THE 1903

LAW QUARTERLY REVIEW.

EDITED BY

SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.
LATE CORPUS PROFESSOR OF JURISPRUDENCE IN THE UNIVERSITY OF OXFORD.

VOL. XIX.

LONDON:
STEVENS AND SONS, LIMITED, 119 & 120 CHANCERY LANE.
AGENT FOR UNITED STATES OF AMERICA, THE BOSTON BOOK CO., BOSTON.
AGENT FOR CANADA, THE CARSWELL CO., LIMITED, TORONTO.
OXFORD: AT THE CLARENDON PRESS.
1903.

Oxford
HORACE HART, PRINTER TO THE UNIVERSITY

INDEX OF SUBJECTS.

INDEX OF CONTRIBUTORS.

SUBJECTS OF BOOK REVIEWS AND NOTES.

TABLE OF CASES, 1903.

[*This table includes only recent cases specially noted or discussed.*]

THE LAW QUARTERLY REVIEW.

No. LXXIII. January, 1903.

NOTES.

THE Editor of this REVIEW will cease to be Corpus Professor of Jurisprudence at Oxford on the 1st of February, as the term of five years for which he was last re-elected will then expire, and he does not seek re-election. Correspondents of the REVIEW are therefore warned that the editor and publishers will not be answerable for any miscarriage or delay caused by letters or printed matter of any kind being wrongly addressed to Oxford. It is best to communicate direct with Sir F. Pollock, 13 Old Square, Lincoln's Inn, marking book-parcels with the letters L. Q. R.

When does a person, who during his lifetime so deals with his property that it may on his death escape liability to death duties, act 'with intent to evade the payment of duty'?

This is a question which occasionally harasses the minds of conscientious testators who wish that as much of their property as possible should pass untaxed into the hands of their children, and yet are haunted by a secret fear that whoever so arranges his affairs that on his death his estate may be chargeable either with no death duties or with a very small amount thereof is guilty of something like fraud.

The inquiry however, what constitutes evasion, is directly raised and answered by several cases, all of which have reference to colonial statutes avoiding acts done with intent to evade the payment of duty.

These cases, such for example as *Payne* v. *Rex* [1902] A. C. 552, 71 L. J. P. C. 128, *Simms* v. *Registrar of Probates* [1900] A. C. 323, 69 L. J. P. C. 51, *Bullivant* v. *Attorney-General for Victoria* [1901] A. C. 196, 70 L. J. Q. B. 645, appear to lay down a pretty clear principle. The Colonial Acts which impose penalties upon attempts to evade the payment of duty extend to colourable transactions

only; if there is a real and complete transfer of the property during the lifetime of the owner, the manifest desire of the owner to avoid liability to the payment of duty is not in itself enough to make the transaction an attempt to evade payment. Evasion, in short, which has in it some idea of fraud or dishonesty is in itself quite a different thing from the honest dealing with property in such a way as to escape liability to death duties.

'In the absence of fraud, good faith is not of itself a sufficient defence to an action founded on tort,' including an action for wilfully procuring a breach of contract; and in such an action the defendant does not 'occupy a better position than a defendant setting up privilege in an action for libel or slander,' and it is not sufficient for him to allege that the person whom he procured or compelled to break a contract with the plaintiff was under some conflicting obligation to himself. So Stirling L. J. explains the principle on which the Court of Appeal proceeded in *Read's* case [1902] 2 K. B. 732, 71 L. J. K. B. 994 (the defendant society's name is really too cumbrous), agreeing with the Lord Chief Justice in the Court below that the plaintiff was entitled to judgment—a conclusion for which the other members of the Divisional Court had thought the evidence not sufficient. The reasons of Stirling L. J. seem to us clear and adequate, though not exhausting or professing to exhaust other questions which may arise. The M. R. gave a more elaborate judgment, stated by Cozens-Hardy L. J. to express his own views also. If we rightly understand it, of which we are not sure, it is not easy to reconcile with Lord Macnaghten's opinion (followed by Stirling L. J.) in *Quinn* v. *Leathem*. We humbly submit that the use of illegal means, when once it is found that the breach of an existing contract has been procured without some positive justification, is merely matter of aggravation; and that the question whether such conduct would not deprive the defendant of the benefit of an otherwise valid justification is interesting, but did not arise in this case. We are still of opinion that this and allied subjects will never be cleared up till we leave off talking about malice, but this opinion, we confess, does not seem to prevail at present.

It is certain, at any rate, that the authority of *Lumley* v. *Gye*, shaken for a time by the dicta in *Allen* v. *Flood*, is now restored by *Quinn* v. *Leathem*; and accordingly people who procure breaches of contract are liable to be sued for it as a wrong: subject, almost certainly, to exceptions, and in particular to the immunity of honest advice given on request, if the judgment of Bigham J. in *Glamorgan Coal Co.* v. *S. Wales Miners' Federation* [1903] 1 K. B.

118, 71 L. J. K. B. 1001—which we understand is to be taken to the Court of Appeal—is right. In some cases, at least, of giving advice it may be said that there is no 'procuring' at all of the breach of contract. But, whatever the exceptions may be, good faith or good motives alone do not constitute one. A learned correspondent observes that the decision in *Read's* case 'limits the power of societies, whether they be trade unions or employers' federations, to enforce rules of trade or business by methods which go very near to intimidation.' That is quite true, but the principle is much wider, and its generality should not be forgotten.

Dunn v. *Bucknall Bros.* [1902] 2 K. B. 614, s. c. *s. n. Dunn* v. *Donald Currie & Co.*, 71 L. J. K. B. 963, C. A. decides the following points:

(1) The carriage by a shipowner of goods destined for an alien enemy without the knowledge and consent of the other shippers, is a breach of duty towards them, and the shipowner is therefore liable to damages caused to them thereby, and this is so even if the damages are caused through seizure of the ship by reason of its having enemies' goods on board, and even if the shipowners are in the bill of lading exempted from liability for loss occasioned by restraint of princes.

(2) There is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea.

On each point the decision of the Court of Appeal commends itself to common sense. A shipowner who, without the knowledge of a shipper of goods, either through negligence or for the sake of securing additional gain, exposes the shipper's goods to unnecessary risks assuredly has violated a duty to the shipper, and if the shipper loses by this breach of duty, owes him compensation. It is again hardly conceivable that as a matter of principle, a shipowner should be free from all liability for loss of market on a contract of carriage by sea. No doubt, as pointed out by the C. A., in criticizing or explaining *The Parana*, 2 P. D. 118, it may well happen that owing to the uncertainties and the length of a voyage by sea, neither of the parties to the contract of carriage has formed a reasonable expectation as to the state of the market when the goods may arrive at their port of destination, whence it follows that the mere fact of a loss of market need not be a damage which is contemplated by the parties and recoverable from the carrier. But when the circumstances admit of reasonable calculations as to the time of arrival and the fluctuations of the market, there is no reason why damages caused by a loss of market should not be recovered from

the shipowner who has been guilty of a breach of duty. The prevalent idea that such damages are not recoverable is a curious example of the way in which a practice in itself reasonable is often supposed by lawyers and merchants to sanction a principle far wider than is required for the vindication of the practice. *Cessante ratione cessat lex ipsa*: but it is easier to know a custom than to understand the reason of it.

The breach of a restrictive covenant (in the particular instance a covenant entered into by a vendor not to erect thereon 'any building other than private dwelling-houses') may be the ground for a claim for compensation under the Lands Clauses Act, 1845, by the owner of land for the benefit of which the restriction was imposed. This is the effect of the *Long Eaton Recreation Grounds Co.* v. *Midland Ry.* [1902] 2 K. B. 574, 71 L. J. K. B. 837, C. A. The judgment of the C. A. dismissing an appeal from the judgment of Lawrance J. is so obviously reasonable that an ordinary reader finds some difficulty in seeing what room there was for doubt. It can hardly be maintained that where the value of *A*'s land is affected by the breach of a covenant made by *X* and for the benefit of *A*, the land is not 'injuriously affected' within 8 & 9 Vict. c. 18, s. 68.

In *Savill Bros.* v. *Bethell* [1902] 2 Ch. 523, C. A., 71 L. J. Ch. 652, a vendor, conveying unto and to the use of the purchaser in the common form, proceeded to except and reserve 'a piece of land not less than forty feet in width commencing at' a certain point 'and terminating at the nearest road *to be made by the purchaser* or his assignee on the estate so as to give access to such road,' &c. At first sight this exception looks thoroughly bad for uncertainty. But it was said to have been made certain by the vendor's election. Buckley J. thought this argument, founded on somewhat slender authority, not tenable. The C. A. did not decide this point, but held the exception bad on two other grounds: first, for purporting to create an estate of freehold to commence *in futuro*, the conveyance operating at common law; secondly, and independently, because the future time in question—namely the making of a road by the purchaser or his assignee—was not necessarily within the limits of the rule against perpetuities. A suggestion that if the exception was bad the whole grant was bad was summarily put aside. Altogether it is a prettier pure conveyancing case than we commonly get nowadays.

Is a voluntary contribution made to a beneficed clergyman by a society, the object of which is to raise and distribute a clerical sustentation fund, assessable to income tax in the hands of the recipient as 'perquisites or profits accruing by reason of his office' under the Income Tax Acts, 1842 (5 & 6 Vict. c. 35), s. 146, and 1853 (16 & 17 Vict. c. 34), s. 2, Sched. E?

This question, which may be of supreme importance to the clergy of the Church of England, was raised by *Herbert* v. *M'Quade* and was answered in the negative by a Divisional Court (Kennedy and Phillimore JJ. [1901] 2 K. B. 761, 70 L. J. K. B. 725). The judgment of the Divisional Court has now been reversed by the Court of Appeal (Collins M. R., Stirling and Romer L.JJ. [1902] 2 K. B. 631, 71 L. J. K. B. 884), which has decided that the Rev. G. N. Herbert is under the circumstances of the case assessable on the sum of £65, paid to him by the Norwich Diocesan Branch of the Queen Victoria Clergy Sustentation Fund. The Court moreover has, as we understand the judgments, laid down the following principle for discriminating cases, the facts of which seem to run very near one another, namely that a sum of money voluntarily paid to a clergyman, or any other minister of religion, on personal grounds, e. g. on account of services rendered by him, or on account of his own poverty, is not assessable to income tax, but that a sum of money voluntarily paid to a clergyman or other minister, with a view to increase the emoluments of his office, is assessable to income tax, and that it is so assessable even though it be not paid for more than one year, and though the recipient has no right to demand the payment: the reason for this distinction being that, in the one case the grant or gift does not, whilst in the other case it does come within the terms 'perquisites or profits, accruing [to the recipient] by *reason of his office*.' The distinction seems a subtle, but is very probably a sound one. A point however which may perhaps remain open to doubt, at any rate on an appeal to the House of Lords, is whether charitable gifts made to a man who holds a particular office can in any case be considered perquisites or profits within the meaning of the Income Tax Act, 1842, s. 146.

In *Tolhurst's* case [1902] 2 Q. B. 660, 71 L. J. K. B. 949, the Court of Appeal reversed the decision below (on which we commented a year ago, L. Q. R. xviii. 10), but substantially re-affirmed the principles on which it was grounded, the differences being partly on inferences of fact and partly on the effect of the particular contract in question. It remains true that the Judicature Act has not made contracts more assignable at law than they formerly were in equity,

and that the promisee under a contract cannot without the promisor's assent assign the benefit of the contract in such a way as to impose a new burden on the promisor. Here the Court held that the original contract was still subsisting, and enforceable by the original promisee (a vendor company in liquidation), who was before the Court; they also held that the substitution of the purchasing for the selling company would really impose nothing on Tolhurst beyond what was contained in the contract, and must be deemed to have been contemplated as possible.

Buying land to build works upon is not a substantial commencement of works, and statutory 'conclusive' evidence is not exclusive of other kinds of proof that works have not been commenced. Those are the points decided, and inevitably so decided, by the C. A. in *A.-G.* v. *Bournemouth Corporation* [1902] 2 Ch. 714, 71 L. J. Ch. 730, though it was a hard case for the Corporation and the ratepayers of Bournemouth. The Corporation had done everything in the way of preparation, but had not actually commenced the works for their tramway within a year from obtaining the provisional order. Accordingly they lost their rights and had no defence to an application, promoted by a rival company, for an injunction.

A Contract of Agency in 1281.

The appended document is of value as showing the terms on which services were hired in the city of London in the time of the first Edward, and the stipulations made by the parties.

A good deal is known of the principal, William Servat, of Cahors, but this Review is hardly the place for the particulars of his history.

We may note that he dealt at various periods in wool[1], silk[2], and groceries (*auer de peis de espicerie*)[3]; and that he seems to have done his best to live up—or down—to the name of a Caorsin[4]. Possibly he found that it was expected of a Caorsin that he should be a money-lender and an offender against the coinage laws[5]. The bad reputation of the past bearers of the name may have demoralized him. At any rate, the facts are that on Nov. 27, 1300[6], he paid a fine of 50 marks for offences against the recent ordinance touching base coin; while the money-lending of himself and his

[1] Pat. Roll, 1 Edw. I, m. 8 d. (1273).
[2] Letter-book A (ed. Sharpe), 37 (1281).
[3] Ibid. 31 (1280): this is probably the meaning of the phrase.
[4] Matt. Paris, Chron. Maj., iii. 328 sq., iv. 8, 442, &c.
[5] Cf. Matt. Paris, Chron. Maj., v. 15–16.
[6] Pat. Roll, 29 Edw. I, m. 34.

partners ranged from thirty shillings, lent to Henry Baunquer in 1286[1], to a sum of about £2,250, which the king owed him in 1315[2]. Obviously, then, a shrewd and successful man of business, to whom nothing by which he could turn a penny came amiss[3]. He was returned as one of the members for the city of London to the parliaments summoned to meet at Westminster, 27 April, 1309 and 23 Sept. 1313[4]; and was an alderman (Walbrook) in 1310–11 and 1311–12[5].

Thomas le Flauner, the other party to the agreement, had had business with Servat before. On March 29, 1280[6], he had given a recognizance before the mayor and aldermen of London in favour of Servat and five partners for the sum of £44 12*s.* for the 'heavy goods of spicery' above mentioned.

Our document shows that Thomas was a member of the pepperers' company.

It recites that he has been in William's service, as his merchant within and without the city, from St. Edward's day[7], 1281. He is to continue in that service till June 20, 1283, and to trade for William's benefit with a hundred pounds' worth of William's goods which have been bailed to him[8], or with a larger quantity if William should so choose. Thomas shall render to William or his attorney faithful account of the profit that God shall give of the goods at the expiry of the two years, deducting the cost of his necessary maintenance during the term. For these services he shall receive ten pounds a year. William shall sustain and aid him in all places, according to his duty to his merchant. And if Thomas have loss or damage for lack of his proper maintenance, William shall compensate him by award of the merchants.

It will be noticed that the agreement must have been dictated to one, who, though a careful scribe, was not really familiar with Anglo-French. The constant recurrence of *la vantdit* for *lauandit* is one among several proofs of this.

ROBERT JOWITT WHITWELL.

[1] Letter-book A, 100.
[2] Close Roll, 8 Edw. II, m. 7.
[3] I hope in another place to tell of his ingenious scheme to exploit the pastures of Pipewell.
[4] Return of Members (1878), 30, 44.
[5] Close Roll, 4 Edw. II. m. 9; Letter-book B, 35; H. T. Riley, Memorials, 94, 102.
[6] Letter-book A (ed. Sharpe), 31 (1280).
[7] June 20.
[8] This is the natural translation of 'Cent Liueres des biens ke ... William ly ad bailie'; but as the clerk writes *liueres* below where he certainly means cash, it is not impossible that this also means sterling money, and that Thomas was to do the smaller (but highly remunerative) money-lending business for William. One wonders whether he had already done something in that line, which led certain persons to waylay him between the hospital of Clerkenwell and the city, twist his hood round his neck, throw him down, and beat and wound him (Patent Roll, 9 Edw. I. m. 29 d.). The fact that he was to be maintained and paid so large a salary as £10 a year out of the profit on £100 is some evidence in the same direction.

Cest le couenant fet entre William Seruat de Chaorz Cytein de Londres de vne part & Thomas le Flavner Peverer de Londres de autre part. Ceo est asauer ke meyme cely Thomas est demore en le seruise le auandite Williame come son marchaunt de dens vile & de hors del Jour seint Edward lan de grace m.cc.lxxxj. Jekes a la fyn de devs avns prochein suauns plenerement acomplis. en tel manere ke la vand dit Thomas deit leaument marchander al prov & al profit la vandit Williame de Cent Liueres des biens ke memes cely William ly ad balie & de plus si plus li balie la avan dit terme. Et del prov qe deus en dora des biens auantnomeez la vant dit Thomas deit rendre a la vant dit Williame ov a son attorne lel akvnte a la fyn de les avant dis .ij. avns, sawe a la vant dit Thomas sa sustinance nesessarie par tot la terme avant nomee del chateil & del gayn avant dit. Et ke le avant dit William deit doner a la vant dit Thomas checon an de les avant nomeys .ij. avns dis liueres des sterlings por son service e por son travail. Et la vant dit William deit sustiner & aider a la vant dit Thomas en tos luys sicom a son marchaunt. Et sil eit perte ov damage par faute de sa sustinence il lui deit amender par agard des lens [?les] marchans. Et testmoinage de verite les avant nomees William & Thomas a cest Escriit [*sic*] parti entrechangablement on mis lur seus pendauns. Temoines sont: William de Farendon', Nichole de Wyncestr', Rauf de Algate, &c.

