Imprisonment, of which penal servitude is virtually a variety, is now the main punishment on which the criminal law depends. The best prisons have now been brought to a state of singular perfection, and yet it is a fact absolutely notorious and visible to every one that they do not reform. The prisoner is, of course, temporarily suspended from habits of crime, but immediately when he gets out he recommences his career. This is scarcely to be wondered at, when it is considered that the necessary effect of prison discipline is to reduce the criminal to a machine, and to deprive him after a certain time of all power to take the initiative, or to commence an honest career for himself. The only cure for this state of things is to regard the offender more than the nature of the offence. "The key," says Mr. Ellis, "to the failure of the prison, and a chief clue in its reform, lies in the system of administering definite and predetermined sentences by judges who, being ignorant of the nature of the individual before them, therefore of the effect of the sentence upon him and of its justice, are really incompetent to judge." The first reform which he considers necessary is the total abolition of definite and predetermined sentences

This has been done in some of the United States, by an Act passed in 1877, which limits for the Courts the power of definitely fixing the period of confinement in prison, until, in the opinion of the managers of the reformatory, the prisoners may be let out on parole for a probationary period of six months. Under this system several thousand persons have passed through the great prison of Elmira, and only a small percentage have proved *recidivists*. Before a prisoner is "paroled," a suitable situation is arranged for him. This is, however, not the only necessary step. The prison staff must be reorganised, and a fitting training given to prison-warders. Within the prison, every agency, physical and moral, must be brought to bear upon the criminals to raise them, so far as possible, out of their anomalous and defective condition, and the barrier between the prisoner and the outside world must be judiciously broken down. Further, imprisonment should not be too much applied, and liability to punishment should, wherever possible, be substituted for actual imprisonment. A sum of money might also be required to be deposited, to be forfeited in case of repetition of misconduct. With this system of penal law, or rather of reformatory law, there should be conjoined, wherever possible, some compensation to the injured party, to be obtained by the labour of the man who has injured him. In slight cases, every end of social protection should be attained by a formal "caution." In the event of a properly curative system being adopted, the constantly recurring difficulty of drawing a line between sanity and insanity—a thing, in point of fact, impossible—would become of minor importance, as in both cases the object will not be penal, but curative, to be attained by the methods most suited to the nature of the disease.

But it is impossible to give more than a mere sketch of the vast quantity of valuable material accumulated in Mr. Ellis's book, and we can only refer those interested in the subject to its own pages with the numerous plates by which it is illustrated.

CHARLES SCOTT.

The Law of Torts, a Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law; to which is added the Draft of a Code of Civil Wrongs, prepared for the Government of India, by Sir FREDERICK POLLOCK, Bart., of Lincoln's Inn, Barrister-at-Law. London: STEVENS & SONS, 1890. Second Edition.

"Good wine needs no bush," and it is unnecessary to write at any length in noticing a second edition of Sir Frederick Pollock's able and learned book. The book first appeared in 1886, and it is a gratifying sign of the rapidly increasing culture of English lawyers that another edition should be called for in four years. Abundance of new material has been accumulating during that period, and to that the author applies the same

solid scientific criticism as distinguishes all his writings. Sir Frederick shows clearly enough that there is no inconsistency between considerable black-letter learning, and a hard-headed appreciation of the facts of modern life. The revision of the chapter on Negligence is no doubt partly due to the appearance of the enormous volume of Mr. Beven, which is here indulgently described as "an exhaustive and scholarly monograph." We are glad to see that Lord Watson's judgments in non-Scottish cases receive the attention they deserve—*e.g.*, in *Wakelin* v. *London & South-Western Railway Co.*, 12 App. Ca. 41. It may be suggested that our Scottish Reports contain a few cases that might serve as useful illustrations. We should much like to have heard Sir Frederick's opinion of the case of *Woodhead* v. *Gartness Mineral Co.*, 4 Ret. 469, on the meaning of common employment, in which Lord Brougham's characteristic misuse of the French word collaborateur seems to have done a good deal of mischief. On the other hand, we are bound to acknowledge that Sir Frederick notices the recent case of *Scott's Trustees* v. *Moss*, 17 Ret. 32, on trespass by parachute (which was, at some length, criticised in this *Review*); and he approves of the somewhat obscure doctrine stated by Professor Bell, Prin. sec. 966, that a proprietor of land must not act *in æmulationem vicini*. He also refers to the Scottish Dog Act of 1863. As there has always been some hesitation about the meaning of this statute (which, in fact, has been lost sight of in some cases), we reproduce the language of Lord President Inglis in *M'Intyre* v. *Carmichael*, 8 M'Ph. 570:—"The next question is whether the Act 26 & 27 Vict. c. 100 introduced any change in the common law with regard to the liability of the owner of the dog in a case of this kind. I must say I do not think the statute deals very intelligibly with this matter. I have no doubt the intention of the legislature was to abrogate the law laid down by the House of Lords in the case of *Fleming* v. *Orr*, 2 Macq. 14, and to make the owner of the dog liable, on proof of its being the cause of the mischief, whether there be proof of fault on his part or not, but certainly that is not very satisfactorily declared by the statute." We do not share the doubt of the learned judge, but it is remarkable that his *dictum* has never been replied to or repudiated. In taking leave of Sir Frederick Pollock's book, we recommend to Scottish readers his observations on the case of *Finlay* v. *Chirney*, 20 Q.B. Div. 494. It is sometimes ignorantly assumed that *actio personalis moritur cum persona* is part of the common law of Scotland, an idea sufficiently disposed of by *Auld* v. *Shairp*, 2 Ret. 191. The history of the brocard in England is well given in this case of *Finlay*.

W. C. S.

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The Confirmation of Executors in Scotland. By James G. Currie, Depute Commissary Clerk of Edinburgh. Second Edition. Edinburgh: Wm. Green & Sons, 1890.