Memoranda, King's Remembrancer: Michaelmas 9 and 10 Edward I, m. 7, cedule.

With reference to the notice which appeared in L. Q. R. xviii. 310 of Mr. Hannis Taylor's *Treatise upon International Public Law*, I should be glad to be allowed to dissociate myself from any responsibility for the title of the book, which involves a phraseological innovation, calculated, as it seems to me, to introduce fresh and gratuitous confusion into legal science. Mr. Taylor (pp. 153, 155) has convinced himself that what is described sometimes as 'the Conflict of Laws,' sometimes as 'Private International Law,' is best described as 'International Private Law,' a term which he thinks is 'favoured' by myself, because I slightly prefer it to one which is certainly the worst, though unfortunately also the most current, of all the terms applied to the topic in question. (In my *Jurisprudence*, ed. ix. pp. 397, 398, I condemn the term adopted by Mr. Taylor, as 'dangerously ambiguous,' and, of the seven terms which I enumerate, express a preference for 'Conflict.')

So far, no great harm is done, but, unluckily, Mr. Taylor proceeds to contrast with his 'International Private Law' what he chooses to call 'International Public Law,' meaning thereby what is usually

spoken of as 'International Law,' pure and simple. This neologism, adopted to secure a verbal opposition between what Mr. Taylor apparently believes to be two branches of the same subject, is, I venture to think, much to be deprecated.

'Public Law' has a well understood technical meaning, as including, in each country, the constitutional, administrative, and criminal, &c., law of that country. 'International Public Law' can only mean—an international species of constitutional, administrative, and criminal, &c., law. Such a science is, of course, non-existent, and is certainly not dealt with by Mr. Taylor's treatise. His title is therefore misdescriptive of his book, while, if received, it would empty of meaning the well-established and indispensable term 'Public Law.'

The defence, which it sadly needs, of the term 'International Private Law' might be that it indicates, in popular language, that the topics with which it deals are questions of 'Private Law,' regarded from a point of view which is not that of any one legislative system. The incurable defect of 'International Public Law' is its *suggestio falsi*, viz. that 'International Law' is a species of a group of topics with which it has in truth no connexion.

I should be sorry to be supposed to have part or lot in a phrase which I venture to hope may disappear from the title-page of the next edition of Mr. Hannis Taylor's considerable work.

T. E. HOLLAND.

We have to regret a strange erratum in our last number (L.Q.R. xviii. 335). By one of those unaccountable slips that sometimes happen to the most careful writers, the decision of the C.A. in *Harburg India Rubber Comb Co.* v. *Martin* is there stated as the reverse of that which it really was. The Court held that the promise in question was substantially dependent on a third person's default, and therefore did come within the description in the Statute of Frauds of a special promise to answer for the debt, &c. of another person. Our learned contributor's observations on the general principles laid down by the Court do not appear to be substantially affected by the mistake.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

CODIFICATION OF MERCANTILE LAW[1].

GENTLEMEN OF THE AMERICAN BAR ASSOCIATION:—

I HAVE to thank you sincerely for inviting me to address you on a subject which for many years has engaged my interest and attention. Though I am a stranger to you personally, I cannot feel myself a stranger in a strange land when I am addressing an assembly of brother lawyers in the country where Chief Justice Marshall and Mr. Justice Story delivered their judgments, where Chancellor Kent wrote his Commentaries, and where Mr. Justice Oliver Wendell Holmes penned his admirable essays on the common law. Whether we be American or English lawyers, we have in the common law the same foster mother, and from that foster mother we have all alike imbibed the principles which guide us in the practice of our profession. Though I am a strong advocate of codification, I am no disparager of the common law, which is unsurpassed for its collection of reasoned principles and applied precedents. Every American or English code must pre-suppose the common law. I think you may compare a code to a building, and the common law to the atmosphere which surrounds that building, and which penetrates every chink and crevice where the bricks and mortar are not. We cannot escape from the common law, and we should not try to do so. As Mr. Justice Holmes has well said, 'However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their growth fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is[2].' The learned judge's words are weighty ones, and they suggest an important principle to be followed by those who would codify any branch of the law. While any branch of the law is in process of formation, it is unwise to attempt to codify it. A code should be founded on a firm basis of experience. You then know what you are doing. A practical and working code cannot spring from the head of the draftsman, as

[1] An Address delivered to the American Bar Association at Saratoga, August 1902.

[2] The Common Law, p. 27.

Pallas Athene is fabled to have sprung, fully equipped, from the head of her father Zeus. In legislation, as in other sciences, the *a priori* road is a dangerous one to tread. When the principles of the law are well settled, and when the decided cases that accumulate are in the main mere illustrations of accepted general rules, then the law is ripe for codification. A code can usefully settle disputed points, and fill up small lacunae in the law, but it should always have its feet on the ground. If you go above and beyond experience, you are codifying in the air, and will probably do more harm than good to commerce and mercantile law. No service is done to the cause of codification by putting the case for it too high. The province of a code, I venture to think, is to set out, in concise language and logical form, those principles of the law which have already stood the test of time. It co-ordinates and methodizes, but does not invent, principles. Compare for a moment a proposition of law where there is a code and where there is none. In the case of a code the propositions of law are stated in the authoritative words of the legislature. When a particular case arises, the sole question is whether it falls or does not fall within some given statement in the code. The process of reasoning is purely deductive, and the code supplies the major premiss in the syllogism. In the case of uncodified law, when a lawyer has to advise, or a court has to decide a given point, two processes of reasoning have to be gone through. The decided cases have to be examined, and from the more or less sufficient data which they give, a general proposition has to be framed. This is an inductive process, which must precede the deductive process. The inductive process has to be gone through afresh each time a question of law has to be determined, for however correctly the general proposition may have been framed, the words in which it is formulated have no authority. On the one hand, no doubt, there is the advantage that the language of the proposition can be adapted to the particular facts, but, on the other hand, it is obvious that there is a greatly increased chance of error in formulating the proposition.

As the Bills of Exchange Act of 1882 was the first successful attempt to codify any branch of English commercial law, it may possibly interest you to know the procedure which was adopted in preparing the measure. The idea was suggested to me by my experience of the working of the Indian Codes, particularly the Indian Penal Code of 1860. I therefore set to work to frame a Digest of the law on the lines of an Indian Code, and published it as a text-book. The frame of an Indian Code is as follows: First of all, the general propositions are stated in sections as in an ordinary statute. Qualifications which in an ordinary statute are

inserted as provisos are called and drafted as 'exceptions.' If the propositions involve any complication, they are followed by illustrations which are part and parcel of the Act itself. This is a peculiar feature of Indian legislation, which owes its origin to Lord Macaulay. It works well in India, where law has to be administered largely by judges and advocates who are not trained English lawyers. But I do not think it is a good precedent for legislation elsewhere, for it holds out almost irresistible temptations to loose thinking and loose drafting. When, as often happens, the draftsman comes across a proposition which is difficult to formulate, he is apt to frame it in terms which are not accurate, and which have to be controlled and modified, instead of being merely explained, by illustrations. But the illustrations can hardly be exhaustive, and then difficulties of interpretation arise in practice. For a preliminary Digest, however, the Indian Code form is a very convenient one. You see at a glance the tests and proofs of your abstract propositions. When I had examined the English reported cases, and roughly digested them, I found what any student of the common law would expect. On some points, and not always on important points, there was a plethora of authority. On other points, authority was wanting, or spoke with an uncertain voice. A good many propositions in the Digest had to be qualified with a 'probably' or 'perhaps.' As Lord Macnaghten has pointed out in a recent case, the more obvious a proposition of law may be, the more difficult it is to find direct authority for it. It is not litigated, and it is assumed rather than stated in the reported judgments. But it is essential that a code should explicitly state the fundamental principles of the law. The next step, therefore, was to test the validity of the doubtful propositions, and to fill up lacunae, by reference to American decisions and the Continental codes and text writers.

The weight to be given to American decisions in England is well stated by Lord Chief Justice Cockburn in the case of *Scaramanga* v. *Stamp* (1880) 5 C. P. D., at p. 303. After remarking that the point for decision was one of first impression, he proceeds to say, 'I am glad to think that in laying down the rule we had the advantage of the assistance afforded to us by the decisions of the American courts and the opinions of American jurists, whom accident has caused to anticipate us on this question. And, although the decisions of the American Courts are, of course, not binding on us, yet the sound and enlightened views of American lawyers in the administration and development of the law—a law, except so far as altered by statutory enactment, derived from a common source with our own—entitle their decisions to the utmost

respect and confidence on our part.' I presume that in these States somewhat similar weight is attached to English decisions in matters of mercantile law. Lord Mansfield and Mr. Justice Story, in judgments which are too well known to need citation[1], have emphasized the essential unity of the law merchant throughout the world, and, in more recent times, Lord Blackburn has again enunciated the rule. 'There are,' he says, 'in some cases differences and peculiarities which by the municipal law of each country are grafted upon it, and which do not affect other countries; but the general rules of the law merchant are the same in all countries. . . . We constantly, in the English Courts, upon the question what is the general law, cite Pothier, and we cite Scottish cases where they happen to be in point[2].' In attempting to frame a Code of any branch of mercantile law, comparison with foreign laws is an essential branch of the operation. It not only enables you to fill up gaps and to form an opinion on doubtful propositions, but it enables you to see what are the really fundamental propositions of your code, which require to be put in the forefront. When a principle is reproduced in the laws of all commercial nations, you may be sure that it is founded on good sense and based on broad grounds of expediency. The Roman lawyers were justified in attaching a peculiar value to those rules of law which were *juris gentium*.

My next step was to publish the Digest, and get it criticized as far as I could. The result encouraged me to throw the propositions of the Digest into the form of a Bill. The draft was carefully examined by an expert committee of the Institute of Bankers. Lord Herschell steered the Bill through Parliament, and it became law as the Bills of Exchange Act, 1882. If I could do the work over again, I could produce a better Act, and I am glad to see that you, in your Negotiable Instruments Law, which has now been adopted by twenty-nine States, have in some respects improved on the English measure. Still, the English Act, during its twenty years of life, has, on the whole, worked very smoothly, and has given rise to very little judicial decision. The most important of those decisions, curiously enough, have arisen on the few amendments which were introduced in Committee. The effect of turning a text-book into a statute was curious. In the next edition which I published, the text was hardly altered, but the legal value of the propositions laid down and of the illustrations which followed them was exactly reversed. In the text-book, the propositions were only law in so far as they were correct and logical inductions from the

[1] See *Swift* v. *Tyson*, 16 Peters 1.
[2] *McLean* v. *Clydesdale Bank* (1883) 9 App. Cas., at p. 105.

decided cases: the illustrations drawn from decided cases were authoritative. But as soon as the statute passed, the general propositions became the law, and the illustrations drawn from decided cases were only law in so far as they were correct and logical deductions from the language of the Act. None the less is it useful to the legal reader to call his attention to the decisions which form the basis of the various sections, and which were intended to be reproduced in the Act. In so far as the law is unaltered, the decided cases are still in point as illustrations.

In dealing with the law of sale, I followed a similar procedure, and again, with Lord Herschell's assistance, we succeeded in passing the Sale of Goods Act, 1893. I am now following a similar plan with regard to Marine Insurance, which is an excellent subject for codification, as it rests mainly on well established principles, worked out by the courts with very little interference by the legislature. The Bill, under Lord Halsbury's guidance, has passed the House of Lords, but has stuck fast in the House of Commons, where there is increasing difficulty in passing any measure of law reform [1].

I hardly know the trend of opinion in the States, but in England I think you may say that mercantile opinion is in favour of codification, while legal opinion is rather against it. Perhaps, then, I may briefly examine the arguments for and against codification from the English point of view. The mercantile view is this: Law is made *by* lawyers, but not *for* lawyers; it is made for laymen, who have to regulate the conduct of their business in accordance with the rules laid down by the law. A man of business, in effect, says to the lawyers, 'Leave me free to make my own contracts, but tell me plainly beforehand what you are going to do if I don't make a contract, or if I fail to express it intelligibly. If I know beforehand exactly what you lawyers are going to do in a given case, I can regulate my conduct accordingly. All I want to know is exactly where I am.' Our great mercantile judges have always kept the mercantile position in view. As long ago as 1776, Chief Justice Willes, in deciding a new point of commercial law, observed that 'in all commercial transactions the great object is certainty. It will therefore be necessary for the court to lay down some rule, and it is of more consequence that the rule should be certain than whether it is established one way or the other [2].' This is a point of view which is very difficult for lawyers to grasp. The lawyer is thinking, first, of the interests of his own particular client, and secondly, of the nice and exact application of precedents to the particular case he is arguing. The fact that a decision, equitable in

[1] [Common report says that it is blocked by one obstinate member.—ED.]

[2] *Lockyer* v. *Offley*, 1 T. R., at p. 259.

itself, may introduce uncertainty and difficulty into thousands of other commercial transactions, is a matter outside his purview, and with which he does not concern himself. The object of the man of business is not to get a scientific decision on a particular point, but to avoid litigation altogether. On the whole, he would rather have a somewhat inconvenient rule clearly stated than a more convenient rule worked out by a series of protracted and expensive litigations, pending which he does not know how to act. A judge deciding a disputed question of law always reminds me of a great surgeon performing an operation. The surgeon proceeds calmly with the use of his knife, and pays no attention to the blood which spurts from every vein of the patient on the operating table. So, too, the judge calmly proceeds to apply his precedents to the case before him, regardless of the costs which spurt from every pocket of the unfortunate litigant.

The most serious, but, I think, the most fallacious argument against codification is the stock objection that the common law is thus deprived of its elasticity. In so far as that elasticity exists, it is another name for uncertainty and obscurity. On this point I cannot do better than cite the authoritative words of the Royal Commissioners on the Criminal Code Bill, who were all great common law judges. Lord Blackburn, Lord Justice Lush, Sir James Stephen, and Mr. Justice Barry, in their report made in 1877, say: 'The objection most frequently made to codification—that it would, if successful, deprive the present system of its elasticity, has, we believe, exercised considerable influence, but when it is carefully examined it will, we think, turn out to be entitled to but little, if any, weight. The manner in which the law is at present adapted to circumstances is, first, by legislation, and secondly, by judicial decisions. Future legislation could of course be in no way hampered by codification. It would, on the other hand, be much facilitated by it. The objection under consideration applies, therefore, exclusively to the effects of codification on the course of judicial decision. Those who consider that codification will deprive the common law of its "elasticity" appear to think that it will hamper the judges in the exercise of a discretion which they are at present supposed to possess in the decision of new cases as they arise. There is some apparent force in this objection, but its importance has, to say the least, been largely exaggerated. In order to appreciate the objection it is necessary to consider the nature of this so-called discretion which is attributed to the judges. It seems to be assumed that when a judge is called upon to deal with a new combination of circumstances, he is at liberty to decide according to his own views of justice and expediency; whereas, on the contrary,

he is bound to decide in accordance with principles already established, which he can neither disregard nor alter. The consequences of this are, first, that the elasticity of the common law is much smaller than it is often supposed to be; and secondly, that so far as a code represents the effect of decided cases and established principles, it takes from the judges nothing which they possess at present, in fact, the elasticity so often spoken of as a valuable quality would, if it existed, be another name for uncertainty. The great richness of the law of England in principles and rules embodied in judicial decisions no doubt involves the consequence that a code adequately representing it must be elaborate and detailed, but such a code would not, except in a few cases in which the law at present is obscure, limit any discretion now possessed by the judges. It would simply change the form of the rules by which they are bound. The truth is, the expression "elasticity" is altogether misused when applied to English law. The great characteristic of the law of this country is that it is extremely detailed and explicit and leaves hardly any discretion to the judges.'

The stock illustration of the effect of a code in arresting the development of mercantile law, which, it is said, ought to be a living and growing body of law, is furnished by the French Code de Commerce. That code, passed early in the nineteenth century, to a large extent reproduced and perpetuated mercantile laws passed in the end of the seventeenth century, when modern commerce was in its infancy. It may well be that France codified her laws at too early a period in her history. But, putting that question aside, let me invite your attention to two other considerations. In the first place, France herself is satisfied with her codes. She may change her political institutions with bewildering frequency, but she ever remains constant in her attachment to her civil and commercial codes. It is only in minute details that she has amended them. But more than that, no country which has codified its law has ever thought of repealing its codes and reverting to the old state of things. That is an argument in favour of codification to which you may apply the test, *quod semper, quod ubique, quod ab omnibus.* In the second place, no code is final. The legislature which enacted it can alter it if it requires alteration. Modern legislatures respond very readily to a stimulus from the outside, and are not, as a rule, overwhelmed with respect for the work of their predecessors. Legislation, it must be borne in mind, is both speedier and cheaper than litigation. The English law of negotiable instruments took about 150 years to develop. Its main principles were worked out by about 2,000 decisions, and taking a moderate estimate, the taxed costs of this litigation must have cost the parties

about two million dollars. Judge-made law has certain great merits, but cheapness is not one of them.