The position which Mr. Currie's work early won among legal manuals of practice is so well-known to all those whose professional duties bring them into practical acquaintance with the law of Scotland, that no words of introduction are required upon the appearance of a second edition. Confirmation is one of those very technical departments of legal practice which cannot be set forth in detail in treatises of a wider scope than Mr. Currie's compact volume; and just because of its exceeding technicality, no lawyer who is not specially engaged in the daily work of the Commissariot, can acquire the information and collect the precedents necessary to enable him adequately to treat the subject. Mr. Currie is fortunate enough to unite with unique opportunities of this kind those powers of lucid and accurate treatment, which make his book a valuable item in the library of the Scots lawyer. His chapter on "Domicile," for instance, is a model of clear exposition. In this new edition many new precedents have been collated with the old, while several parts of the treatise have been re-written and re-arranged, and no pains have been spared to bring the admirable set of forms in the appendix abreast of the most recent practice. A good selection of statutes and acts of sederunt forms a useful and novel feature of the edition.

J. A. C.

Church and State: A Historical Hand-book. By A. Taylor Innes, Advocate. Edinburgh: T. & T. Clark, 1890.

This volume forms one of a series of so-called "Hand-books for Bible Classes and Private Students," brought out by the Free Church of Scotland, under the editorship of Drs. Marcus Dods and Alexander Whyte. It seems well suited for the purpose in view, but we can recommend it also to all readers interested in political ecclesiastical history, as giving a remarkably clear and succinct account of the rise and progress of the Christian Church in its relations to the State during the several epochs of the Church's history. The author, who is already well-known to the profession by his treatise on "The Law of Creeds and Confessions," is one of the very few lawyers in Scotland who have made a study of the important subject of ecclesiastical law, and his opinions on the subject are well worthy of attentive consideration.

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County Council Guide to the Roads and Bridges Act. By J. Eaton Dykes, Advocate, and Dudley Stuart, Advocate. Bell & Bradfute, 1890.

One of the most important functions transferred to the County Councils consists in the words of the Local Government Act of "the whole powers and duties of the County Road Trustees." These County Road Trustees were not an ancient body. They began their existence only in 1878, and in some counties their birth was delayed until 1883. But although a modern body, they had a difficult and important work to do, for they controlled the management of the highways in Scotland at the time when tolls generally ceased to be levied, and roads began to be wholly maintained by assessments. Although their administration was proceeding without complaint, it would have been absurd that they should continue a separate existence after the County Councils had been appointed. But although the County Road Board has superseded the Road Trustees, the duties are practically the same as formerly, and are still for the most part regulated by the Roads and Bridges Act of 1878. It is therefore most important for county councillors to understand the working of this Act. Shortly after the passing of the Act, two editions of it were published (those by Hunter and Macbeth), and now there is a third edition by Messrs. Dykes and Stuart, appropriately enough entitled the "County Council Guide to the Roads and Bridges Act." It contains the Roads and Bridges Act, with explanatory notes, and there has also been printed in an appendix a considerable number of extracts from the Local Government Act. Extracts are always unsatisfactory. Besides, in one or two cases, clauses have been omitted by mistake; for instance, the note to section 13 refers to section 30 of the Local Government Act, and the note to section 19 refers to section 8 of the Local Government Act and yet neither section 8 nor section 30 has been printed. For the rest however, the Roads and Bridges Act has been carefully annotated, and all cross references to the Local Government Act are given with suitable explanations. This work of annotation has not been an easy one, for, besides in certain cases expressly repealing sections in the Roads and Bridges Act, the Local Government Act also contains a clause repealing in general terms all enactments inconsistent with it. The authors of the "County Council Guide" have thus had not only to state when a section has been expressly repealed, but also when it has been repealed or superseded by the same subject being dealt with in the Local Government Act.

The book also contains extracted portions of the Locomotive Acts and the Railway Clauses Consolidation (Scotland) Act, 1845, and a digest of decisions on road cases. As in many cases the local Sheriff is the sole and final judge of a dispute, his decisions as reported in the *Scottish Law Review* are inserted in the Digest of Cases side by side with the

Decisions of the Supreme Court, and this seems right enough, as all information on the working of the Act is useful.

Messrs. Dykes and Stuart mention in the preface a Bill entitled "The Roads and Streets in Police Burghs (Scotland) Act," which they say was expected to pass last session. That expectation, however, has not been realised, but as the Bill deals with what appears to be the one contentious point in the management of roads, it may not be inappropriate to refer to it here. Under section 11 of the Roads and Bridges Act the management of county roads is transferred to the Road Trustees (now the County Council), while in burghs the management rests with the Town Council or other Local Authority; and a "burgh" is defined to mean a royal or parliamentary burgh, or a populous place, provided its population was ascertained, within three months after the Roads and Bridges Act came into operation in the county, to exceed 5000. This arrangement gives satisfaction to all except the smaller burghs whose population did not, when the Act was adopted, come up to the required amount. These populous places are perhaps jealous of small royal burghs, and perhaps there is a risk that small places might not keep up the main thoroughfares in a state of efficiency. But, at the same time, it must be admitted that, as at present Police Commissioners have no legal right even to clean streets under the control of the County Road Board, much less to break them up in order to lay gas pipes or make drains, it is not to be wondered at that they grumble at having to apply to the County Council for leave to do such things. Another point deserves notice. In a considerable number of instances, when the Act was brought into operation in a county, the police burghs within it omitted to have their population ascertained as directed, and in other cases, they had not at that moment a population of the required amount. Such burghs are at present absolutely excluded from managing the streets within their boundaries, no matter what their population may be. There seems to be no reason why places that have become populous since the Roads and Bridges Act came into operation, should be in a different position from those that were so before.

L. T. N.

The Law of Scotland relating to Notaries Public, with Forms of Instruments. By JOHN C. MURRAY, Solicitor and Notary Public. Edinburgh: WM. GREEN & SONS, 1890.

This is, as the author tells us in his preface, a book meant to meet a demand for a treatise dealing exclusively with the office and practice of a notary public, and it contains a collection of styles applicable to those notarial writs which are of most frequent occurrence in business. There was room for such a book, and Mr. Murray has made a useful collection of modern forms, and has displayed a fair amount of industry in bringing together some statements of the law relating to such writs. But then Mr.

Murray's ambition was not satisfied. He must write an historical introduction. Did he write it? Let any one read his introductory chapter, and then take the trouble to glance at the opening chapter of a small, dusty, and unpretentious book called the *Ars Notariatus* (printed in Edinburgh for Alexander Donaldson in 1740, and subsequently reprinted in numerous editions), and we fear he will be able to give only one answer to that question.