Codification of course does not mean the abolition of litigation. Until the millennium arrives there will always be disputed facts which will give rise to legal contest. Lord Westbury is said to have advised an aspiring junior at the bar in the following terms: 'My young friend, in arguing your case, never make a mistake in your logic; the facts are always at your disposal.' The object of a code is limited to the prevention of mistakes in logic. It is no part of its purpose to curb the exuberant imaginations of the witnesses. Moreover, draft a code as carefully as you will, there are certain to be ambiguities and small discrepancies and obscurities in it, which can only be cleared away by judicial interpretation. No code can provide for every case that may arise or always use language which is absolutely accurate. If a code provides a clear rule for a great majority of the cases which crop up in ordinary business, it satisfies the needs of business men. Exceptional cases must shift for themselves. An acute lawyer can always pick holes in any codifying draft, and can suggest doubts and difficulties of construction. But experience shows that these theoretical doubts and difficulties do not arise in practice. The solution of the problem is to be found in the old answer, *solvitur ambulando.*

Lawyers, perhaps, are inclined to attach too much weight to the occasional difficulties which arise in construing a codifying statute. The cases which come before lawyers are just the cases in which the code is defective. In so far as it works well, it does not come before them. Every man's view of the question is naturally coloured by his own experience. In dealing with commercial matters, we, as lawyers, are apt to forget that we see mainly the pathology of business; its healthy physiological action is a matter outside our professional experience. A perfect code is, of course, an impossibility, but in codification, as in other practical matters of life, *le mieux est l'ennemi du bien.* If we seek after an impossible perfection, we lose our chance of a practical and positive good which is within our reach.

In the United States, the case for codifying mercantile law is stronger than in England. I am told that an American lawyer who wishes to keep abreast of the current of judicial decision has to take in some fifty-eight volumes of Law Reports every year. In America, there is no choice between common law on the one hand and statute law on the other. Each State is independent in matters of legislation and judicature. The American lawyer, therefore, has to deal not with one but with forty streams of common law, each of

which is liable to be disturbed by the action of an independent Legislature. But commerce knows nothing of State boundaries, and it seems intolerable that if a man in Chicago makes a contract with a man in New York, his rights and duties cannot be determined without an elaborate investigation into the conflict of laws. The only possible remedy that I can see for this state of affairs is codification.

M. D. CHALMERS.

THEORIES OF TORT IN MODERN LAW.

THERE is, probably, no branch of legal study to which the comparative method can be more profitably applied than the Law of Torts. The dangers arising from a too restricted view of the subject may be gathered from a sentence written by an author, to whom all intelligent students of English law will readily acknowledge a debt of gratitude. In the Preface to his admirable Elements of the Law of Torts, Mr. Bigelow makes the following remark: 'The chief principles of the English law of torts prevail in all civilized countries.' If this statement is really true, it must be true in a sense beyond the comprehension of the ordinary student of the laws of civilized countries. For to him it seems tolerably clear, on the plainest evidence, that in no respect does English law, at least English private law, differ so profoundly from contemporary systems as in the matter of Torts.

Let us look first at the definition of Tort. It is frankly admitted, by Mr. Bigelow himself, that English law does not afford what may be called a substantive definition. At best we can say that a tort is 'a breach of a duty towards one's neighbour, imposed by the law, for which the Courts will award damages to the party wronged'; or something to that effect[1]. That is, obviously, a very lame definition; but would it be safe to go further? Mr. Bigelow[2], indeed, hints at *intention* as being the 'connecting link which binds the whole chain of torts.' But is he serious in suggesting, for example, that the publican whose servant leaves open his cellar-flap, really 'intends' that the casual passer-by shall fall through it and break his leg? Or that the man who, in perfect good faith, buys *A*'s stolen horse from *B*, 'intends' to convert *A*'s property?

On the other hand, contemporary systems furnish us with abundant definitions of Tort. We turn naturally to the Code Napoléon, the parent of so many Continental codes, and we find (Art. 1382) the following statement: 'Every human act (*fait de l'homme*) whatsoever, which causes damage to any one, obliges the

[1] This I take to be Sir Frederick Pollock's view (Law of Torts, 6th ed., pp. 2, 3). My criticism of it would be, that it would include remedies *quasi ex contractu*. But this is a small point. [My attempt in the Encyclopaedia of English Law, *s. v.*, is as follows: 'a breach of some duty between citizens, defined by the general law, which creates a civil cause of action.'—F. P.]

[2] Preface, 2nd ed., p. v.

man by whose fault the damage occurs to make it good.' Or we look at the newly promulgated *Bürgerliches Gesetzbuch* of the German Empire, and we read (Art. 823): 'He who, by design or negligence, wrongfully harms (*verletzt*) the life, body, health, freedom, property, or other right of another, is bound to compensate that other for the resulting damage.' Or, once more, we refer to the Swiss *Obligationenrecht* of 1881, and we see (Art. 50): 'Whoever wrongly causes harm to another, by intention or negligence, is bound to compensate him [1].' It is easy for an English lawyer, confident in the superiority of his own system, to deride what to him appears to be the vagueness of such definitions. But the facts remain, that they are substantive definitions, not mere subterfuges, and that they are daily administered, by thousands of tribunals, as working principles. Mr. Bigelow's distinguished fellow-countryman, Mr. Justice Holmes, of the Federal Supreme Court, has, indeed, in his brilliant essay on Torts [2], suggested that the germ of the English conception is the fact, that the tortfeasor might reasonably be expected to know that his conduct would cause harm to another; and the suggestion deserves all respect. But he would be a bold advocate who submitted such a proposition, as a working principle of English law, even to an Equity judge in his most expansive mood—nay, probably, even to Mr. Justice Holmes himself. To take an actual decision. The farmer who negligently allows thistles to grow on his land, must reasonably be deemed to know that his conduct will cause serious damage to his neighbours. Moreover, to apply another test which the learned writer appears to favour [3], the farmer's conduct falls below the standard of the 'fair average member of the community.' Yet it is settled law, in England, that he is not liable in Tort [4].

It must not be supposed, however, that the peculiarities of the English Law of Torts are confined to the arbitrary character of its scope. In the somewhat barren discussions which have taken place on the nature of so-called 'absolute rights,' it has seemingly been forgotten that our Law of Torts does recognize rights which, in a very practical sense, may be termed 'absolute'. *A* trespasses on *B*'s field. *B* may not, on that account, be one penny the worse. But he is entitled to damages from *A*. By the purest accident, *A* takes *B*'s stick from the hall of a club, leaving his own, which is much better, in its place, and, likewise by accident, loses *B*'s stick.

[1] For a similar provision see Dutch *Burgelyk Wetboek* (Artt. 1401–2) and the Italian *Codice Civile* (Art. 1151). Belgium adopts the Code Napoléon. The Portuguese *Codigo Civil* (Artt. 2394–8), is much more like English law.

[2] The Common Law, Lectures III and IV. See especially pp. 147, 149.

[3] *Op. cit.* p. 162.

[4] *Giles* v. *Walker* (1890) 24 Q. B. D. 656.

A is liable in damages, probably for conversion, certainly for trespass. And the fact that he volunteered, on being challenged, to give up his own stick to *B*, is no defence. *A* publishes an untrue and unprivileged defamatory statement about *B*. As a matter of fact, *B* suffers no loss; either because no one believes *A*'s statement, or because *B*'s character is already so bad, that *A*'s libel cannot affect it for the worse. Yet *B* is entitled to damages. No doubt *A*'s conduct, in all these cases, deserves reproof, possibly even punishment. But the English law is, probably, alone in leaving the infliction of the necessary reproof or punishment to the discretion of a private individual, mitigated only by the clumsy expedient of refusing costs, when the Court deems that discretion to have been wrongly exercised.

Further, English law is, probably, unique in the separation which it affects to draw between Tort and Crime, a distinction the more remarkable, because the forum of Tort and the forum of serious Crime have for ages been, in theory, identical in England. It is a matter of common knowledge that the French *Code d'Instruction Criminelle*, the earliest and one of the best of the procedure Codes of modern Europe, expressly (Art. 63) allows the *partie civile* to appear and claim *dommages-intérêts*, in all criminal prosecutions. The only question is whether the party injured is to have control of the criminal proceedings; and this appears to depend on the nature of the alleged offence, whether it is *crime*, *délit*, or simple *contravention* [1]. This rule appears in several of the codes modelled on the *Code d'Instruction Criminelle*; and, after a most interesting discussion, the principle has been adopted in the projected Penal Code of the Swiss Republic [2], the latest, or almost the latest effort at codification in legal history. Nay, the Swiss Code goes a step further, and provides [3] that, when any one has been damaged by a delict, and it appears impossible for him to obtain reparation (*Ersatz des Schadens*) in any other way, the tribunal may award him part of the fine inflicted on the criminal, or even secure him part of a convict's earnings. To the best of the writer's knowledge, the principle of awarding civil damages in a criminal prosecution is, in English law, confined to the limited scope allowed to it by section 4 of the Forfeiture Act, 1870 [4], and section 9 of the Criminal Law Amendment Act, 1867; for the rules affecting the restitution of stolen property

[1] President Barris, in Merlin, Répertoire de Jurisprudence, vii. 235–8.
[2] Art. 2. [3] Art. 31.
[4] This section empowers the Court to order compensation, to the extent of £100, to be paid out of the convict's property, to any person whose property has been injured by the offence. The family of a person killed in endeavouring to arrest an offender may be compensated by the Treasury (Criminal Law Act, 1826, s. 30).

rest on other principles[1]. One obvious result of this rigid severance between proceedings in Tort and proceedings in Crime is the alleged existence of the unsatisfactory and anomalous rule, acted upon in *Wellock* v. *Constantine*[2], to the effect that a person who has been damaged by an act, which is both a felony and a tort, cannot sue in Tort until the offender has been prosecuted for the felony. To this severance may, probably, also be attributed the anomalous rule that a breach of trust is not a tort[3].

Once more (not to labour illustrations) the inheritance of rights and liabilities in Tort is, by English law, left in a thoroughly anomalous position. Starting with an inadequate, and, possibly, a misapprehended maxim—*actio personalis moritur cum persona*—the rules on the subject have been modified, at haphazard, by statute and decision, till some of the worst consequences of the governing maxim have been removed. But, even now, the results cannot be called satisfactory. Claims for *restitution*, even though they sound in Tort, may be said, broadly speaking, to be beyond the chances of death. But many claims for *compensation* are still dependent on the accident of the survival of the parties, even though the damage done is capable of money satisfaction. Why should the victim of a wanton assault, or a cruel libel, be deprived of such compensation as damages can afford him, merely because his assailant dies before an action can be brought to trial? Why should the family of a man who has been ruined by a deliberate malicious prosecution be remediless against the oppressor[4], merely because their unhappy parent has succumbed to his sorrows? The climax of the absurdity is reached when we find that, as was explained by Bowen L. J. in *Phillips* v. *Homfray*[5], the executors of a deceased person can be made liable, in an action of mesne profits, for the value of minerals taken from land of which he has been in unlawful possession, but not for the value of his occupation, nor for the actual damage done by him to the land. Apparently there is no trace in the chief Continental Codes of such a state of things; and we may, therefore, fairly assume that simpler rules prevail[6].

[1] See Larceny Act, 1861, s. 100; Police Property Act, 1897, s. 1.

[2] (1863) 2 H. & C. 146.

[3] This is, of course, not merely a technical distinction. It prevents the party injured obtaining any damage beyond the repayment of the money misappropriated by the trustee—sometimes a most inadequate remedy.

[4] I take it that this is the rule, notwithstanding *Twycross* v. *Grant* and similar cases.

[5] (1883) 24 Ch. D. 439. See especially p. 455.

[6] See Merlin, Répertoire, vii. 243–4; Dalloz, xxxiii. 117, 251, xxxix. 299–301, and s. 2 of the Code d'Instruction Criminelle for France. The German Strafgesetzbuch (s. 30) makes even a true criminal penalty recoverable from the estate of a deceased offender, if the sentence has actually been pronounced before his decease. The only exceptions, in the case of civil liability, appear to be those mentioned in Art. 847 of the B. G. B.

It is, surely, not an unprofitable task to inquire, first, how such anomalies come to exist in English law, and, second, what are the consequences of their existence.

The history of the English Law of Torts has been sketched, with admirable clearness, by Mr. Justice Holmes, in the work previously alluded to; and its main outlines are now fairly well known. It would seem, therefore, more profitable to look at the history of a cognate system, which has succeeded in shaking off the survivals which still cling to our own law. And, inasmuch as the Continental Law of Torts is, at the present day, virtually that of the Code Napoléon, we shall, perhaps, do well to look at the circumstances of French legal history.

French law, as distinguished from the law of Roman Gaul, begins, of course, with the three Barbarian Codes—the *Lex Salica*, the *Lex Burgundionum*, and the *Lex Wisigothorum*—which formed the basis of the *Droit Coutumier*. As is well known, these codes, like most custumals from a similar stage of civilization, are largely concerned with providing penalties for a class of offences which the late Sir Henry Maine, in an unguarded moment, spoke of as 'torts[1].' Maine's object was, of course, to emphasize the fact that these offences could not properly be called *crimes*; because neither the community itself, nor the rudimentary executive, undertook to punish them. But, for all that, they were not torts, in the modern sense; for the object of the penalties was not compensation, but atonement and vengeance. No doubt the amount of the penalty varied, roughly, with the loss suffered by the injured party (more for an arm, less for a tooth, and so on). But that fact is explained by the desire of the community to induce the avenger of blood to stay his hand. No doubt, also, as has been said, the application of the penalty was, in a sense, left to the injured party; that is to say, he or his friends would start out on the track of the offender. But the really characteristic step in the proceedings comes when the offender's kin, or, maybe, the elders of the village, induce the avenger of blood to swear the peace and accept the fine. It is to be feared that Maine's unguarded expression has led a good many people to the hasty conclusion, that the law of Tort is one of the oldest, instead of one of the youngest, branches of the tree of jurisprudence.

It is hardly necessary to insist on the essentially *penal* character of primitive delictual procedure. The authorities on legal history appear to agree, for once, with the conclusions of 'general juris-

[1] Ancient Law, 15th ed., p. 370.

prudence[1].' But, if proof were needed, it will suffice to point to the mutilation of corpses, the hanging in effigy, the sacrifice of animals which have been guilty of violence, the whole theory of *deodands*. In all these cases, the object of the party is manifestly vengeance, not compensation. The persistence of these primitive ideas may be gathered from the fact that the practice of noxal surrender of animals prevailed in Flanders until the sixteenth century at least[2].

It is, however, right to point out that the barbarian custumals do reveal faint traces of a more modern rule. The phrase *damnum aestimatum* occurs, at least in the later texts, on rare occasions[3]; and perhaps the mysterious *delatura* (*excepto capitale et delatura*), which appears so often, stands for something in the nature of a payment for delay. But, if so, it is more than probable that, like the payment for the later *essoin*, it was an arbitrary sum, as was the fine itself. And it is, perhaps, equally probable that the *damnum aestimatum* of the codes is a mere flourish, borrowed from some epitome of Roman law. At any rate, it is significant to note that, where the Salic and the Visigothic Laws compel the man who drives a herd of beasts into his neighbour's corn to pay the *damnum aestimatum*[4], the Burgundian *Lex Gundobada* (xxvii) makes it simply a shilling fine for each beast.

With the earliest documents of the middle period of French law we get a significant movement—a movement towards specialization. The word *meffé* appears to be used as a generic term, to cover all kinds of offences; but it is recognized that *meffés* fall into two groups, which Beaumanoir[5], for example, distinguishes as *crimes* and *menres meffés*. It would be easy to suggest that we have here a recognition of the line between Crime and Tort. But an examination of Beaumanoir leads us to the conclusion that, if an English parallel must be sought, it is to be found rather in the distinction of Felony and Misdemeanour[6]. Though the passages are not all entirely consistent, the general result appears to be, that a *crime* involves death, imprisonment, or loss of goods, a *menre meffé* only a fixed fine (*amende*)[7]. The thoroughly penal character of the *amende* is shown by the fact that it varies, not with the rank of the injured party, but with the rank of the offender.

[1] See e. g. Brunner, Rechtsgeschichte, ii. s. 136 (*Privatstrafen*); Schröder, Rechtsgeschichte, s. 36; Pollock and Maitland, i. 26.

[2] See Damhoudère, Praxis Rerum Criminalium, cap. 144.

[3] e. g. Lex Salica, Tit. ix, De Damno in Messe (ed. Geffcken, p. 114).

[4] Lex Sal. ix. 7; Lex Visigoth. (Antiqua) VIII. iii. 10.

[5] Coutumes des Beauvoisis, attrib. to thirteenth century.

[6] This again seems to correspond very closely with Brunner's classification (for an earlier period) into *Achtsachen* and *Buss-sachen* (Rechtsgeschichte, ii. s. 136).

[7] It is noticeable that Beaumanoir's word for penal consequences of all kinds is *venjanche*.

'It is annoying,' says Beaumanoir, 'that our custom allows a little *home de poest* (*homo de potestate*, serf) to strike a worthy man, and then only to pay five sous *amende*; and so I agree that a long imprisonment must be given him [1].'