The ethics of plagiarism afford a wide field of discussion, and *pace* Mr. Andrew Lang, we will not enter on them here. We are all plagiarisms on the oxen and sheep we have consumed, and the store of human knowledge is the common property of the race. But even where more is borrowed than is lawful, an acknowledgment may be made. But Mr. Murray has borrowed everything and acknowledged nothing.

Mr. Murray begins, "The office of notary public is one of great antiquity, and is derived from the Romans, among whom there existed a body of notaries or tabellions, who were entered in a school or college, which was presided over by a superior officer, who was known as the *Primicerius Notarium*." The anonymous author began, "This employment of notary is derived from the Romans, among whom there was a body of notaries erected into a school or college, and governed by a superior officer called *Primicerius Notariorum*."

At the foot of page 2 Mr. Murray tells us, "In after ages, when people were not so nice in the use of correct language, these terms, *tabularii*, *scribæ*, *tabelliones*, *&c.*, were promiscuously used to signify the same officer and minister of justice, such as we now call a notary, the reason being that all those officers were in some way or other concerned about the same instruments or writings." This is very well, but some of the phrases are *archaic*, and jar on a modern ear. The excuse must be that the anonymous author had said, "In after times, when people were not so nice in the language, these words, *tabularii*, *scribæ*, *tabellionis*, and *tabellarii*, were promiscuously used to signify the same officer and minister of justice, such as we now call a notary, because they were in ancient times, every one of them, concerned some way or other about the same kind of instruments or writings." Observe the "*niceness*" and care of the transcription. And so on. Mr. Murray has not a word of thanks to his brother-practitioner in the 18th century, who did the work, but remained unknown. Mr. Murray has another method of writing history. His account of notaries in England is borrowed from "Brooke's Office of a Notary" (6th edition, 1890); even the pompous citation of authorities is transferred. But here, on pages 5 and 7, references to Brooke are introduced which make it appear, contrary to the fact, that only two paragraphs are borrowed, and not the whole account. Mr. Murray has brains enough to write a book himself. If he uses another man's brain, he should mention the fact.

J. C.

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Notes on Decided Cases.

Proof — Hearsay — Admissibility of Written Statements.—*Tennent* v. *Tennent*, 27 S.L.R. p. 841. This case presents several features of interest and importance. It supplies a strong illustration of the kind of proof which will induce a Court of law to disregard the maxim, *Pater est quem nuptiæ demonstrant*, and to hold illegitimacy established on evidence that in point of fact no intercourse took place between husband and wife, but mainly on evidence of their conduct in word and act antecedent to the raising of the question. A controversy arose in this case, and apparently formed the subject of elaborate discussion, as to the admissibility in evidence of declarations by the mother (now dead) to the effect that the pursuer was not the child of her husband. These declarations were contained in two documents—(1) A certificate of registration of the pursuer, George Dreadnot Tennent's, birth made by Mrs. Tennent, the mother, in which a man not her husband was stated to be the father; and (2) an affidavit emitted by Mrs. Tennent in a Chancery suit for the purpose of distributing her deceased husband's estate, he having died intestate, in which she stated that the only child born of the marriage between herself and her husband was a daughter, whom she named.

The Lord Ordinary (Lord Fraser) admitted these documents as good secondary evidence, the mother being dead, to prove the illegitimacy of the pursuer. In regard to the affidavit, the First Division did not find it necessary to found their judgment to any extent upon it, and it appears from the opinion of Lord M'Laren, who delivered the judgment of the Court, that the judges felt they could not safely proceed upon any of the affidavits which Lord Fraser had admitted.

Lord M'Laren's remarks suggest a doubt whether the question as to the admissibility of hearsay evidence contained in writing can be considered as finally settled. It has certainly been the subject of much discussion in recent cases, and the decisions in some of these seem hard to reconcile with earlier views. In the case of *Gordon* v. *Grant*, 13 D. 1, Lord Justice-Clerk Hope laid it down that "proper hearsay is admitted as to matters of private right by the law of Scotland expressly on this ground that you

can ascertain from the witnesses, who are to state what the dead man said, all the circumstances in which he made his statement." Again, in *Macdonald* v. *Union Bank*, 2 Macph. 963, Lord Neaves stated: "The admission of hearsay evidence is an exception to the general rule, which requires that all evidence shall be given on oath in presence of the Court. By our practice that rule has been relaxed to the effect of admitting the declaration of a deceased person, if proved by a living witness." This seems to exclude from the category of hearsay evidence declarations made by a deceased person in writing, or at all events written declarations, not spoken to by a living witness acquainted with all the circumstances in which the statement was made or written. But in the *Lauderdale Peerage* case, L.R. 10 App. Ca. 692, 22nd July, 1885, this view of the law of hearsay evidence was unsuccessfully pleaded in support of an objection to the admission of certain writings by dead persons tendered as evidence, and that not on any special ground applying only to pedigree cases. "I cannot for a moment doubt," says Lord Watson, p. 706, "that, by the law of Scotland, the statement of a deceased person in relation to facts which must presumably have been within his personal knowledge, and to which he could have spoken, as a witness may, after his death, be received as secondary evidence through the medium of writing as well as through the medium of a living witness who heard an oral statement made by him." Again, in the *Dysart Peerage* case, 7th March, 1881, L.R. 6 App. Ca. 489, the same learned judge gives the following definition of hearsay evidence, p. 505: "What I understand hearsay evidence to be is this, either the writing or the verbal statement proved by a witness who heard it of a person deceased, who, if alive, would have been a competent witness." According to this wider view the writing of a dead person is admitted as hearsay evidence equally with his verbal statement, and the only qualification is this (and it is a qualification which applies equally to both kinds of hearsay), that the Court must be satisfied that the writing or the verbal statement was made in such circumstances as to free it from the suspicion of being untrue or coloured and one-sided. In the *Lauderdale* case, Lord Watson thus expresses it: "What I apprehend the law to be is this, that the statement of a deceased person, whether oral or written, is not admissible as evidence when its own terms, or the circumstances in which it was made, are such as to beget a reasonable suspicion either that the statement was not in accordance with the truth, or that it was a coloured or one-sided version of the truth." Lord Selborne gave his adhesion to this view (p. 700): "The general rule being in favour of the reception of evidence of the declarations of deceased persons in points as to which they would have been competent witnesses, and as to which they would have had personal knowledge of the things respecting which they have made statements, if true, that general rule is subject to exception when and only when there is something in the document, the evidence, or the circumstances to raise a *prima facie* ground of suspicion, not perhaps so strong as to amount to an affirmative presump-

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tion of bad faith, but to make it unsafe to rely upon the good faith of the document. In the case of precognitions and everything else *post litem motam*, the principle of that exception is clear."

The altered, or rather the wider and more expanded, view as to what constitutes hearsay evidence is surely just and sound. If the object be to obtain the best available evidence, there seems to be no reason why the written statement as well as the words of a deceased person should not be admitted. The former evidence, indeed, may often be much better than the latter, which depends for its value in the more or less imperfect recollection of the living witness. Taking the law to be settled as above explained, it would appear that Lord Fraser was right in admitting the affidavit in question (the circumstances in which it was granted being, in his Lordship's opinion, such as to free it from suspicion); and probably the meaning of the sentence in Lord M'Laren's opinion is just this, not that the Court would refuse to admit as secondary evidence an affidavit emitted in circumstances not open to suspicion, but that in this particular case they were not satisfied that that condition had been fulfilled. It would certainly be unfortunate if the matter were still to be held as open, or if the older and narrower view were again to be reverted to. But their Lordships found it unnecessary in *Tennent's* case to express, and refrained from expressing, any view on the general question. Lord M'Laren's observation against affidavits drawn by solicitors is in perfect harmony with the views expressed in the *Lauderdale Peerage* case. Such documents would, in the general case, be objectionable as being obtained *post litem motam*, and as being (in the words of Lord Selborne) "filtered through professional hands."

With regard to the other document admitted by Lord Fraser (the certificate of registration of the pursuer's birth), there seems no doubt that, as part of the history of the case, the statement there contained, made too without reference to any question which had then arisen or was in prospect, was admissible, and formed a most valuable piece of evidence.

R. L. O.

Succession—Vesting—Declaration as to Destination-over on Death before Receipt.—*Macdougall* v. *M'Farlane and Others*, 27 S.L.R. 638. The testator who expressly declares at what period vesting is to take place is, perhaps fortunately, unable to take part in the discussion on the terms of his disposition. "I have often thought," said Lord Justice-Clerk Inglis in *Croom's Trustees* against *Adams* (22 D. 45), "and may have remarked that it would be desirable, in order to avoid the difficulties which arise in the construction of settlements as to the period of vesting, that testators should expressly declare when the vesting is to take place. Here, however, the testator has done so expressly, and thence has arisen the whole difficulty in the case; so I fear that is a very doubtful remedy." Whether

doubtful or not, the point has again cropped up in the case above mentioned: but as the testator died in 1857, he had no opportunity of considering the observations of the Lord Justice-Clerk. The direction here was on the death of the truster and his wife, and on the youngest child reaching the age of forty, to divide among children who should then be alive, and the declaration was that the provision should not vest until actual payment or conveyance, with a destination-over to surviving children in the event of death before receiving payment. Both spouses died, and the youngest child reached the age of forty, and survived five months. The question was whether his share had vested. The pursuer pleaded that the trustees, of whom the youngest child himself was one, had plenty of time between December 1887 and May 1888, the date of death, to make conveyance of the property, and that the maxim, "*Quod fieri debet infectum valet*" applied. There seems, however, to have been no attempt to prove unreasonable delay in administration. "On this point," said Lord Wellwood (Ordinary), "I do not think that there can be the slightest doubt that the words must be given their natural interpretation. If the truster had intended that vesting should take place at the period fixed for division of his estate, it would have been easy for him to have said so, but it is clear from the wording of the clause, and also from the language used in the other passages to which I have referred, that what he had in view was the actual receipt or conveyance of the shares, and not the time fixed for division of the estate." On the point of undue delay, his lordship added, "Even if there was, John M'Farlane, who was a trustee, was as much to blame for it as anyone." The case of *Howat's Trustees* v. *Howat*, 8 Macph. 337, was referred to, and, principally on its authority, their lordships of the Second Division upheld Lord Wellwood's judgment.

It should be noted, however, that while in *Howat* the testator made no express declaration as to the period of vesting, yet as regards the latitude to be allowed to the trustees for conveying the property, a good deal turned upon the construction of the words, "twelve months after my decease, or so soon thereafter as my trustees may be able to realise said estates," the point being whether "thereafter" referred to the testator's death or the expiry of the twelve months succeeding. In *Macdougall's* case, Lord Young, while agreeing that *Howat's Trustees* was in point, stated that he wished to say nothing that would add to the authority of that case, and described it as one worthy of re-consideration. His Lordship expressed a desire to establish some such rule as this—"If a trustee creates a right in any person, which right has to be established by trustees, that right is not to be frustrated by the want of zeal, or inactivity of the trustees." He does not, however, mention how that rule would be affected by the case, as here, of the person in question being a trustee himself. Nor does it appear how such a principle would have affected the decision in *Macdougall's* case, as there was certainly no proof of inactivity, or

want of zeal. It does not seem to have been before the Court in this case, or in the recent case of *Popham's Trustees*, 10 Ret. 888, that the whole subject has been greatly canvassed in the Court of Chancery. Lord Wellwood, indeed, refers to Sir G. Jessel's opinion in *Johnston* v. *Crook*, 12 Ch. Div. 369, but he seems to have been unaware of the more recent decision in *Bubb* v. *Padwick*, 13 Ch. Div. 517, and of the general current of authority in England. There are three points to be distinguished—(1) what canons of construction will the Court apply in the peculiar class of cases of gift-over on death before receiving; (2), if "receiving" means, as Lord Eldon once said, receiving "in hard money," is such a destination-over valid? (3), assuming that the right of the beneficiary cannot be affected by fraudulent or unnecessary dilatory dealing of the trustees, in what circumstances, and to what extent will the Court permit an inquiry into the administration of the trust. (1.) As Mr. Jarman says (ii. 812), "actual receipt may be delayed by so many different causes that the Court is unwilling to impute to the testator an intention to make that a condition of the legacy." Of course, a declaration that "receipt" is the period of vesting makes construction more difficult, but even in this case, as Lord M'Laren observes (Wills and Succession, ii. 3 (c)), "the Courts, both here and in England, have in general disregarded such expressions as being contrary to the principle that the right of the beneficiary cannot be affected by the *laches* of the trustee." This was the logical view taken by Lord Deas, who dissented in *Howat's Trustees*. (2.) It has always been supposed in England that Lord Thurlow decided in *Hutcheon* v. *Mannington*, 1 Ves. Jun. 366, that a divesting clause, if it refers to the time of actual receipt, is really void, as being too uncertain to be given effect to; see V.-C. Wood in *Martin* v. *Martin*, L.R. 2 Eq. 404, Lord Selborne in *Minors* v. *Batteson*, 1 App. Ca. 428, and V.-C. Malins in *Bubb* v. *Padwick* above mentioned. This point has not yet been argued in Scotland. No doubt the authority of Sir G. Jessel in *Crook* v. *Johnston* is the other way, but in that case the words "actually received whether payable or not" were held to apply to non-receipt from any cause, including fraud, accident, or mistake, and thus to disclose an intention of the testator that the legatee was to take the risk of misconduct on the part of the trustee. (3.) Where, however, it is not suggested that the legatee was to take such a risk, what is a relevant case for inquiry into the administration? Lord Thurlow's view would, of course, exclude most such inquiries. It has been suggested that the lapse of a year would raise no presumption against the trustees, where there was no direction to convey on a particular event.