The almost contemporary *Ancienne Coutume de Normandie* (the *Summa de Legibus* of Tardif) has a corresponding classification of *Querelae personales*, into *quae per legem apparentem deducuntur* and *quae per simplicem legem* (*vel desrainiam*) *terminantur* [2]. The first class are probably the offences which entail battle and ordeal; and they correspond, in fact, very closely with the list of *crimes* enumerated by Beaumanoir. The second class, apparently, involve merely a denial or rational disproof by the accused. But there is nothing to suggest that the less serious class of cases are one whit less 'criminal,' in the strict legal sense, than the graver charges. It is assumed that the punishment of *amende* duly follows, and that the *amende* goes (normally) to the proprietor of the tribunal. The same is the rule in the many interesting cases reported for us in the *Olim* [3], or records of the Parlement de Paris, also dating from the thirteenth century.

The last fact emphasizes the really important change which has taken place in the idea of legal offence since the days of the *Leges Barbarorum*. In spite of the political anarchy of feudalism, the individual man finds the hand of authority heavy upon him. A murder or a theft is now no longer merely a personal wrong to an individual or clan; it is an act of disobedience to authority, royal or seignorial. And the particular authority, whose orders have been disobeyed, has a strong interest in bringing the offender to justice; for it will get his property, or, at least, a part of it, if he is convicted. No doubt the process had been a long one; and only by degrees established. Dr. Schröder's suggestion [4], that criminal law begins with the necessity of bringing home punishment to the person *alieni juris*, is well worthy of attention. And we realize, of course, that, in the palmy days of feudalism, most people were *alieni juris*, at least relatively; for they were in the power and jurisdiction of their immediate lords. We have hardly yet learnt the full significance of that revolution which, in the England of the twelfth and thirteenth centuries, rapidly threw open the King's Courts to all *liberi homines*. Or it may be that we exaggerate the completeness of the change.

Making all allowance, however, for these considerations, it seems tolerably clear, on looking at the custumals of Western Europe,

[1] Coutumes des Beauvoisis (ed. Beugnot), cap. xxx (18).
[2] Coutumiers de Normandie (Tardif), vol. ii. See cap. lxvi. 5 (p. 166).
[3] ed. Beugnot, Documents Inédits.
[4] Rechtsgeschichte, s. 36.

that, if there had been, in the eighth and ninth centuries, very little law that was truly criminal, in the thirteenth and two succeeding centuries there was very little law that was anything else. It may sound a rash challenge; but we should like to see a clear proof that, apart from claims to recover specific property[1], there was any purely civil action in French law before the middle of the fifteenth century. The law merchant of the burgher courts may have recognized such a thing; but would not the answer of the defendant to a purely 'civil' proceeding in any royal or feudal tribunal have simply been—'I have broken no command: what have you to allege against me?'

And yet it must be admitted that, even in the early monuments of the *Droit Coutumier*, the claim for damages in the strict sense is beginning to make itself felt. And this particularly in two important classes of cases—(1) in actions of trespass, and (2) in accusations of negligence. As respects the first class, we must not, in the face of Professor Maitland's protest[2], regard the *amende* as compensation for breach of the lord's seisin. But it is difficult to deny, that all the numerous offences which in England fell under the denominations of disseisin and trespass, in France of *nouvele dissaisine*, *force*, and *nouvel tourble*, in Germany of *Friedensbruch*, were regarded, primarily, as offences against authority[3], rather than as wrongs to private individuals. As early, however, as Beaumanoir and the *Olim*, we find distinct evidence of a tendency to award part of the *amende* to the injured party by way of compensation, especially if his record is clear. Thus, in a famous case of a riot committed in 1306 by the mayor, jurats, and commonalty of Corbeil, on the lands of the convent of Corbeil, the offenders were fined 500 livres Tournois; 'but nothing was adjudged to the religious, because some of them gave occasion to the aforesaid riot[4].' By the time that we reach the *Très Ancienne Coutume de Bretagne*, attributed to the fifteenth century, but parts of it certainly older, the rule is more boldly stated. 'When amends are imposed for the deed of any one, the party to whom the wrong (*meffait*) is done ought to share the amends with the Seigneur, except in the following cases[5].' The case of mere negligence is very curious. 'He has not a very good conscience,' says Beau-

[1] Even the old popular action to recover movables (the *Intertiatio*) was clearly penal in idea. It assumed that there had been a theft, and that the restoration of the chattel was the reward of a pursuit of the offender ('He gets his chattel for beheading him').

[2] L. Q. R. i. 324; ii. 481; iv. 24, 286.

[3] This seems to be quite clear from the rule stated in Beaumanoir (xxxii. 6), that if a man is rash enough to bring *nouvele dissaisine* against his lord he incurs a fine of sixty sols.

[4] *Olim*, iii. 214 (ed. Beugnot).

[5] Bourdot de Richebourg, iv. 215.

manoir[1], 'who levies a fine for a thing not done maliciously, although no doubt he can levy it by custom in many cases.'

'If a led beast break its tether and do damage, and if the owner will swear on the gospels that it broke its lead, and that he went after it as soon as he could, he is relieved of the fine; but he must pay the damage done by the beast, for the negligence or bad guardianship of a man does not excuse the damage done to another[2].'

Thus it would appear that, so far from intention being the gist of Tort, it is precisely the point at which Tort begins to sever itself from Crime. But the severance is very gradual. In the same important custumal, we seem to get, at first sight, on the subject of *Tricherie* (Tit. xxxiii) a full-blown statement of Tort. *Tous les damaces qui sont fet par force ou par tricherie doivent estre rendu.* We should, however, err greatly if we translated this as—'All the damage done by force or trickery must be paid.' The real meaning is, as the examples show—'All the gain made by force or trickery must be given back.' In other words, the illicit profit is regarded as being the property of the injured party. The measure of damages (as we should say) is not the plaintiff's loss, but the defendant's gain[3].

The real change comes when the Roman law begins to impinge on the *Droit Coutumier*; and the point of contact is the *Coutume d'Orléans.*

Orléans was, of course, in the heart of the *pays coutumier*; for the Orléannais was the ancient possession of the counts and kings of Paris, and it formed a good part of that royal domain which afterwards expanded into the kingdom of France. But, just when this expansion was going on most rapidly, in the days of Philip Augustus, St. Louis, and Philip the Fair (perhaps because of that process[4]) the jurists of Orléans began a passionate study of the Roman law. And their study was no lifeless exercise. They taught the Roman law in the vulgar tongue; and they aimed to rationalize the *Droit Coutumier* by comparing it with the Digest and the Code. The customary rule which could not be made to harmonize with the Roman law was '*coutume haineuse*; but the efforts at reconciliation were desperate, and the 'Aurelian gloss' became a byword in the mouths of sterner critics. Where the two systems agreed, there was *droit commun*, which none could question.

[1] Tit. lxxii.
[2] ib. xv. s. 57.
[3] See the examples given in the passage referred to.
[4] Probably the conquests in the south (Toulouse and Provence) brought the royal officials a good deal into contact with the *droit écrit.*

The work which most strongly reflects this important movement is the famous *Livre de Jostice et de Plet*, perhaps the product of a teacher in the University of Orléans, attributed to the end of the thirteenth century. The order followed is that of the Digest[1]; and the author has drawn largely on the *De Lege Aquilid* and the *De Dolo Malo*. But, in spite of an audacious fiction which attributes the provisions of the latter title to 'the king,' and equally fictitious quotations from Étienne Sancerre and Jean de Beaumont, there can be little doubt that, in this matter at least[2], we are dealing with pure speculation. The interest of the passage lies in the evidence which it affords, that one, at least, of the influential French thinkers of his day was beginning to realize the imperfections of the barbarian theory of damage. The case of the *Lex Aquilia* is more important; for here was, beyond question, common ground for Roman and customary law[3]. All the more interesting is it, therefore, to discover that, even with the Digest open before him, the author cannot get away from barbarian ideas:

'If a man or four-footed beast does damage, first we must know the manner how he did the damage, whether he did it intentionally, or unintentionally (*à esciant ou sanz esciant*) . . . And if thy horse or beast, thy ox, thy cow, thy swine do me harm, art thou liable? No, if that were not done by thy negligence or bad care; *but the beast is bound*[4].'

It would be difficult, perhaps, to find a clearer example of the meeting of two systems of ideas. But the later history of the *Coutume d'Orléans* seems to show, that the author of the *Livre de Jostice* failed to impress his countrymen permanently. For, in the official redactions (*Coutumes de Lorris*) of 1509 and 1583, there appears to be no reference to the subjects of damage and fraud[5].

His toil was not, however, without its fruit. Two important efforts at consolidation of the customary law appeared at the end of the fourteenth century; and one of them at least has something interesting to say on our point. If a domestic animal does harm, and the owner disavows it, then the beast is sold *par l'ordonnance de justice*, and out of the proceeds the injured party is *rédintégrée*. But if the owner avows it, he is liable. This statement appears

[1] The almost contemporary *Conseil de Pierre de Fontaines* (for Vermandois) follows the order of the Code.

[2] Bk. III. Tit. viii, ed. Rapetti.

[3] Is it ignorance of Roman law which causes the writer to feel that the famous Lex Aquilia itself is a trifle barbaric?

[4] Bk. XIX. Tit. xlviii. ss. 1 and 10. It may interest students of English law to know that this Title (s. 2) anticipates the facts of *Angus* v. *Dalton*.

[5] The 'customary' character of this edition may be gathered from the fact that, in a dispute about movables, the ancient process of *intertiatio* still applied, even in the city of Orléans (Tit. ccclxxix of 1503).

without comment in the splendid Colard Mansion edition of the *Somme Rurale* of Jean Boutillier in 1479; but in the later edition, by Charondus le Caron, in 1603, the editor remarks, '*vix hoc de jure sustineri posset, et ne s'observe pas le droict français.*' But the *Somme* itself goes a step farther (Tit. xxxviii). 'If it happens that a man does damage to another *non escient*, why should not he be compelled who did this to amend the damage only, *and the injury not*?' This was nearly a hundred years before the famous argument of Fairfax in the English *Thorne* case[1]; and that the suggestion was acted upon, at least in later days, is proved by an actual precedent quoted by Charondus. A labourer of Creçy in Brie was condemned to pay the value of beasts which had fallen into a pit digged by the defendant in his own land, because it was near the highway, and he had not given notice[2]. Again, however, we are baffled by the fact, that the almost contemporary *Grand Coutumier*, attributed to Jacques d'Ableiges, and valuable as one of the precursors of the *Coutume de Paris*, does not, apparently, approach the question. We find, however, a suggestive maxim: *criminalis causa civili praejudicat*[3]. And this may serve as a fresh point of departure.

The sixteenth century is notable in French history as the culmination of that process of absorption, which converted the old kingship of Paris into the modern kingdom of France. The crowning act in the long drama was the formal annexation to the Crown, in the year 1532, of the great Duchy of Brittany. And this supreme achievement was rapidly followed, not only by a great revival of the process of recording the *Coutumes*, begun in the previous century, but by a striking series of great royal *Ordonnances*, inspired by statesmen such as Poyet, l'Hôpital, Colbert, Pussort, and Seguier. One or two of the provisions of these statutes must be mentioned.

The *Ordonnance sur le fait de justice dans le duché de Bretagne* (Aug. 1536), afterwards generalized for the whole kingdom, provides (ii. (1) and (2)) that the *juges ordinaires* are to inform themselves, and cause informations to be brought, and not to wait till they are approached by the *parties civiles et intéressées*, in all matters of crime and delict. And again (subs. 5) the compositions which the parties interested have been accustomed to make by reason of the said crimes and delicts are not to be henceforward received, and justice is to have no regard to them, until it has fully inquired into,

[1] Y. B. 6 Edw. IV (1466, Mich.) 7 *a*. pl. 18.
[2] Sub Tit. xxxviii.
[3] Bk. II. c. xliv. Another notable attempt to harmonize Roman and Customary Law will be found in a redaction of the *Coutume d'Anjou*, known as *Selon les Rubriches de Code*, attributed to Claude Liger, about 1437 (ed. Beautemps-Beaupré, 1877).

and been informed of the said crimes; and their (i. e. the prosecutors') interest is to be arbitrated by justice, as shall be found reasonable—aggravations, qualities, and circumstances of the said crimes and delicts being weighed and considered.

Three years later, the famous 88th Article of the *Ordonnance de Villers-Cotterets* enacts that:

'In all matters, real, personal, possessory, civil, and criminal, there shall be an adjudication of damages and interests proceeding from the instance, and the calumny, or the temerity of the party who fails; and these shall be, by the said sentence and judgment, taxed and moderated at a certain sum . . . provided always, that the said damages and interests have been demanded by the victorious party.'

It seems clear, in spite of the somewhat obscure wording of this section, that the damages and interests include, not merely the loss arising from the proceedings, but the whole of the private claims of the parties. And it is quite certain that they were in addition to the *dépens*, or costs, which by several sections of these statutes are made payable by the defeated party[1]. No doubt, if the process led to confiscation of goods, the *partie civile* might get little or nothing[2]. And this may have been the reason why the *Ordonnance d'Orléans*, of 1561, provides (Art. 63) that the judges shall not compel the *parties civiles* to take any actual share in criminal prosecutions. But the distinction between the civil and the criminal claim is now becoming definite, despite the fact that both are, or, at least, may be, enforced in the same proceedings[3].

The influence of the *Ordonnances* soon made itself felt in practice. The famous *Style de du Breuil*[4], composed about 1330, though it deals with the highly specialized procedure of the *Parlement de Paris*, seems unable to draw any clear distinction between civil and criminal proceedings. We read a little about the *causa criminalis vel ex officio* (fo. ix), and about *causae criminales civiliter intentatae* (fo. xviii). In his note on the latter passage, Aufrère (who glossed the *Style* in the sixteenth century) explains that you sue *civiliter de crimine*, when you ask that 'any corporal penalty or debt for delict'

[1] See the great Ordonnance of 1667, Titt. xxxi (*dépens*), xxxii (*dommages et intérêts*).

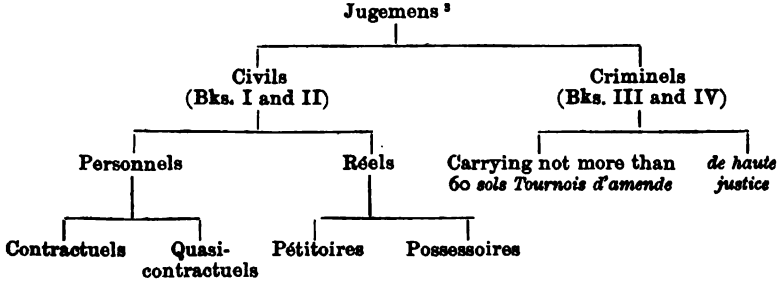
[2] The rule of confiscation seems to have been far more lenient in France than in England, being practically confined, even for movables, to high treason (Imbert, Practique Judiciaire, ed. Guénois, 1602, iii. 17, s. 6, n. g). But the Courts were in the habit of imposing enormous fines, which amounted to much the same thing (ib. s. 7). Of these, however, the *partie civile* got a share (ib. 21. 4).

[3] One of the great inducements to adopt criminal process was the fact that damages awarded to the *partie civile* in such proceedings could be enforced, if above 200 livres, by indefinite imprisonment, although imprisonment for *dettes purement civiles* had been abolished (Ord. of 1667, Tit. xxxiv).

[4] I have only been able to see the ed. of Aufrère (Stilus curie Parlementi, 1551).

may be imposed. The *Practica Forensis* of Jean Masuer, composed about a century after the date of Breuil's work, though professing to describe the practice of Auvergne, is so obviously copied from Roman sources, that it is of very little value for our purpose. It states, however, a rule which is of some interest to English lawyers, and which we may suspect to have been borrowed from a similar source. 'The heir is never liable for the delict of the defunct, unless the cause has been contested in his (i. e. the defunct's) lifetime, or unless something has come to him from it[1].'

But much light breaks in when we open the *Institutionum Forensium Libri Quattuor* of Jean Imbert, who practised at Fontenay-le-Comte in the middle of the sixteenth century, and whose work was, in effect, the earliest commentary on the new legislation. Apart from the luminous clearness of its style, which makes it the easiest of reading, it is of special interest as professing to give the practice of the *pays coutumier*, and well deserves the punning encomium placed upon its title-page by an enthusiastic editor[2]. Imbert has in his head a perfectly clear and comprehensive scheme of procedure, which we may tabulate thus:



The very want of logic in this arrangement is a testimony to its genuineness. It will be observed that, whilst personal actions are classified according to the nature of the obligation out of which they arise, real actions and criminal proceedings are grouped according to the objects for which they are set on foot. Furthermore, it is possible to trace in Imbert's pages, in the clearest manner, the normal course of a civil action, and to contrast it with the course of criminal proceedings. The result may be usefully exhibited in parallel columns:

[1] Tit. xxix, *De Obligationibus, &c.* (3).
[2] *Quasi Imber super herbam, et quasi stillae super gramina.*
[3] 'Jugemen,' with Imbert, means a good deal more than our 'judgment.' He defines it as 'une disputation ou plaid faict en lieu public destiné pour les plaids' (i. 1. a. 3).