J. M. B.

Heir and Executor.— *Stroyan and Another* (*Black's Executors*), 19th July, 1890, 27 S.L.R. 896. The tacksman of land under a long lease assigned the lease absolutely to a person advancing him

money, and received a back letter from the lender declaring that the assignation, though *ex facie* absolute, was really in security for the loan. The assignee made up a title by recording a notarial instrument along with the lease, in terms of the Registration of Leases (Scotland) Act, 1857. The lender having died, the question arose whether the money thus secured passed to his executors as moveable, or to his heir as heritable estate. The Second Division, Lord Rutherfurd Clark dissenting, decided in favour of its being moveable. In view of such a dissent, and of the fact that the Lord Justice-Clerk merely concurred with Lords Young and Lee, and gave no grounds for his opinion, the judgment cannot be regarded as satisfactory. The decision of the case depends on two apparently simple points—(1.) At common law is such a security heritable or moveable? (2.) Has any statute altered the common law rule? On both these questions Lords Young and Rutherfurd Clark differ. On the first, Lord Young is unwilling to hold that the assignation of a lease in security of a personal debt, rendered that debt heritable. Lord Rutherfurd Clark thinks that an absolute assignation of a lease for 999 years is "plainly an heritable right," and he has "always understood that securities constituted over heritable rights are themselves heritable." The grounds of Lord Young's opinion on this point appear to be twofold. First, "modern feeling" is in favour of cutting down the rights of primogeniture, and making as much as possible descend to the executors. It is difficult to see what "modern feeling" has to do with the common law, the rules of which are certainly a good deal older than it is. "Modern feeling" has caused many statutory alterations to be wrought on the common law, but there is something startlingly novel in giving it as the ground for a view of what the common law is. However, Lord Young gives a second reason for holding that at common law a security such as the one in question is moveable—a reason which will commend itself far better than the first. "The lease," he says, "was at common law a merely personal contract, the Act 1449 only made it real to the extent of rendering it effective against singular successors, and therefore an assignation of this personal contract is not a security of a heritable nature." It is true that the tack was originally merely a personal contract, but in the view of our older institutional writers, and the practice of the country, it ceased to be so, and became a species of real right after the Act 1449 (see Stair ii. 9, 2). Hence leases go to the heir in the ordinary case on the death of a lessee. In the case under consideration, the creditor, by taking the absolute assignation and making up a title as he did, assumed the full position of lessee. No one could set up a claim to the lease preferable to his; the back letter merely gave the borrower a right to demand an assignation in a certain event. In these circumstances it is difficult to see why this lease should not descend, as leases always do at common law —viz., to the heir. It is further evident from section 7 of the Registration of Leases Act, 1857, that the framers of that statute considered that

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leases assigned in security should go to heirs, for that section provided "that it shall be competent for the heir of any party who shall have dies vested in right of any such lease or assignation in security, recorded as aforesaid, to make up his title" in a way prescribed. For these reasons, it is submitted that Lord Rutherfurd Clark's view of the common law rule is sounder than Lord Young's.

But if a lease assigned in security is at common law heritable estate of the creditor's, is there anything in any Act of Parliament giving effect to the "modern feeling" which has altered the common law rule? Those who plead for the moveable character of the security say that section 117 read along with section 3 (the interpretation clause) of the Titles to Land Consolidation Act, 1868, does so. That section provides that heritable securities, except where executors have been expressly excluded, shall form part of the creditor's moveable estate. But section 3, in defining "heritable securities," declares they shall not include absolute dispositions qualified by back letter. The reason for this exclusion is obvious. If an absolute disposition (really in security), qualified by a back letter, had made the lands so disponed *moveable estate* of the creditor, by virtue of section 117, a search for back letters would have been required on every landowner's death before the question of succession could have been settled. The same result will follow if recorded absolute assignation of leases (really in security) are to be regarded as moveable estate of the assignee. The further question arises whether the above-mentioned sections of the Consolidation Act apply to securities over leases at all. If they do not, the common law as to succession to such securities is untouched; if they do, securities by way of absolute assignation of leases would appear, as Lord Rutherfurd Clark holds, to be equivalent to absolute dispositions of property to the extent of bringing them under the exception stated in section 3. It may be hoped that when the question of the character of such a security as the one under consideration is again raised, it will be submitted to such a tribunal as will enable the conflicting opinions of Lords Young and Rutherfurd Clark to be thoroughly sifted. In the meantime to rely on Stroyan's case would be by no means safe.

F. T. C.

Inventory or Probate Duty—Interest in Indian Partnership.—*Laidlay's Trustees* v. *The Lord Advocate*, 12th July, 1889, 16 Ret. 959, reversed in the House of Lords, 7th August, 1890. The questions involved in this case were—(1) Whether a certain partnership concern was Indian or British? and (2) Whether the mode in which, under the partnership articles, the interest of a deceased partner was directed to be realised made that interest simply a contract debt due by the partnership trustees, who were in Britain, to the partner's executors, who were also resident there, and so liable to inventory duty? The importance of these questions arose

from the principle that, in considering the incidence of inventory duty, the *locus* of each personal asset is the test, assets outside the United Kingdom being free from duty here.