Civil (personal[1]) Action.	*Criminal Cause.*
1. *Adiournemen* (or summons).	1. *Information.*
2. *Proposition de demande et action.*	2. *Dépositions* (no copy to be given to accused).
3. *Exceptions*— (a) *dilatoires.* (b) *péremptoires.*	3. *Decret d'adiournemen personnel*, or *de prinse de corps.*
4. *Appoinctemen de contestation en cause.*	4. *Ouir et interrogation* (of accused).
5. *Interrogatoires* (*mutuels*).	5. *Contestation* (formal demand of release or prosecution).
6. *Enquête* (if question of fact involved).	6. *Sentence interlocutoire.*
7. *Appoinctemen à produire pièces.*	7. *Récolement et confrontation des témoins.*
8. *Publication de l'enquête.*	8. *Conclusion des gens du Roy.*
9. *Appoinctemen en droit.*	9. *Nommement des témoins et faits justificatifs* (by the accused).
10. *Sentence.*	10. *Question*, i. e. torture (if presumption of guilt raised by evidence).
	11. *Sentence deffinitive.*

This is so clear that we need but call attention to three points of importance. First, the line between civil and criminal proceedings is not so broad as it might seem, for (*a*) all minor criminal proceedings (*en justice moyenne*) are conducted in the same way as civil actions[2]; (*b*) even a prosecution for serious crime *en haute justice* may be turned into *procès ordinaire* (or civil) at the stage of *sentence interlocutoire*[3]. Second, *all* proceedings on delict are primarily criminal, i. e. commenced by *information*, unless they are so light as to be within *la justice moyenne*; for, as will be seen by a glance at the Table, civil personal actions are all *ex contractú* or *quasi ex contractú*[4]. Third (and this has not been before mentioned) Imbert tells us, *à propos* of the *proposition de demande*, that we now never *name an action, but only state the facts*[5].

Comparing this state of things for a moment with the contemporary position of English law, we shall not fail to note the salient points of difference. In England, with the disappearance of appeals of felony, there comes a sharp line of cleavage between civil and criminal proceedings; and certainly there can be no chameleon-like change from the one to the other, as in French law. Hence the disastrous wavering in the English judicial mind as to the true gist of Tort; whether it be the *damnum* of the plaintiff or the *culpa* of the defendant. In England, too, as Sir Henry Finch informs us, we have the purely historical distinction of personal (civil) actions, into actions implying force and actions not implying force[6], a distinction which was afterwards rendered still more meaningless by Blackstone, who applied it to 'civil injuries[7].' Third,

[1] If the action is 'real' there may be further steps, e. g. view, award of interim possession, &c.

[2] Imbert, iii. c. 1, s. 2.

[3] Ordonnance Criminelle of 1670 (Tit. xx).

[4] Imbert, i. c. 1, s. 8.

[5] ib. i. c. 15, s. 4.

[6] Discourse of the Law, Bk. IV. c. 14. Those 'without force' again subdivide into (*a*) that go not so far as breach of the peace, (*b*) that do break it. Under the latter head fall (virtually) all actions of Tort (cap. 15).

[7] Comm. iii. 118.

in England we have, until long after Finch's day, the necessity for the choice of a special action, upon penalty of complete failure if the wrong writ be chosen. These latter peculiarities long tended to obscure the theory of Tort in England, by keeping it involved with the idea of contract or *assumpsit*, by insisting on the necessity for bringing each claim within the words of an existing writ, and by making the reasonable distinction between direct and indirect damage turn on the existence of physical possession. On the other hand, the clarifying effect of the sixteenth century *Ordonnances* at once resulted, in France, in the wholesome rule, that, whereas crime is extinguished by the death of the criminal, the claim for *réparation civile* can always be brought against the criminal's heirs [1].

The way of procedure cleared by the *Ordonnances*, the development of the substance of French law was resolutely taken in hand by the great French civilians of the seventeenth and eighteenth centuries. Domat, in his famous work, *Les Lois Civiles dans leur Ordre Naturel*, first published in 1694, after vainly striving to reconcile Roman law with the *Coutumes*, and finding both unsatisfactory, at last throws aside all technicalities, and lays it down that: 'all the loss and damage which may happen by the deed (*fait*) of any one, be it imprudence, carelessness, ignorance of what one ought to know, or other like faults, trifling as they may be, must be made good by the person whose imprudence or other fault has given rise to them [2].' For this bold proposition, Domat admits that he can find no express authority; but his boldness was imitated by his great successor, Pothier, who, in his *Traité des Obligations*, published in 1761, has an equally sweeping definition of tortious liability. 'Le fait par lequel une personne, par dol ou par malignité, cause du dommage ou quelque tort à un autre' (Délit); 'le fait par lequel une personne, sans malignité, mais par une imprudence, qui n'est pas excusable, cause quelque tort à un autre' (Quasi-délit).

The older notion of *délit* continued to appear in the exponents of customary law, e.g. Loysel (*Institutes Coutumières*) and Bourjon (*Droit Commun de la France* [3]). But when Napoleon took up his great work of codification after the Revolution, the generalizations of Domat and Pothier were accepted; and the principles of liability on delict are stated broadly and compendiously in five famous Articles of the Code Civil, which may be paraphrased thus:

(1) Every act which causes damage to another binds the man by whose fault the damage occurred to repair it. (Art. 1382.)

[1] Bouchel, Bibliothèque du Droict François, ed. 1629, iii. p. 225.
[2] Bk. II. Tit. viii. s. 4 (1).
[3] Bk. VI. Tit. iii.

(2) A man is responsible also for the damage caused, not only by his act, but by his negligence or imprudence. (Art. 1383.)

(3) A man is answerable for damage done, not only by his own act, but by the act of persons for whom he is responsible, and of things which are under his care[1]. (Art. 1384.)

(4) The owner of an animal (and the user of it whilst he is using it) is responsible for the damage done by it, even though it is frightened or has escaped. (Art. 1385.)

(5) The owner of a building is responsible for the damage done by its fall, when the fall was caused by neglect of maintenance or vice of construction. (Art. 1386.)

The last two rules appear to be mere illustrations of the final clause of Rule 3; but they were probably inserted to remove historic doubts, and to prevent unprofitable discussions as to whether the movements of animals and inanimate objects could properly be described as 'acts'. The discussion on the *projet* of the title seems to have been very brief[2]; and the result is a theory of Tort unsurpassed for brevity and clearness, which, as previously stated, has been, in the main, adopted by almost every civilized community of Continental Europe. An examination of the consequences of this theory, as contrasting with the doctrines of English law, must be reserved for another chapter; but it may be well, in conclusion, to summarize the history of Tort, as it has appeared in French law.

In the first stage, the idea of justice is confined to regulating the exaction of vengeance by the injured party or his friends. Whether the object of the vengeance is the expiation of the offence, or the solace of the outraged feelings of the avenger, is too subtle a question to be discussed here. It is more profitable to note, that the ascertainment of the acts which will warrant the exaction of vengeance seems to be purely arbitrary. In all probability, they are the acts which, as the experience of the community has shown, do in practice tend to disturbance and bloodshed.

In the second stage of its history, the idea of compensation appears as an appendage of the idea of punishment. The conception of an offence is now, *primâ facie*, the conception of an outrage against authority. Naturally, the two conceptions at first work side by side; and (to use English terms) the 'appeal' still competes with the 'indictment,' as a consequence of manslaughter and larceny. But the State, if it is at all vigorous, is so keenly bent, on more than

[1] Parents, teachers, and mechanics can get rid of responsibility by proving that they could not have prevented the acts of their children, pupils, or apprentices. Not so employers and contractors, in respect of their servants and workmen (Art. 1384, subss.).

[2] See Discours du Code Civil, vol. I. No. 62.

one ground, in discouraging the private prosecution, that the latter almost disappears, at least for a time, in that class of offences which the State is interested in suppressing. But, almost always, the State has to make concessions to the natural desire for vengeance, and to encourage, by the offer of a bribe, the supply of information to be used for purposes of a State prosecution.

This bribe generally takes the form, either of sharing the results of the prosecution with the party primarily injured, or of awarding to him compensation, in addition to the punishment inflicted on the offender by the State. In France this bribe was offered on a great scale. But, even in England, a clear instance of the practice is to be found in the well-known statute of the year 1529[1], which allows the prosecutor in an indictment for larceny to recover his goods if the felon is by his active help convicted. But, in England, with the conspicuous exception of revenue cases, the practice did not spread. The distinction between Crime and Tort became sharp at an early date. The quasi-royal action of trespass soon became purely private; while the quasi-private appeal of felony disappeared entirely before the royal prosecution.

In France the process was more gradual, and the severance was never accomplished. The *partie civile* early established his claim, as a matter of practice, to compensation, in a prosecution which we should call criminal, because it was certainly conducted by the officers of justice. But, though the two claims, the claim of the ruler and the claim of the party injured, were enforced in the same proceedings, the differences in their character were early recognized. The quasi-paternal position of the Court induced a mitigation of punishment when the intention to offend was absent; but this could not be held to affect the position of the injured party, for it would have been bad policy to discourage prosecutions. Thus, in spite of the apparent closeness of the procedural connexion in France, the distinction between Crime and Tort ultimately became more clear there than in England; and the way was open for the rationalizing efforts of the great jurists of the eighteenth century.

Historically speaking, then, we are left with four alternative theories of Tort:

(*a*) A tort is an act which is likely to provoke retaliation by the person who suffers from it. (The view of the *Leges Barbarorum*.)

(*b*) A tort is an offence against the criminal law, which also involves damage to a private person. (The view of the French law in the later Middle Ages.)

(*c*) A tort is any act or omission, due to a moral or intellectual

[1] 21 Hen. VIII. c. 11.

failure, which causes damage to a private person. (The modern Continental view.)

(*d*) A tort is an act or omission, not being a mere breach of contract, for which the Court will award damages to a private person. (The English view.)

I hope to be allowed, in a later article, to compare the practical consequences of these rival theories.

EDWARD JENKS.

[I venture to doubt whether there is any necessary difference between (*c*) and (*d*), except that 'moral' and 'intellectual' failure are not terms familiar to the Common Law. Four years ago I suggested, in the Encyclopaedia of English Law, xii. 190, that now, at any rate, English lawyers 'are free . . . to say that the various forms and species of action express a general duty not to do harm to our neighbours, either wilfully or by failing to observe reasonable care and caution. Any duty so widely stated is and must be subject to large exceptions; but there will in any case be exceptions, and large ones, even if we confine ourselves to stating particular duties; and this being so, it seems the more rational and simpler way to consider the modern law of tort as enforcing so much of the moral duty "to hurt nobody by word nor deed" as positive law can conveniently enforce in an individualist and competitive scheme of society.' As a matter of fact, the Continental categories most nearly answering to the law of torts are exceedingly meagre in an English lawyer's eyes, and Continental lawyers appear to treat many questions of what we should call purely civil liability from a quasi-criminal point of view. I do not know that practically equivalent results are not attained in other ways by French, German, or Italian jurisprudence, or that the vagueness of the rules may not lead to very wide applications of them in particular cases.—F. P.]

LABOUR COMPETITION AND THE LAW.

PART I.

MR. HALDANE, in the recent debate on the subject of Labour legislation in the House of Commons, struck home when he compared the alleged position of Trade Unionists in recent cases with that of the combination of shipowners in the *Mogul* case[1], and asked, in effect, whether there be one law for the capitalist and another for the working man.

The problem, indeed, which has to be faced and solved in the immediate future resolves itself into two distinct questions. Upon the answer given in each case, the possibility of a satisfactory adjustment of the whole Labour question must, it is conceived, ultimately depend. They may be thus stated:—

1. Does there exist a special law affecting combinations of workmen with illegality and rendering them actionable, as compared with combinations of a purely trading character, or otherwise not affecting the relations of capital and labour *inter se*? Does the law deny to the working man, in the matter of combination and competition, rights which it permits the members of more favoured classes to enjoy? If this in truth be the case, it seems difficult to deny that the law does work at least the semblance of that injustice towards the labouring classes to which Mr. Ritchie referred at the close of the debate.

2. Next, assuming that the law in these respects permits equal rights for all, what is to be the dividing line between combinations which are actionable and those which are not?

It may be interesting to note upon what slight thread of argument the answer to the first of these depends. The great majority of the judges are presumably disposed to deny the existence of any distinction of so invidious a character as that to which Mr. Haldane tentatively referred in the debate; but it would appear that there is at least one noble and learned member of the House of Lords who entertains views to the contrary.

Any such special liability as this (if indeed there is any such special liability) must depend upon what is known as the doctrine of 'restraint of trade.' It has been commonly but erroneously supposed that the Conspiracy and Protection of Property Act, 1875,

[1] (1889) 23 Q. B. D. 598; [1892] A. C. 25.

might affect the civil liability of workmen and others for strikes. But the House of Lords in *Quinn* v. *Leathem* held, and one cannot doubt the legal accuracy of the decision, that this Act does not affect civil liability. This Act, indeed, is in spirit and in letter a purely criminal provision.

The following expressions, however, of Lord Lindley in *Quinn* v. *Leathem*[1] seem to assume that the question of civil liability may depend on a construction of the Act of 1875, and that where that Act does not apply, all injurious combinations by workmen are, if indeed not punishable, at least actionable. The civil liability of traders in respect of injurious combination is certainly not determined by any reference to the Act of 1875. Consequently we are driven to suppose that in Lord Lindley's view workmen labour under a disability in the matter of combination from which traders are exempt. The passage in question runs as follows: 'Is a combination to annoy a person's customers, so as to compel them to leave him unless he obeys the combination, permitted by the Act or not? It is not forbidden by s. 7. Is it permitted by s. 3[2]? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in the case of *Lyons* v. *Wilkins*[3] in the case of Schoenthal which arose then.' Seeing that the question in *Lyons* v. *Wilkins* was one of civil liability only, it is difficult, except upon the above assumption, to reconcile the above expressions with a later passage[4] in his Lordship's judgment where he repudiates the notion that the civil liability in conspiracy depends necessarily upon the criminal liability therefor.

'Nor can I agree with those who say that the civil liability depends on the criminality, and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable.'

In connexion with the first part of this sentence, it will be well to make an observation.

The notion that the civil liability for conspiracy to injure depends *in its historical origin* upon the criminal responsibility therefor, seems to have received support from several judges in the case, and to be one for which weighty authority is otherwise to be found, notably in the *Mogul* case. It is moreover in no wise inconsistent with the doctrine that a specific elimination of criminal responsibility does not necessarily carry with it a corre-

[1] [1901] A. C. p. 541.

[2] Which enacts (*inter alia*) as follows:—'An agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime.'

[3] [1896] 1 Ch. 811.

[4] [1901] A. C. p. 542.

sponding relief from civil responsibility, the latter being a distinct and independent doctrine not peculiar to Lord Lindley, but finding, it seems, universal favour with the judges in the House of Lords. The civil liability for conspiracy to injure may well indeed have sprung from the criminal liability; but the two sources of responsibility seem to have existed side by side for a very considerable time, as independent though germane conceptions. To accord, therefore, support to the doctrine connecting the two conceptions, is entirely consistent with the above principle of construction unanimously subscribed to by the House of Lords.

A similar difficulty is raised by the language, in the same case, of Holmes L. J. in the Irish Court of Appeal. The learned judge would almost seem to have assumed that so far as the criminal liability for conspiracy was expressly eliminated by s. 3 of the Act, the civil liability therefor was destroyed as well, for he bases a portion of his judgment on the consideration that there was in the case before him no 'dispute between employers and workmen' within the meaning of s. 3[1]; and he, too, refers with approval to *Lyons* v. *Wilkins*. But it seems plain that if the rights of workmen are equal to those of traders, and if, as the House of Lords held, the exemption from criminal responsibility accorded by the Conspiracy Act does not carry with it a corresponding exemption from civil liability, that Act of Parliament, which in the matter of conspiracy is purely protective in character, has no bearing whatever in a case where the civil liability for conspiracy is the questoin for determination. Consequently, to decide a civil case of conspiracy against the defendants upon the ground that their conduct does not appear to be permitted by the terms of the Act, is to decide it on a false issue, and to entirely beg the question whether the combination be justifiable at common law. If there be no justification for the injurious combination at common law, *Quinn* v. *Leathem* decides that it is actionable whether or no the combination be criminal by virtue of the Act. Conversely, if there be justification at common law for a conspiracy to injure, there can be no cause of action, whether or no the conspiracy be 'in furtherance of a dispute between employers and workmen[2].'

The learned Lord Justice himself admits that the common law recognizes justification under certain circumstances for injurious combination, and he refers in illustration to the *Mogul* case. He further admits that if there had been no justification in the *Mogul* case for the combination, 'the case would have been otherwise decided.' These considerations do not of course concern the actual decision in *Quinn* v. *Leathem*, but they have an important bearing

[1] [1899] 2 I. R. p. 778. [2] Ibid. p. 777.

on the general law of civil liability for conspiracy, and in particular upon the question whether the decision in *Lyons* v. *Wilkins* on the point of conspiracy was right. For it follows from the foregoing that the Court of Appeal in deciding that case on a construction of s. 3 of the Act of 1875 decided it on irrelevant grounds; unless, indeed, it be that rights of workmen to-day in the matter of combination are less than those of traders. If we lay aside the latter question as one for independent consideration, it follows that the real question for determination in *Lyons* v. *Wilkins* was whether or no there was justification at common law for the injurious combination. This is also a question to which we shall have occasion later on to suggest an answer.

The statutory sheet-anchor, however, of Trade Unions with respect to their protection from civil liability for acts in restraint of trade, really consists, it would seem, of the second and third, and particularly the third, section of the Trade Union Act, 1871. Section 2 enacts that:—

'The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be deemed to be unlawful, so as to render any member of such trade union liable to criminal prosecution for conspiracy or otherwise.'

Section 3 enacts that:—

'The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust[1].'

Now although section 2 does not in terms carry with it an exemption from civil liability for acts in restraint of trade, does the language of the third section permit of, or is it compatible with, an action against a trade union for acts coercive of other persons, as being *in restraint of trade*? Upon this question one may quote with advantage what Lord Bramwell said in the *Mogul* case with reference to this very section:—

'The enactment is express, that agreements among workmen shall be binding, whether this would or would not but for the Acts have been deemed unlawful as in restraint of trade. Is it supposable that it would have done so in the way it has, had the workman's combination been a punishable misdemeanour? Impossible. This seems to me conclusive, that though agreements which fetter the action of the parties to it may not be enforceable, they are not indictable[2].'

Applying what I take to be the argument of Lord Bramwell in this passage to the question of civil liability (which was the question

[1] For the statutory definition of a trade union see infra.
[2] [1892] A. C. 47.

in point of fact in the *Mogul* case), we arrive at the key to the legal position of trade unionists upon this particular question. How can it be said that an agreement, which is not to be unenforceable at law by reason of its being in restraint of trade, can yet at the same time have been intended by the Legislature to be actionable at law for the damage which it contemplates and inflicts, by reason only of the fact that the conduct inflicting such damage presents the element of *restraint of trade*, the very element which it is declared shall be no bar to its enforceability at law?

Supposing the answer to this question be against the workman, tracing the matter back, the question might then incidentally depend upon whether the opinion expressed in Mr. Justice Wright's standard work on Conspiracies (Consp. p. 51), which Sir James Stephen followed in his History of the Criminal Law (vol. iii. pp. 210, 220), to the effect that the old Combination Laws (repealed in 1824) were not declaratory of the common law, or that of Sir William Erle (Trade Unions, p. 57) to the contrary effect, be the right one; and tracing the matter still further back, the question might ultimately depend on whether the common law recognized any civil liability of workmen to an action upon this ground. But the language of Lord Bowen in the *Mogul* case[1], in which he expresses his disapproval of a *dictum* of Crompton J. in *Hilton* v. *Eckersley*[2], is precise. 'No action at common law will lie, or ever has lain against any individual for entering into a contract merely because it is in restraint of trade.' Equally precise on this question is the language of Fry L. J. (23 Q. B. D. p. 627); Lord Halsbury L. C. (1892, A. C. p. 39); Lord Watson (ib., p. 42); Lord Bramwell (ib., p. 46); and Lord Hannen (ib., p. 58).

If this be true, and the authority to that effect seems overwhelmingly strong, was the result of the repeal of the Combination Laws in 1824 to destroy the civil liability for restraint of trade which the criminal liability therefor had involved? Tracing now the matter forward, and assuming a negative answer to the last question, did the repeal of the replacing Acts of 1825 and 1859 by the Criminal Law Amendment Act, 1871, destroy the civil liability depending on the criminal liability which these replacing statutes again involved? If not, then lastly, does section 2 of the Trade Union Act 1871 cover civil liability? Does not the language and operation of section 3 show that the Legislature intended, or must be taken to have intended, section 2 to have that effect?

And this leads us to an inquiry, in order that our investigation of the subject may not lack completeness, as to the precise meaning to be attached to the term 'restraint of trade' in the Trade Union

[1] 23 Q. B. D. p. 619. [2] (1859) 8 E. & B. 47.

Act, 1871. Such difficulties as may be raised by the language of the Act and by decisions upon various of its sections seem to be considerably minimized, if not altogether dispelled, if close regard be had to the general scheme and intendment of the Act as evinced by the precise terms in which the draftsman embodied, or purported to embody, the intentions of the Legislature.

One salient feature of the structural foundation upon which the Statute is built must never be lost sight of. The Act, it appears from a scrutiny of its language, was intended to give legal recognition to a body or collection of persons. The method employed is to accord in specific terms legality, previously withheld, to the *purposes* for which that collection of persons is formed; and then again *through those purposes* to legalize the rules and other agreements entered into by members of the body as such; but still, again, only so far as they were previously illegal by reason of those purposes. This is clear from the language of sections 3 and 4[1]. Consequently, notwithstanding that section 3 declares that the purposes of a trade union are not to be deemed unlawful as being merely in restraint of trade, for the purpose of rendering void or voidable an agreement or trust, this enactment does not operate to render valid an agreement in unreasonable or oppressive restraint of trade, entered into by members of a trade union as such. Such an agreement is therefore void by virtue of the common law. Upon this point reference may be made to the cases of *Mineral Water Bottle and Trade Protection Society* v. *Booth*[2], and *Urmston* v. *Whitelegg*[3], where in each case the Court of Appeal appear to have held an agreement *void* on the ground of unreasonable restraint of trade, notwithstanding that sections 3 and 4[4] of the Trade Union Act,

[1] Set out infra. [2] (1887) 36 C. D. 465. [3] (1890) 55 L. P. 453.

[4] Section 4 of the Trade Union Act, 1871, enacts as follows:—

'Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:—

1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed.
2. Any agreement for the payment by any person of any subscription or penalty to a trade union.
3. Any agreement for the application of the funds of a trade union,
   (*a*) To provide benefits to members; or
   (*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or
   (*c*) To discharge any fine imposed upon any person by sentence of a Court of Justice.
4. Any agreement made between one trade union and another.
5. Any bond to secure the performance of any of the above mentioned agreements.

But nothing in this section shall be deemed to constitute any of the above mentioned agreements unlawful.'

1871, were applicable thereto. So again on a reference to *Swaine* v. *Wilson* (1890; 24 Q. B. D. 252) we see how it may even happen that a trade union may possess a rule operating in unreasonable restraint of trade and therefore illegal and void, and yet its other rules and agreements may be unaffected by s. 4, and be directly enforceable at law; and that, even though they be of a kind specifically mentioned in that section. Provided, however, that the main purpose of the union be not in restraint of trade. This result, however, it would seem clear, has only been rendered possible by the operation of the section of the Act of 1876 amending the definition of a trade union, for under the principal Act[1] a trade union was limited to such a body as would prior to the Act 'have been deemed to have been *an unlawful combination* by reason of some one or more of its purposes being in restraint of trade[2].' To ascertain whether the main purposes of a trade union are in restraint of trade or no the Court considers all the circumstances, and in particular inquires whether it be possible or even probable that a member could disobey with impunity a rule in restraint of trade without forfeiting his chances of obtaining benefits under other rules (see *Old* v. *Robson* (1890) 59 L. J. M. C. 41, per Wills J.).

It follows, therefore, that where the Act refers to restraint of trade as an element which prior to the Act rendered the purposes of a combination illegal, something is thereby denoted less than unreasonable or oppressive restraint of trade: for it is plain that if

[1] See next note.

[2] Section 23 of the Trade Union Act, 1871, defined a trade union as follows:—

'The term "trade union" means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, as between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade: Provided that this Act shall not affect:

1. Any agreement between partners as to their own business;
2. Any agreement between an employer and those employed by him as to such employment;
3. Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft.'

Section 1 of the Trade Union Act Amendment Act, 1876, enacts as follows:—

'This Act and the Trade Union Act, 1871, hereinafter termed the principal Act, shall be construed as one Act, and may be cited together as the "Trade Union Acts 1871 and 1876," and this Act may be cited separately as the Trade Union Act Amendment Act, 1876.'

And section 16:—

'So much of section 23 of the principal Act as defines the term trade union, except the proviso qualifying such definition, is hereby repealed, and in lieu thereof be it enacted as follows:—

The term "trade union" means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade.'

it had included that element, the Court could not, as they did in the two cases above referred to, have held the agreements entered into by a trade union *void*; in face, that is, of the provisions of s. 3, and of the concluding proviso to s. 4. For s. 3 declares that the purposes of a trade union are not to be deemed to be unlawful merely on the ground of restraint of trade; and as we have seen, the legality of the rules and agreements of an union follows, according to the intendment of the Act, that of the purposes for which an union exists. And the latter inference becomes particularly plain on an examination of the proviso to s. 4.

What then was the precise source of illegality which the Legislature in passing the Trade Union Act, 1871, intended to eliminate? We have, so far, ascertained that the epithet 'in restraint of trade' denotes at least something merely restrictive of trading liberty, an interpretation consonant with the language of Sir Montagu Smith in *Collins* v. *Locke*[1], and of Lords Esher and Lindley (then L. J.) in *Swaine* v. *Wilson*[2]. Is there any limitation or qualification upon the term as thus interpreted?

We do not get in reality much help from the language of s. 3 of the principal Act, taken by itself. But much light is thrown on the question by the history attaching to s. 16 of the Amendment Act.

For although s. 23 of the principal Act refers in terms to combinations for regulating the relations of capital and labour *inter se*, *or* for imposing restrictive conditions on the conduct of any trade or business, which would have been illegal, &c., we may now assume in view of the section of the amending Act that the latter of these expressions or phrases was and is to be construed as *ejusdem generis* with the first. For it was considered necessary to alter the definition of a trade union in such a way as to embrace combinations coming within either of the above-mentioned groups or classes, whether or no it would have been illegal prior to the Act of 1871 on the ground we have been discussing. And Lord Alverstone C.J. explained in *Chamberlain's Wharf Limited* v. *Smith*[3], that this alteration was made in consequence of the existence of a doubt in competent quarters whether combinations merely restrictive of trade, but not affecting any relationship of capital towards labour *inter se*, or vice versa, were illegal; whether they were illegal, that is to say, as being in restraint of trade prior to and within the meaning of the Act of 1871, and thus whether they were within the definition of a trade union in the principal Act.

We are now, therefore, in a position to define the precise meaning of the epithet 'in restraint of trade' as used in the principal

[1] 4 App. Cas. 674. [2] Supra; and see *Tallis* v. *Tallis*, 1 E. & B. 391.
[3] [1900] 2 Ch. 605 at p. 612.

Act, and accordingly to say that it means 'restrictive of trading liberty in connexion with or concerning some relationship, actual or prospective, of capital towards labour, or of labour towards capital.' And this definition is in accordance with all that is known about the history of trade unionism from the earliest times [1].

The term 'restraint of trade,' then, in the Trade Union Acts does not cover 'unreasonable restraint of trade.' The Act of Parliament, which we have had occasion to designate the 'statutory sheet-anchor' of trade unionists, is limited in its intendment and in its application. Can, then, a combination of workmen or other persons be actionable in respect of the damage which it causes, on the ground that its purposes are in unreasonable or oppressive restraint of trade?

Here, again, we are met with the *dicta* referred to above of Lord Bowen and of several other judges in the *Mogul* case, to the effect that a contract in unreasonable restraint of trade is merely void and not illegal [2]. The feature of unreasonable restraint of trade is contrary to law only in the sense that the law will not assist either party to enforce it. This consideration, however, does not, as we shall have occasion to suggest later on, exclude the incidental materiality of the reasonableness or unreasonableness of conduct for the purpose of determining legal liability for the conduct of two or more persons taking part in a combination to compass the harm of another. It is sufficient for the present to state that restraint of trade in any sense of the term is not, and cannot be, according to authorities of the highest eminence, the *gist* of an action laid in conspiracy.

It follows that the doctrine to be inevitably inferred from Lord Lindley's language in *Lyons* v. *Wilkins* and *Quinn* v. *Leathem*, and differentiating the position of workmen and traders with regard to their civil liability respectively for injurious combination, cannot be supported by any reference to the notion of restraint of trade. We may also place out of consideration as untenable, but not perhaps altogether irrelevant, the notion that a court of law has an inherent power to declare, out of its inner consciousness and without reference to the legality of the act threatened, certain conduct to be illegal, merely because the mind of another person has been affected by a moral pressure which no reasonable man could withstand. The truism seems obvious that all coercion of the will is effected by inducing the fear of unpleasant consequences to follow, if the demands of the coercer be not complied with. If it were

[1] Crompton J. appears to have been the only judge who has ever been disposed to hold that *all* agreements restrictive of trade are illegal and even criminal at common law. His dictum to that effect in *Hilton* v. *Eckersley* was, as has been already remarked, disapproved by six judges in the *Mogul* case.

[2] In the sense of possessing a tortious character.

true that the actual inflicting of unpleasant consequences or loss were invariably prima facie unlawful, and needed justification, we might no doubt correctly assume that all pressure on the mind of another needed justification as well, if, that is, it were of a kind, and offered under circumstances, which would be likely to influence a reasonable person into compliance.

But one of the most important consequences, from a legal point of view, of what was said by the majority of the House of Lords in *Allen* v. *Flood*[1] (excluding Lord Shand) is to destroy the notion that every damage or harm inflicted on another is prima facie wrongful and needs excuse, even where that damage so inflicted directly affects that other's source of livelihood. If, we repeat, it were true that every act of pressure on another's mind is prima facie unlawful, it would follow that a threat of a merely lawful act might be illegal. But there is absolutely no case directly deciding that such a threat is or can be illegal, still less criminal; except, indeed, where the object of the threat is to extort property; a case in which there must apparently be present something approaching the *animus furandi* (see *R.* v. *Walton*, L. & C. 238; and *R.* v. *Tomlinson* (1895) 1 Q. B. 706); a case, moreover, to meet which it is significant that it was thought necessary to pass an Act of Parliament. On the other hand, the language of the judges in *R.* v. *Perham*[2] and *Walsby* v. *Anley*[3] may be considered positive authority the other way. The actual decisions, too, in the *Mogul* case[4] and the *Glasgow Fleshers* case[5] may be fairly regarded as authorities for the proposition that the justifiability of certain conduct suggested or threatened which is prima facie unlawful in itself, operates to justify the act of influencing another's mind by means of that suggestion, an act which would in like manner be presumably unlawful, *scilicet*, because its legal character depends in the result upon that of the act threatened. It is plain on this view that the actual degree of moral force or pressure employed is immaterial, given that it effect or be reasonably calculated to effect its desired object. Consistently with this, the threat of an act which is not prima facie unlawful, does not (apart from express enactment to the contrary) need any justification whatever. To admit, in view of the cases last mentioned, that a threat of a lawful act is ever unlawful at common law, is apparently to hold that the State has entrusted to the Courts an inherent and purely arbitrary discretion in the matter of what is and what is not illegal coercion, or else to credit our judges with a mysterious knowledge or power of discrimination not accorded by Providence to other reasonable beings.

[1] [1898] A. C. 1. [2] (1859) 5 H. & N. 30. [3] (1861) 30 L. J. M. C. 61.
[4] [1892] A. C. 25. [5] 35 S. L. R. 645.

Let us take a case. *A* threatens *B* that if he continues to employ *C*, he (*A*) will sink a well in his own land and dry up *B*'s spring. *B* in consequence gives *C* proper notice to leave his service. Here the act threatened is lawful, and *B* would have no right of action against *A* if he carried out his threat (*Chasemore* v. *Richards*, 7 H. L. C. 349). Neither has *C* any right of action under the circumstances supposed, according to *Allen* v. *Flood*[1], unless *A*'s conduct amount to an unlawful threat to *B*. If it were good law that every person has a prima facie right to freedom of the mind, unless justified on some ground or other, and *A* were to be held liable to *B* on the ground of coercion resulting in the loss of a servant, or to *C* for the loss of his employment, it would follow that a man would never know what he might lawfully do in the matter of influencing his neighbour's mind, whether with reference to contemplated contractual relationships or as to any other matter. The freedom of the subject and of speech would be so curtailed by the fear of legal proceedings for coercion, that the conditions of life would be unbearable. *Allen* v. *Flood* precludes, on the other hand, *A* from being made liable on the ground of procurement by lawful means not to enter into contracts. And the inadequate justice displayed by an application of that principle to (amongst others) the present case, leads one to suppose, that that rule itself may sooner or later be altered by statute. But the liability for coercion must, it is thought, always remain qualified in general by an application of the above limitation.

If, then, there is any distinction between the cases of workmen and traders with regard to their rights of injurious combination, it must lie in the fact that the common law denied and still denies a source of justification to workmen which it accorded or accords to traders, on some ground other than restraint of trade. But if in truth there exist any such ground of distinction, it is certainly, at least since the Trade Union Act, 1871, past the powers of the ordinary lawyer to tell what it is, or when and why it was first established[2].

It would seem, therefore, that it ought fairly to be assumed, and this on behalf of masters and workmen alike, that the Legislature has finally done away with any special ground of civil liability as well as criminal liability for combination, that may have existed, depending for its illegality upon any notion of restraint of trade, or otherwise upon the notion that the combination in question was

[1] [1898] A. C. 1.

[2] The effect of the Trade Union Act, 1871, in the writer's view, was to release, as it were, the common law justification for conspiracy to injure, previously withheld by the application of the doctrine of restraint of trade; so far, that is, as the latter had been preserved by the legislation subsequent to 1824.

prejudicial in its operation to a nice adjustment of the relations of labour to capital and vice versa. We proceed to discuss the second question, the question perhaps of even more vital importance at the present juncture. What is to be the dividing line between actionable and non-actionable combinations to injure a man in the trade?