The Lord Ordinary in Exchequer (the late Lord Fraser) held the partnership concern to be British, and answered the second question in the affirmative. The First Division of the Court held it unnecessary to answer the first question, but assumed (in favour of the executors) the concern to be Indian, and concurred with the Lord Ordinary in giving an affirmative answer to the second question. Lord Shand, however, differed from the Lord Ordinary, and held the concern to be Indian; he also dissented from all his brethren on the second question, and answered it in the negative.

The first question is not of much general importance. The answer to it depended upon a construction of a very elaborate contract providing somewhat complicated machinery for the conduct of the business. The business, however, was defined as "the carrying on and working of indigo and silk concerns and zemindaries for the production or manufacture or working of indigo and silk and other produce, and for the sale in Calcutta, or shipment for realisation in Europe, of such produce." Another mercantile firm in Calcutta were the managing agents, with the fullest administrative powers, embracing the cultivation of the lands, the manufacture and sale of the produce, the employment and dismissal of clerks and workmen, the exclusive use of the partnership name, the charge of the business books, and the ascertainment and appropriation of profits. The proceeds of the business were, however, remitted to a different mercantile firm in London, who financed the concern, and in whose office a committee of advice, consisting of five partners, met and consulted, and where also general meetings of the partners were held. In these circumstances, and notwithstanding the measure of control that could be exercised from England, the House of Lords had no difficulty in coming to the conclusion that "the seat of the business was in India;" and the case on this point is only of importance as showing what is the true test or standard in such cases, and what the kind of facts that have a bearing upon it.

This Indian concern being, therefore, outside the United Kingdom, the second question arose upon a construction of the clauses of the partnership contract, which regulated the realisation of a deceased partner's interest therein. It was provided that if his representatives should desire to sell his share to any of the partners, or to any other person to be approved of by the committee, the same might be sold within six months after death, for such price as might be agreed upon,—the purchaser becoming a partner on undertaking the partnership obligations. In accordance with this provision the executors in this case sold to each of the three sons of the deceased one share at the agreed-on price of £9000 each. There was an alternative mode of realising under the partnership deed, if a purchaser were not found within six months—viz., to have the deceased's share valued by the London agents, and transferred to the partnership trustees.

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or to an approved purchaser, the trustees paying to the executors the value thereof, the funds for which were to be provided by the partners rateably.

Much importance was attached by the majority of the judges in the Court of Session to this mode of realisation, though not resorted to in the present case, as showing, in their opinion, that the true nature of the asset to which the executors had right was a claim of debt against the partnership trustees,—not a share in a partnership concern, and that as these trustees were resident in the United Kingdom, the asset, like any other debt, was locally situated at the domicile of the debtor. Accordingly Lord Adam held the asset to be nothing but a contract debt against the Company for a sum of money, and that it was not a claim, or a sale of a right, to a proportional part of the property of the Company. This view was in flagrant opposition to the language both of the partnership deed and of the contract of sale to the sons, in both of which the subject of sale and transfer was described as the entire or undivided shares of and in the real and personal property and other assets of the partnership.

The House of Lords has entirely condemned the views of the majority of the Court, holding that it arose from a confusion between the rights arising out of the sale of an asset of a testator, and the character and situation of that asset before it was sold (Lord Herschell); a confusion between two things essentially distinct—*i.e.*, the intrinsic nature of the asset which fell *in bonis* of the partner on his decease, and the powers given to his executors to deal with it (Lord Watson). "The character of the asset and its local situation cannot be affected by considerations or circumstances arising out of a transaction subsequent to the death. The question is where, at the time of the death, was the asset situated?" (Lord Herschell). It is further pointed out that under the contract the share or shares did not cease to exist on the partner's death; up to the end of the financial year the current profits accrued, and thereafter the interest of the deceased partner in the shares which belonged to him was in abeyance; "but it belongs to his legal personal representatives, and to no one else. They, and no one else, can sell it, and when they sell it, they sell it with all the profits belonging to it, which have accrued in the meantime" (Lord Macnaghten). Lord Watson also expressly states that it would make no difference whether the first or second alternative mode of realisation provided in the contract were adopted.

Similar views were expressed by Lord Shand with a like precision in the Court of Session.

The legal principles expounded in these judgments are of general interest and importance, and not entirely dependent upon the terms of the particular contract. To the partner's representatives the case had a special interest, seeing that on the advice of Counsel in India they had already paid Probate duty there; and it can never have been intended to exact two Probate duties on the same estate in one undivided empire.

J. C. L.

Succession—Acceleration of Vesting—Repudiation of Testamentary Provisions.—*Muirhead* v. *Crellin*, 15 R. 254, revd. L.R. 15 App. Ca. 289. "The construction put upon the settlement by the Court below seems to me to offend against two very familiar rules for construing instruments, inasmuch as it puts into the instrument words which are not there, and by putting those words into it robs of their proper meaning words which are there." Such was the opinion delivered by the Lord Chancellor in the House of Lords in reversing the decision of the Second Division of the Court of Session in this case. The Second Division rested their judgment on the authority of three cases, *Annandale* v. *Macniven*, 9 D. 1201; *Alexander's Trs.* v. *Waters*, 8 M'P. 414; and *Lucas Trustees* v. *The Lucas Trust*, 8 R. 502. The first-mentioned of these cases is now curtailed of a large part of the authority hitherto attributed to it, by the explanations it has received from Lord Watson: the second has been shown to possess only a very limited scope of application; and the third must henceforth be placed in the category of "doubted" authorities.