In the writer's view there is but one principle upon which the Courts can fairly and justly proceed in trying cases of this character; and it is a principle which is not without its analogy in some respects in another branch of our law, the law of defamation. Furthermore, it is a principle which is pre-eminently calculated to strike at the real evil of trade unionism, and at the same time to preserve all its beneficial characteristics. And again, since the principle about to be indicated is equally applicable to all classes of His Majesty's subjects, it is one of which no one has any right or just cause to complain. But before proceeding to discuss it, it will be necessary to interpose some remarks concerning the general law of conspiracy. In view of the baffling and often elusive character of the topic before us, extreme caution and accuracy in the use of terms will perforce need to be observed, even at the risk of a seeming prolixity.

The earliest conceptions of conspiracy, for the purpose of a civil action, lay in the notion of procurement of a wrongful act as evidenced by the fact of agreement to do it or to procure it to be done. It merely embraced the notion of joint and several liability for an act intrinsically tortious or wrongful, arising from the fact that a wrongful act had been counselled and abetted by the conspirators and also brought about in pursuance of their agreement. Some authorities allege that a charge of conspiracy has been occasionally inserted in a declaration in a spurious sense, as mere surplusage, intended either as matter of aggravation, or else as evidence of ill-motive in the exceptional cases where actual motive is an essential ingredient of a cause of action, e. g. malicious prosecution. But it may be doubted whether these instances do not merely illustrate the use of the term 'conspiracy' as a method of charging the joint and several procurement of a wrongful act. These points seem to be the sole inferences properly deducible from the cases cited in the note to *Skinner* v. *Gunton* (1 Wm. Saunders, p. 230), e. g. *Savill* v. *Roberts* and *Roberts* v. *Savill*. The charge discussed in these two cases was one and the same, namely, conspiracy to maliciously indict a person of a crime. The treatment of the expression 'damage' by Lord Holt in these cases as if it were synonymous with the phrase 'wrongful act' was, I submit, a clerical inaccuracy to which the greater part of the confusion

concerning the nature of conspiracy is attributable. Note that in *Savile* v. *Roberts* (1 Ld. Raym. at p. 378) the Chief Justice says that 'the damage is the ground of the action' in connexion with the distinction between actionable and indictable conspiracies (see the reporter's side note, and the general context); but in *Roberts* v. *Savile* (5 Mod. at p. 408) he says the same thing in order to explain that persons agreeing to do or procure an unlawful act are severally liable in tort. According to modern views, in no case is it completely accurate to say that the damage is the ground of an action at law; any more than it is true to say that proof of damage is invariably necessary to the successful maintenance of an action[1]. And it is submitted with some confidence that an allegation of agreement in a statement of claim furnishes a specific element of illegality essential to the cause of action on the case for conspiracy, and this whether it take the form of conspiracy to harm, or that of conspiracy to do an unlawful act. In the former case, the combination constitutes an element of danger and of oppression by reason of its numerical strength. This, coupled with the harmful object, furnishes the *injuria* as distinguished from the *damnum*, which in this instance is a necessary condition of civil liability; while in the latter case the issue of agreement or (so-called) conspiracy is, in substance and effect, an issue of procurement or proximate cause. It may be added that the statement of Lord Holt that 'an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution' is equally true of either form of action[2] on the case for conspiracy; and, furthermore, that the commission of one overt act or more in pursuance of an agreement does not necessarily involve damage to any one. From which the truth emerges that, since Lord Holt was considering a charge of conspiracy to do or procure an unlawful act, either his logic was at fault in making reference to the difference between criminal and civil conspiracy at all; or, in the alternative, he should in strictness have said that the wrongful act as well as (in some instances) the damage is the ground of the action in the class of case before him. These considerations explain the rule appearing incidentally in many old cases, that where the alleged counsellors or procurers of a wrongful act were sued by the person injured, one of them might be found guilty without the other, although an agreement between them was alleged; or where both the alleged procurers and the actual wrongdoers were before the Court, judgment might go against the latter

[1] Illegal conduct (*injuria*) is always, damage is only occasionally, an essential feature of a cause of action.

[2] If it be true, as we contend, that there *are* two forms known to the law of the action on the case for conspiracy.

alone[1]. So far, the effect of proof of an agreement to secure the performance of a wrongful act is but to render the persons agreeing responsible as procurers of an unlawful act; a responsibility which could be equally brought home to one of them without proof of agreement. Namely upon showing that the act was proximately due to his personal influence, exertions, or assistance offered in full knowledge of another's rights.

By the time, however, that *Gregory* v. *Duke of Brunswick* came up for decision in 1843, a separate and independent doctrine had been evolved, the salient features of which appear to be these:—

1. Agreement not merely contemplating acts calculated to damage an individual specifically contemplated by the parties to the agreement, but having for its immediate *object* the occasioning of harm or loss to a known individual. This is of the essence of the liability both civil and criminal. Although a presumption of fact that the object of the agreement was to inflict harm on an individual would appear to be raised by proof of an agreement to do that which is calculated to harm (a presumption assisted in civil cases by proof also of the damage), whether harm was the *primary* object of the combination is always a question of fact for the jury alone to determine[2].

2. Infliction of such damage in pursuance of the agreement. This is a feature of civil liability only.

3. A secondary purpose of an improper character; a desire other

[1] The Court in *Gregory* v. *Duke of Brunswick* (6 Man. & G. 953) were evidently doubtful whether judgment in that case could or could not have been given, as the declaration stood, against one defendant alone. But the suggestion that judgment could have been so given, assuming it to be correct law, is susceptible of meaning merely that on action brought against *A* and *B* for conspiracy to injure *C*, and it transpire that *A* and *D* were the culprits, judgment may go against *A* alone, even though *D* is not before the Court. The liability of several persons for any kind of tort, including the procurement of a wrongful act, is in general, we apprehend, a joint *and several* liability.

[2] The fact that the damage contemplated or inflicted by the combination is of a very slight character, is doubtless one which the judge may take into account in considering whether there is any evidence to go to the jury of a primary *intention* to inflict harm. It is not enough to show a mere agreement to do a harmful act. There must be a common intention to inflict harm for harm's sake. This may evidently exist with or without an intention that the person to be harmed shall be conscious of the injury in store for him. Where such a consciousness is intended (as in practice has been invariably the case), the agreement is either purely vindictive, in which case it is absolutely illegal; or the harm is intended either by way of punishment, or with a view to coerce. In such cases it is merely *prima facie* illegal, and may be justified. Thus, in the *Mogul* case, there was a coercion in fact of the plaintiffs, as well as the shippers and agents; but what needed the justification, ultimately accorded by the House of Lords, was the concerted harm for harm's sake, inflicted upon the plaintiffs, threatened to the shippers, and both threatened and in some instances inflicted by the defendants upon their agents. These reflections may render it sufficiently clear how the unfortunate (though frequently noticeable) confusion arose between the conceptions of illegal coercion and harmful conspiracy: conceptions which have absolutely no logical connexion with one another.

than that to exercise legal rights or pursue lawful interests; in short, a desire to gratify feelings of hatred and ill-will. Usually, however, this desire is merely deemed to exist by presumption of law, although sometimes its existence must be real and actual to render a combination to injure illegal. It is sufficiently raised from proof of the agreement and of the fact that its primary object was to harm. Such presumption, however, is rebuttable, but only rebuttable (at least in civil cases) by proof of facts from which a desire to exercise lawful rights ought reasonably to be presumed. In other words, to justify the agreement and the primary object of harm which it embodies, a reasonable utility must be shown to attach to the harm agreed upon, as also a reasonable occasion for its infliction; each of these being considered in relation to the lawful purpose relied upon as justification. Lastly, this presumption of a lawful motive may in turn be negatived by independent evidence that ill-will lay in reality at the root of the agreement.

The kinds of cases where this presumption of malevolence arises and where not, it is left for cases occurring in the future to ascertain and establish as precedents. The main difficulty in the way of considering *Kearney* v. *Lloyd* (26 I. R. 268) rightly decided, lies in the fact that there was no evidence that the plaintiff was morally, socially, or physically unfit for his post. Consequently, it becomes difficult to admit that the damage inflicted upon him was *reasonably* referable to the desire on the part of the defendants to further lawful interests. In this case the defendants, who were subscribers to a sustentation fund upon which the plaintiff, a clergyman, was mainly dependent, *agreed* to withdraw, and in pursuance of the agreement did withdraw, their subscriptions, *in order to make him resign his living. Held*, no cause of action. It is clear that the primary or direct object of the defendants in this case was to harm the plaintiff adverting to the *loss caused him.* They wished to impoverish him so as to drive him from his living, with an ultimate object which was in itself a proper one, namely, that of furthering the religious and social interests of the parish. The writer can discover no sufficient ground for supposing that any distinction exists between criminal and civil cases, with reference to the presumption above indicated. The whole legal position appears to rest on this, that two persons contrive harm to a third, contemplating his loss and intending it, at their peril; and secondly, that although the law sometimes permits[1] proof of the actual existence of an unjustifiable object to oust a presumption of legal right, it cannot in general allow a legal presumption of illegality to be

[1] As it apparently does indeed, in certain instances of conspiracy to injure, as well as in certain cases of defamation.

rebutted by proof of an object (here a secondary one) which is, intrinsically speaking, perfectly innocent. The law in this particular adopts an 'objective' and not a 'subjective' standard. It is also to be observed that the criminal law does not in general punish a man for seeking to gratify vindictive feeling, it punishes him rather for the nature of the concrete act which he does, and in many cases also for an abstract object of harm or fraud.

The conceptions, therefore, of conspiracy to procure a wrongful act including a breach of contract, and of conspiracy to injure respectively, are to be carefully distinguished. The difference in the legal effect of motive in these two forms of action depends on the fact that in the latter instance the agreement immediately contemplates loss or harm and is directed to the *damage*, while in the former it is merely directed to an *act* which is wrongful.

If the above distinction be borne in mind, a flood of light seems to be thrown on much that has been said in the older cases connected with the law of conspiracy. Lord Brampton in *Quinn* v. *Leathem* ([1901] A. C. 529) appears, indeed, to have treated the case of *Barber* v. *Lesiter* (7 C. B. N. S. 175) as a case of conspiracy to injure. If, however, one reads that case, keeping always before the mind the above distinction, it becomes abundantly clear, I think, that Erle C.J., for one, thought that no cause of action arose for a conspiracy to injure—not because the plaintiff had charged a conspiracy to injure and had failed to show special damage—but because such a charge neither had been made nor, if made, could have been substantiated. It is conceivable, however, that at the present day the declaration in this case, since the decision of Wright J. in *Wilkinson* v. *Downton* ([1897] 2 Q. B. 61), could be supported on the ground of something like deceit. This point does not seem to have been adequately considered by the judges in *Barber* v. *Lesiter*.

The difference between the liability for an agreement to procure a wrongful act and that for procurement by a single individual of a wrongful act appears to be one of form rather than of substance. It is probably necessary to show that each of the defendants by means of his promise of support proximately caused the wrongful act, besides showing that the damage (when this is essential to the action) is proximate both to the wrongful act and to the act of conspiracy or procurement. For in these cases a charge of agreement is to all intents and purposes a charge of procurement. And in all cases of procurement it appears necessary that the acts relied upon as amounting thereto be shown to be in a visible manner the *causa causans* of the wrongful act. It must appear that but for the act of the person sought to be charged, the

application of his personal influence or exertions, or the tendering of his assistance, pecuniary or otherwise, the wrongful act would not have been, humanly speaking, committed. It therefore seems reasonable to suppose that the same grounds of justification for procurement of a wrong (*vide infra*) by a single individual apply to excuse an agreement to procure a wrongful act. Such are the main features, in the writer's view, of what is known as the law of civil conspiracy.

Let us now consider conspiracy to harm a man in his calling, and in particular—

The doctrine of useless and unnecessary damage.

Assuming that all conspiracies to injure a man in his trade, and which do in fact injure him, are prima facie actionable, and assuming that the jury in a given case have found that such an agreement existed, and that the damage complained of is referable to that agreement, it is then, we suggest, the function of the *judge* to proceed to inquire (1) whether the relative position of the plaintiff and the defendants and the circumstances, generally, of the case are such as to raise a *legal presumption* that the motive which prompted the defendants to contrive the harming of another was the proper one of furthering their own interests in the province of trade or labour[1]. For this purpose he will consider incidentally whether the acts occasioning the damage complained of are sufficiently nearly connected with facts proved in evidence and found by the jury from which such presumption might reasonably be inferred. Such presumption is no doubt determined with reference to the circumstances at the time when the agreement to injure was entered into. And in particular, he will ask himself whether the damage of which the plaintiff complains was *reasonably calculated* to effect the purpose of advancement of personal interests. In other words, was, or was not, the damage inflicted in respect of an ultimate or secondary object so removed from that damage, as that the conduct in question can only be described by reasonable men as 'arbitrary'? This is, I venture to believe, a question of law; a question, be it carefully noted, in which considerations of actual motive or purpose play no part whatever. Should the judge decide that this legal presumption of privilege is not raised by reason of the foregoing considerations, he will give judgment for the plaintiff. If he finds, on the other hand, that privilege is so raised by the circumstances, he will next consider (2) whether there is any specific and independent evidence of the

[1] Or, indeed, any other lawful interest. Cf. the facts in *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland*, infra. For the present we are only concerned with the lawful object of furthering interests in the course of competition.

presence of an improper motive to account for the conduct of the defendants; and if he thinks there is, he will then, but not till then, ask the jury to say whether the defendants in fact abused their privileged position for the real purpose of gratifying *feelings* of animosity or ill-will, or for any other improper purpose. I need hardly add that the jury would have to find, in the event last named, either that this was the common purpose of them all, or of two or more of them, specifying them by name; so that the persons so specified would alone be affected with liability.

The judgments in *Quinn* v. *Leathem* are certainly far from indicating any clear rule upon the matter, and it is true that in one out of the two cases of this description which have been tried at *nisi prius* in the present year, the judge appears to have left it entirely to the jury to say whether the defendants acted vindictively or with the object of furthering their own interests. This course appears to have been adopted with a view to giving judgment for the plaintiff only in the event first named. But the disadvantage, nay, the danger, if one may respectfully say so, of this course regarded as one generally to be followed in cases of this kind, seems fairly obvious. Two main objections present themselves to this course as a fair and proper method, in the general case, of deciding a matter fraught with momentous consequences for the persons concerned. Determination of cases of this sort would in the first place depend entirely upon what might be a jury's opinion of the actual character of the defendants' motive—of what was passing in the minds of each of them. Neither of the litigants, and especially so the defendants, can be sure (to quote a wise observation of Lord Herschell) of 'what their rights are.' A still more forcible objection is that which we have already noticed in passing. The class of cases in which an actually existing honest or proper state of mind may directly operate to destroy the right to compensation which an injured person would otherwise possess, appears to be now limited to the liability for malicious prosecution. It is true that the question of honesty of purpose may also be material in an action for defamation, but it is only material in an indirect sense, namely, in that the law may in some cases of this class *presume* it from the surrounding circumstances until and unless the contrary be proved. The justice and expedience of limiting instances of a direct exemption from liability on this ground, must occur to every thinking person.

D. R. Chalmers-Hunt.

(To be continued.)

THE WORK OF A SCHOOL OF LAW[1].

IN coming here to-day, as a Saxon stranger, to speak before the University of Wales, I desire in the first instance to congratulate the University in general, and the College at Aberystwyth in particular, on the creation of its new Law School.

The people of Wales, like the people of Scotland, have ever shown a zeal for education, in advance, I grieve to say, of the majority of Englishmen. And it is no longer necessary now, as it was on October 25, 1758, when Dr. Blackstone rose to deliver the first Vinerian Lecture in the University of Oxford, for any one to argue that the Common Law of England is a subject which may properly be included in the *curriculum* of a University. Wales has now its University; and that University could not long exist without a Faculty of Law. Still I cannot but feel that the University College of Wales has done a plucky and a patriotic thing in establishing here in the far west at Aberystwyth a School of Law—a teaching and not merely an examining body—a School with two Professors, whose lectures will include the law of Imperial Rome as well as that of modern England, who will not neglect that somewhat neglected science, jurisprudence, but will also correct and expand its academic propositions by the practical study and comparison of the legal systems actually prevailing in the British Empire, on the Continent, and in the United States of America.

Many legal writers have dwelt on the dismay and discouragement that attend the commencement of the study of the law, when that study is commenced in the old-fashioned way. A lad fresh from school is placed in his father's office: he is caught up at once in a whirlpool of business unintelligible to him: he is set to copy out certain common forms of conveyancing: as a relaxation he may accompany the managing clerk when he goes to issue a writ. No one in the office has any spare time to explain to him the elements either of the theory or the practice of the law: these he must dimly discover for himself as best he may, with the result that his original discoveries will probably be erroneous or only half true. Many a practitioner, educated in this way, suffers all his life from wrong ideas which became rooted in his mind when he was in his

[1] An Address read at Aberystwyth before the University of Wales on Friday, October 10, 1902.

teens, and which no subsequent training can wholly eradicate. But here the future practitioner will be started on the right road, a road which avoids the Slough of Despond: he will be shown a map of the district and taught how the land lies, before he begins his journey: if there must be peas in his shoes, the professor will kindly boil his peas for him before he starts!

Your students, as a rule, will enter here when they are young; for there is a good deal of law to be learnt. But they must first receive a sufficient training in general Arts subjects: this you will secure by requiring them to pass a Matriculation Examination. They will then proceed to the Degree of LL.B., which will save the future solicitor two years of his articles. The future barrister can keep terms at the Temple while reading here for his Degree.