Muirhead's case has cleared away some of the uncertainty attaching to a difficult department of vesting law—namely, the effect of repudiation or discharge by a liferenter or annuitant of conventional provisions, contained in a marriage-contract or testamentary settlement, in accelerating the period at which the fee of the settled estate vests in the beneficiaries to which the same is destined. It is now laid down by Lord Watson that in cases where the final distribution of a trust-estate is directed to be made on the death of an annuitant or liferenter, and such annuitant or liferenter discharges the provisions in his or her favour, the Court may ordain an immediate division, provided—(1) that it clearly appears that, in postponing the time of division, the testator had no other object in view than to secure payment or annuity or liferent; and (2) that the beneficiaries to whom the trustees are directed to pay or convey shall have a vested and indefeasible interest in their provisions. The chief importance of this enunciation of legal principle attaches to the provisos appended to it. The first of these involves an appeal to the *regula regulans* of all rules of vesting, the intention of the testator. And it was in the interpretation of the intention of the testator in *Muirhead's* case, that the House of Lords found their main disagreement with the decision of the Second Division. Briefly stated the provisions of *Muirhead's* testamentary settlement were: to trustees to hold for the payment of an annuity to the truster's widow, and the balance of income over and above the annuity to be accumulated till her death; then "as soon after the death of my second wife as convenient," to divide the estate among the children and the issue of such children as might "predecease the term of payment," with a clause of survivorship referable to the term of payment. On the truster's death in 1865, the widow at once repudiated her annuity and elected to take her legal rights of terce and *jus*

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relictæ. The Thellusson Act forbade any further accumulations of income after 1886, and in that year the widow having received her *jus relictæ* and discharged her right to terce, and being still alive—proceedings were taken by the truster's children (including the husband of one of the truster's daughters who had died without issue) for the purpose of having the estate distributed on the footing that, in consequence of the widow's prompt repudiation, the fee of the estate had vested *a morte testatoris*. To this claim the Second Division gave effect, holding that the intention of the testator was equally fulfilled by the widow's repudiation as by her death, on the grounds—(1) that the annuity was in either case terminated, and (2) that the only object of the postponement of the distribution was the benefit of the wife.

The effect of this reading of the settlement was to substitute the date of the wife's repudiation as the date referred to in the survivorship clause for that named in the deed—viz., her death; and this is the inversion of the plain meaning of the settlement against which the Lord Chancellor makes the brief and stinging remonstrance quoted above.

One fallacy underlying the principles upon which the Second Division decided the case consists in the assumption that a renunciation or discharge will make the fee vest although it does not vest under the deed—an assumption which directly traverses the rule authoritatively laid down in *Pretty* v. *Newbigging*, 16 D. 667, and acted upon in a very large number of cases (*cf. Robertson* v. *Davidson*, 9 D. 152; *Rainsford* v. *Maxwell*, 14 D. 450; *L'Amy* v. *Nicholson's Trustees*, 13 D. 241—a strong case; and *Routledge* v. *Carruthers*, 2 Bligh, 692, a case of direct destination in which there was no trust interposed). There is no doubt, however, that *Annandale* v. *M'Niven* has been repeatedly used as authority for the proposition that the termination of a liferent is, for the purposes of construction tantamount to the liferenter's death; and the same proposition appears in *dicta* by Lord Jeffrey in *Robertson* v. *Davidson*, 9 D. 152; and by Lord Murray in *Pretty* v. *Newbigging*—*dicta* which did not meet with support from the other judges who took part in the decision of these cases. *Annandale* v. *M'Niven* is reported in the most beggarly fashion, it being impossible to discover with certainty the grounds of the judgment pronounced, but the destination is recorded as follows:—to trustees, for the widow's liferent, and "*on her death or re-marriage*" to the children in fee, failing children then "*on the widow's death*" (without mention of remarriage), to the truster's brothers and sisters, with clause of survivorship referable to the date of the widow's death. The widow and a child survived. The latter died, and thereafter the widow re-married. The Court sustained a claim by the truster's brothers and sisters to have an immediate division, and likewise sustained a claim by the representatives of the deceased child for *legitim*. This case, even as reported, might have been a clear authority for the proposition in question, had the deed under construction been less ambigu-

ously expressed. But, as it is, there is room for Lord Watson's suggestion that the Court must have held the date of vesting intended by the testator to be the date of the widow's re-marriage, failing which, the date of her death, in which case no violence would be done to the survivorship clause, and the right of the claimants to an estate in which they had a vested right would be clear. In any event, Lord Watson refuses to regard a case recorded in so meagre form as an authority for the broad proposition that a life-renter's repudiation is equivalent to his death, no matter how that may affect other provisions in the settlement. *Alexander's Trustees* v *Watters*, was also relied on by the judges of the Second Division. It was a judgment which proceeded largely upon the authority of *Annandale*, and must now be regarded as a case ruled by specialties. In it a husband in his trust-settlement, conveyed to trustees to give the widow an annuity, and on her death, and (among other events) on the marriage of all his daughters, to divide the estate among them, with survivorship clause. All the daughters married, and thereafter the widow renounced her annuity. The deed was so worded as to leave room for the view that vesting was to occur as soon as all the daughters were married, even though the widow might be alive, and the Court laid special stress on the fact that the postponement in the date of payment was made solely for the purpose of securing the annuity. This latter point has also been commented upon in *Muirhead* in connection with the provisions in the settlement in that case regarding accumulations of income.

The case of *Lucas' Trustees* v. *the Lucas Trust*, was regarded by the Second Division as a direct authority against regarding such a provision as a bar to the acceleration of vesting. The direction there was to pay an annuity to the widow, and hold certain heritable estate for her liferent use, and accumulate the balance of income during her life-time, and, on her death, after paying certain legacies to certain persons, if then surviving, to pay the remainder to named trustees for a charitable purpose. The widow having repudiated her conventional provisions, the trustees of the charity were found entitled to an immediate conveyance of the residue, subject to the existing and contingent interests involved in the legacies. The House of Lords (*per* Lord Watson) have expressed doubts of the validity of this decision, inasmuch as it is inconsistent with the idea of the postponement of the date of payment having been made solely for the security of the annuity. Lord Watson would have regarded the provision with regard to accumulations as sufficient to negative such an assumption in *Muirhead's* case, even if there had been no other features in the case indicating a similar result. No opinions by the judges are reported in *Lucas' Trustees*, which cannot now be regarded as an authority.

J. A. C.

Trade-Mark—Objection to Registration.—The case of *Eno* v. *Dunn*, 15 App. Ca. 252, decided by the House of Lords on 19th June, 1890, evoked much conflict of judicial opinion. It originated in an application to register, as part of a trade-mark, the words, "Dunn's Fruit Salt Baking Powder." The appellant, Eno, opposed the application, on the ground that it interfered with his trade-mark, "Fruit Salt," which he had employed for years to designate a powder used for producing an effervescing and aperient drink, and that it was calculated to deceive the public. Kay, J., held that on these grounds the trade-mark ought not to be registered. The Court of Appeal (Lindley and Fry, L.J., J., Cotton, L.J., dissenting), reversed this decision. The judgment of Kay, J., was, however, restored by Lords Watson, Herschell, and Macnaghten, who formed the majority in the House of Lords, Lord Halsbury, L.C., and Lord Morris dissenting. It was admitted that Eno had no right to the exclusive use of the words, "Fruit Salt," and the question in the case was, therefore, narrowed to this, whether people who were already familiar with Eno's preparation, would naturally suppose that "Dunn's Fruit Salt Baking Powder" was manufactured with Eno's Fruit Salt. Dunn asserted that he had borrowed the expression "Fruit Salt" from a manual of chemistry, but the phrase could not be discovered, and it was assumed by the majority of the House of Lords that, as Lord Macnaghten put it, "Fruit Salt has come to mean Eno's preparation, that at present it means nothing else, and that Eno's preparation is well known, and very popular." This being the case, their Lordships held that a baking-powder was not so entirely unlike the aperient powder of Eno as to prevent the risk of confusion. Lord Herschell admitted there would be no such objection to registering a "fruit salt umbrella" The case seems to remove any doubt there may have been as to the discretion of the Comptroller under § 73 of the Patents, Designs, and Trade Marks Act, 1883. He ought to refuse registration where it is not clear that deception may not result.

F. P. W.

INDIAN AND COLONIAL CASES.

Sheik Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu* (1889, 17 Ind. App. p. 28).—The decision of the Judicial Committee in this case throws an interesting light upon the present state of Indian law as to gifts of property to charitable uses (*wakf*). The material facts are fully set out in the official report of the appeal, above cited, and it may therefore be sufficient if we summarise the points of law that were accepted, decided or raised by the judgment of the Privy Council. (1.) A *wakf* may lawfully embrace provisions for the family of the grantor. On this point the

language of Kemp, J., in *Muzhurool Huq* v. *Puhraj Ditarey Mohapattar*, (13 Suth., W.R. 235), was adopted. (2.) A gift is not good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other. (3.) *Quaere*, whether a gift of property to charitable uses, which is only to take effect after the failure of all the grantor's descendants, is an illusory gift? (4.) The terms *fisabilillah wakf* (appropriation to God) used in a deed of gift, are not sufficient to make the properties covered by the instrument *wakf* properties under the Mohammedan law, if it appears on the construction of the whole instrument, that the donor's intention was to aggrandise his own family, and to make their property inalienable. In the case under consideration, the *wakfnama* or deed of gift commenced as follows,—"I hereby appropriate and dedicate as *fisabilillah wakf* in the manner provided in the paragraphs mentioned below," the properties in question for certain charitable purposes. . . . "and I pray to God that He may in His mercy accept and preserve the same for ever, for being applied to those purposes." "The paragraphs mentioned below," were thirteen in number, and contained provisions for accumulation, for the exemption of the salaries of the trustees (*mutwalis*) from alienations and creditors, for the appointment of male issue as *mutwalis*, coupled with allowances to other male issue, and to wives and daughters of such issue, all indefinite in duration and intended to be commensurate with the existence of the family. The *wakfnama* also sanctioned increased salaries and allowances, and required new *mutwalis* to bring all their private acquisitions into settlement; but not a word was said about increasing the amount spent on the charitable uses beyond the customary expenditure. The Judicial Committee held that the property had not been converted. It is worth noticing that the original decree, from which the appeal was brought, was pronounced on July 26, 1883.

A. W. R.

Mussammat Hayat-Un Nissa v. *Sayyid Muhammad Ali Khan* (1890, 17 Ind. App. 73).—This case derives its chief—perhaps its sole—legal interest from the very remarkable conflict of evidence to which it gave rise. The only question that the Judicial Committee had to decide was whether a Mohammedan lady, Wazir un Nissa, who died childless and intestate on the 26th October, 1881, belonged to the *Shia*, or to the *Sunni* sect at the time of her decease. A summary of the conclusions at which the Privy Council arrived may prove of interest. 1. The father of the deceased was a Sunni. His succession was treated by all parties interested as that of a Sunni, and his childless widows received the shares that the Sunni law allotted to them. 2. In the beginning of 1864, Daud Ali, the respondent's father, brought a suit for redemption of a mortgage granted by the paternal uncle of Shulam Ali. In that suit, Iradat Ali and his sister-in-law Wazir-

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un-Nissa intervened on the ground that they, and not Daud Ali, were the legal heirs of the mortgagor under the rules of the Shia sect, to which they all belonged. Their lordships held, however, that there was no evidence of the deceased having personally authorised this statement, and that at the time when it was made, she was subject to her husband, who was a Shia. 3. After her husband's death in 1865, Wazir-un-Nissa made a journey to Ajmere, in order to visit a Sunni shrine, in the company of a "pir," or spiritual guide of the *Sunni* sect, whose office and functions were unknown among the *Shias*. Now, the subordinate judge, who was conversant with the customs of both sects, attached little weight to these circumstances, and said "that thousands of Hindus and Mohammedans, both Shias and Sunnis, especially women who are not acquainted with their religion, visit the shrine without changing the creed." It will be observed, however, that the learned judge was silent on the subject of the "pir," and Mr. Justice Mahmood (in the High Court for the North-West Provinces), being himself as well acquainted with Mohammedan sects as the subordinate judge, was of opinion that the company, in which the pilgrimage was made, was conclusive evidence that Wazir-un-Nissa had abandoned her husband's faith. The Judicial Committee, following the opinion of Lord Watson, took this view, and decided on the whole issue that she was a Sunni at th time of her death.

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Hunter v. *The Government of British Honduras.* (See *Jurid. Rev.*, Vol. II. p. 207).—The damages awarded to the plaintiff in this case by Sir Benjamin Pine and the other arbitrator have not been paid, and we understand that the Colonial Office is now taking up the ground that they are only payable when *the revenues of the Colony* permit. If this attitude is persevered in, some instructive legal questions will arise for settlement. (1.) Can the words that we have placed in italics be imported into a submission that simply provides for the sums found due "being paid." (2.) Can the Colonial Government be served with a writ? (See *Sloman* v. *Governor of New Zealand*, 1 C.P.D. 563.) (3.) If not, will petition of right lie? We shall discuss these questions in a subsequent note, should necessity arise.

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