It is unnecessary, then, for me to urge upon you the need of a School of Law; for yours is already an accomplished fact; the only School of Law in the Principality. But I propose this afternoon to tell you what I humbly conceive the work of a School of Law should be; I shall even venture to state the methods by which I think such work can best be done. I am fully aware, of course, that such subjects include many debateable points—that men, at least as capable of judging as I am myself, will probably differ from me in many particulars. But that is no reason why I should not state my views for what they are worth. And I think it is better to state them boldly and baldly, so that there can be no mistake about my meaning, than to hedge them about with saving generalities so as to deprecate criticism from any quarter. But please do not think when in a few minutes you hear me laying down the law bluntly and curtly in the imperative mood, that I wish to dictate to others, or that I am not ready to listen to all that may be urged in answer to the opinions which you have rashly invited me to inflict upon you to-day.

I.

What, then, is the work that lies before this School of Law?

Its first and foremost duty will be to train future practitioners, to teach them how to learn law.

First, it must teach them our legal language; it must teach them the true signification of the terms which they will have to use in practice hereafter. They must know exactly what is meant by an 'easement' or an 'estate in fee simple.' And they must learn to use such words with accuracy and precision; they must not regard 'devise' and 'demise' as interchangeable terms. Above all, they must learn always to use the same word in the same sense. Different

lawyers seem to attach different meanings to the same word; nay, often the same man will use the same word in different senses. Nothing leads to confusion of thought so much as this looseness of nomenclature.

Hence, whenever a teacher in addressing beginners has occasion to use such phrases as 'mesne profits' or 'days of grace,' he should always stop to make sure that they understand the meaning of those words before he proceeds to state the law relating to them. Some students are most ingenious; they have great powers of invention; and will assign to such terms very remarkable meanings of their own. Others will be content to repeat them like parrots without any idea as to their proper use.

Next, the teacher should make clear to these beginners what I may call 'elementary legal notions.' For instance, he should teach them to distinguish 'accident' from 'negligence' and 'negligence' from 'fraud.' And he should teach them that there is no such thing as 'legal fraud' or 'constructive fraud[1].' Fraud is fraud; the word means in law exactly what it means in ordinary English, and always did mean that, till certain Chancellors and Vice-Chancellors took to calling any conduct of which they disapproved 'equitable fraud'! Then teach them, if you can, what the word 'malice' means in law; and above all teach them that there is no such thing as 'malice in law'—that phrase has been a stumbling-block gratuitously placed in the path of the student for more than a century.

Next, you must state to the student in clear bold language of your own the elementary principles of our law, as it at present stands. Do not worry him at the same time with history; that should come later. The existing law is one thing; how and by what stages it came to be the existing law is another. Teach him first what you conceive to be the present law. And state it to him, as far as possible, in your own words. Do not string together scraps and tags from different judgments delivered, one fifty, one a hundred, years ago. Above all, do not read them sections from Acts of Parliament. They will have to suffer all the rest of their lives from the involved and tortuous style in which our Legislature thinks fit to issue its edicts to the people. Spare them this yet a while! Avoid too the ancient phraseology so incessantly repeated in our text-books. Do not talk to beginners about a 'tabula in naufragio,' or tell them that the grantee to uses in an ordinary

[1] [I agree that this term is useless now: but the terms constructive possession, constructive notice, constructive fraud, are in themselves all apt and significant. The adjective means that facts which do not amount—or are not judicially proved to amount—to actual fraud, &c., are treated, for reasons of policy or convenience, as if they did.—Ed.]

settlement of real estate is merely 'a conduit-pipe'; most students find these time-honoured metaphors more difficult to understand than the propositions which they are supposed to elucidate. I cannot conceive why English law should be taught in bad Latin. I am sure that much of the difficulty which a beginner experiences when he has to grapple with the rule in Shelley's case is caused by the words 'either mediately or immediately,' which invariably occur in the statement of that proposition. The student never saw the word 'mediately' before; he has no idea what it means; yet he is afraid to ask for an explanation!

And do not teach doubts to your younger students. There is plenty of law that is absolutely fixed and clear. The 'uncertainty of our law' is grossly exaggerated by ignorant persons. I always find that the uncertainty is in the so-called 'facts.' In ninety-nine cases out of a hundred the law is clear enough; the trouble is caused by the witnesses not swearing up to their proofs! If the facts suggested in the brief are proved to the satisfaction of the jury, then a man in good practice has seldom any serious doubt about the law applicable to those facts; though he may not know at first just where to find it clearly stated.

So here in your School of Law I would advise you (if I may) to leave 'moot points' and other *apices juris* till the men reach their third or fourth year. Teach the younger men what the undoubted law is; it will take them quite two years to master that. State it to them in clear, general propositions; and illustrate those general propositions by decided cases drawn from the reports. Whenever you lay down a rule, you should also give an example. State to them the actual facts of some decided case and leave them to say whether the action will lie or not in that case. If they decide it will, then alter one fact; will the action still lie? If so, take away or add another element of the cause of action—does that bring the case across the dividing line? In this way they will learn the exact limits of the rule of law laid down, and will also learn to apply that rule to varying sets of facts. With beginners you must pursue deductive methods.

Later on, when the framework is put together, when the student knows the outline of the law of England, then precisely the reverse method can be employed. Now the student should be urged to dig in the rich mines of English case-law. Set him to study four or five decided cases apparently in conflict; bid him evolve from them the *ratio decidendi*, the guiding principle, the rule of law which underlies them all. This is work which has constantly to be done in practice. Every lawyer writing an opinion, every legal writer composing a law book, every judge preparing a judgment,

must go through this process. It is right, therefore, that the more advanced students should attempt this. Encourage them by all means, *after* they are familiar with the general outline of the law, to reconcile and distinguish apparently conflicting decisions, to discuss moot points of law, to argue cases as in court, to write essays on legal subjects. Teach beginners merely the *results* at which you have arrived. But to the more advanced students explain the method by which you have arrived at those results, and invite them to embark on similar journeys. Teach them how to find out the law for themselves. Teach them where to look for it. Teach them how to state their arguments and how to marshal and present their facts.

If this Law School does nothing more than teach the future practitioners of Wales to think clearly and to express themselves clearly, to state facts clearly and in proper order, whether in a speech or a letter, in instructions or the recitals of a deed, it will have done the State good service and saved much public time.

While thus sketching out the training of the intending practitioner at College, I do not for one moment underrate the value of 'practice.' No man is fully competent to act either as a barrister or a solicitor till he has been brought into contact with actual cases that are coming before the law courts, or has helped in the preparation of legal documents which are really needed by actual clients. There are also many practical details which can only be properly mastered when the student is engaged in the work of a solicitor's office or a barrister's chambers. These the Law School will wisely neglect. But it will ever strive to prepare the student for contact with the business of the profession; and so to prepare him that he may quickly grasp the meaning, and thoroughly appreciate the importance, of even technical details when he meets them in actual practice.

II.

But a School of Law will not confine itself to training future practitioners. It aspires also to teach the principles of our law to laymen and to laywomen. Every citizen, whether male or female, should have some acquaintance with the laws by which he or she is governed, and which he (though not yet she) has some share in making. The laws of this country are not the exclusive property of any special clique or class; they are not the perquisite of any particular profession; they are the heritage of the nation as a whole. Therefore the nation should take a pride in its property, and make some effort to understand its value.

And in former days it did so. In Saxon times the doomsmen were

judges of law as well as of fact. The Norman barons knew their exact rights, and refused to change the laws of England at the bidding of clerical canonists: *nolumus leges Angliae mutare quae usitatae sunt et approbatae.* In the days of Queen Elizabeth a lad from Stratford-on-Avon, who ran away to London because he had been out poaching, yet knew so much of the law that some of his misguided admirers actually assert that his plays were written by a Lord Chancellor. Falkland and Hampden knew the laws of their country and fought for them sturdily and well. During the sixteenth and seventeenth centuries some years' study at an Inn of Court was the natural finish to a liberal education. But that is not so now. Our laity seem to have abandoned any attempt to comprehend even the outline of the system by which they are governed, or rather by which they are supposed to govern themselves. Our law is to them a matter of indifference. They take no interest in it, except when they abuse it and ignorantly declare it unjust.

This is matter for regret, though the cause of it is not far to seek. The Law of England is worth studying. It embodies the traditions and instincts of a noble people that has ever sturdily maintained its rights. To us the whole world has come for lessons in the law of freedom. And shall we now pretend that this, our birthright, is valueless? The genius of the English race, its manners and customs and modes of thought, the growth of its civilization as well as the development of its constitution, are best learnt from its litigation and its legislation. Our law is not a thing of to-day; it is not the product of one period; it has broadened slowly down from precedent to precedent. The trained intellects of a long series of most capable judges, lawyers, and legislators, have been for centuries busy in its amendment. It is a thing of native growth; not a ready-made importation, nor a Code Napoléon suddenly imposed by an Emperor on his people. And yet, while still retaining what was valuable in the former law, it has never been unduly reluctant to accept suggested improvements from any source. It has assimilated what was best in Roman law, in Teutonic custom, and in the Maritime Laws of Oleron and of Rhodes. We can trace in it the gradual interweaving of the Saxon law with the feudal system which the Conqueror introduced; we see how both these subsequently were modified by the rise of commerce. Our law is full of human interest: it is a living and a growing thing, which has spread and grown, and still will spread and grow, with the social development of the people. The law of England is worth knowing for itself alone.

Again, the study of the law is of great value as an educational factor. I should place it next after mathematics and classics, and

before natural science, as a training for the mind. It supplies all the fundamental requisites of a good education; for it tends to develop and enlarge the mind, and to quicken and invigorate its powers. It requires an intellect of no mean order to grasp the rules and fundamental notions of our jurisprudence, to distinguish true from false analogies, to draw correct inferences from evidence, and to reason justly and readily on questions which are not concluded by authority, or on which the reported decisions of our judges appear to clash. Moreover, from the law—if properly taught—the student learns an invaluable lesson: how to 'sift facts'; that is, in the first place, to reject much unnecessary recrimination, charge and countercharge, and narrow down the dispute to the real question which has raised the controversy between the parties; and next, to disentangle from a crowd of irrelevant details the facts that are material to the question in issue. Then comes a further mental process, equally valuable, equally difficult to learn elsewhere, namely, the application to these material facts of the appropriate rule or principle which guides us to the right conclusion. These lessons will be useful in every scientific study, and in every problem of a busy life.

And if we descend to more utilitarian considerations, it is surely the interest, as well as the duty, of every English citizen to understand the law by which England is governed. That law is not only a most interesting product of the human mind; it has at the same time a direct practical bearing on our health and wealth, on our means of livelihood and our personal happiness. It regulates all our social concerns. How can a man adequately and intelligently discharge his various duties as a citizen, how can he share in local government or take his part in the administration of justice, without some knowledge of the law—in its principles, if not in its practice? Each one of us is liable to be called as a witness, or to serve on a jury, or to be made a guardian of the poor; each one of us ultimately must become either a testator or an intestate. We might be asked to stand for Parliament: we might be made an executor or a trustee, or worse still, a defendant in a lawsuit. Is it not wise to prepare ourselves for these various calamities? Is it too much to say that some knowledge of the law is the best introduction to the living business that goes on around us, the best preparation for the actual affairs of life. In all the infinite variety of human concerns, law has a finger. The progress and well-being of a nation depend largely on its legal system. It is right, then, that a School of Law should not be merely a training ground for future lawyers; but should open its door to all future citizens of the State.

And in the phrase 'future citizens' I include women as well as

men. I have the honour to be a graduate of an ancient and learned University, which refuses to allow the letters B.A. to be placed after the name even of a young lady whose place in the Mathematical Tripos was 'above the Senior Wrangler'! But in the University of Wales men and women stand in all respects on equal footing. And I see no reason why women should not know some law, though they cannot act as advocates. A married man dies unexpectedly; his widow is suddenly called upon to take command of his family and his affairs. At a moment when she is overwhelmed with private sorrow she is called upon to deal with questions of probate duty and partnership law, of trustee investments, of specific legacies and the guardianship of young children; and she cries 'Why was I not told of all this before?' Even a spinster must live somewhere, and must pay her bills; she will be none the worse, then, for knowing something about a lease and a cheque. Moreover, the Legislature has at last admitted that a married woman is capable to some extent of managing her own affairs. If so, should she not be taught what her rights are over her separate estate? A learned note to Blackstone's Commentaries quotes a writer of the fifteenth century who states in so many words that 'it does not appear to me unseemly that women should know law; for it is written concerning the wife of John Andreas, the commentator, that she was so learned in both the civil and the canon law that she dared to teach publicly in the schools[1].' I myself examined and presented for her degree at the University of London a young lady who took first class honours in the LL.B. Examination, beating all the men but one. So who shall say that the twentieth century may not rise to the level of the fifteenth, and see a Lady Professor expounding the Common Law of England to a class at Aberystwyth. Professors Brown and Levi must look to their laurels!

III.

Then, again, there is Research work to be done. A Law School may do much to improve and extend our knowledge of the existing law and of the history of our law. Such work as my friend Professor Maitland has done at Cambridge is invaluable, beyond all praise from me. But there is room for many labourers in that field. And there are other fields awaiting Welsh followers of Savigny, Austin, and Maine.

First comes Jurisprudence—a science which can only be ade-

[1] 'Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andreae glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit.'—Bernadinus de Busti: Mariale, pt. iv, serm. 9.

quately studied in detail by those who are already acquainted with more than one system of law. The province of this science was most accurately determined, its boundaries marked out with most minute precision, by John Austin some seventy years ago. But the intervening area has not yet been occupied by buildings of much actual utility. We need now a more practical jurisprudence —a scientific statement of the elementary principles which underlie all modern legal systems—a true primer in the law. Next, there is much work to be done in the field of Comparative Law. Every lawyer in practice should be acquainted with some system of law besides his own. Such knowledge will help him in his practice: it will clear his ideas: it will suggest to him many an argument and apt illustration: it will give him a wider grasp of general principles. And the means are close at hand. If we keep to these islands alone—England, Scotland, Ireland, the Isle of Man, and the Channel Islands—we meet with very various rules of law and procedure. It is startling to an English lawyer to learn that in Jersey legal documents require no stamp, that in Guernsey a landowner cannot dedicate a highway to the use of the public, and that in Scotland a husband who is found guilty of adultery is still liable to be treated as civilly dead. While if we extend the field of view till it covers the whole of the British Empire, we shall find every variety of modern civilized law and many specimens of ancient law still in force—Hindu and Mahometan law in India, Roman-Dutch law in Cape Colony, French law in Quebec and Mauritius, and many another variety; while each member of the new Australian Federation has a legal system of its own. And how much depends on the way in which these various bodies of law are administered by Englishmen abroad. In many of our recent acquisitions any careless disregard of local law and custom might create disaffection, or even arouse revolt. Now add the present law of France, Germany, Switzerland, and the United States, and from the apparent conflict of laws extract the common *substratum*, the essential elements of civilized law; and the problem of jurisprudence is solved. You have arrived at the true *jus gentium*. You have refined away the dross of antiquated technicality, the accidents of local custom; and only the pure gold is left.

And now we enter the field of Legal History. The study of the various existing bodies of law must provoke the question: How did all these differences arise, Whence did these various systems spring? First in importance comes the history of our own law. We sadly need a good modern text-book on this subject. I do not mean by this a book on Constitutional History. The men and women who study at this University are of course taught the

English Constitution; as it is and as it was. Nor do they neglect, I trust, the kindred study of the laws affecting Local Government. The future district or county councillor must learn what are the powers and what are the duties of those important bodies which hold in their hands the health and comfort of each neighbourhood. And the history of Local Government in England and Wales deserves attention also. But apart from the existing law of the Constitution, apart from Constitutional History, apart from Local Government, stands the History of our Private Law. Look at the changes which the last century saw in the law of libel, in the law of husband and wife, in the law of master and servant. What a flood of light these changes throw on the social history of the period! what an advance they show in the morality, in the sense of justice and fair dealing, and, I may add, in the common sense, of the English nation!

Is the same advance to be traced in other nations? For this we must study the history of Continental Law; we must see how France and Germany have dealt with the problems of capital and labour, husband and wife, master and man. How do they manage their prodigals and lunatics, their habitual drunkards and their habitual criminals? Have they pursued the same path as we have or adopted methods of their own? We may learn much of the national characteristics of these nations from the temper in which they respectively approach such questions. We may learn, too, how the methods which they did adopt have answered. Have they been effectual, or have they only aggravated the evils which they were intended to remedy? It is possible—I state this proposition mildly—it is *possible* that foreign nations may have found the true solution of some difficulties which still trouble us.

The English law of landlord and tenant works fairly well in England: in Ireland it provoked ill-feeling, disaffection, agrarian outrage. Under the later Roman Emperors the peasant who tilled the soil paid his landlord a fixed proportion of each year's crop. This form of tenancy still lingers in the south of Europe: the *métayer* tenant is the direct descendant of the Roman *colonus medietarius*: he pays the landlord half the value of whatever the land has produced. I am informed that a precisely similar form of tenancy exists among the natives of Ceylon. And such an arrangement, so widely spread, seems fairer to the tenant than our system which compels him to pay the same amount of rent, in bad years as in good. Yet on the other hand it may be that such a system does not provide the same stimulus to exertion on the part of the tenant as would arise from the necessity of his paying a fixed rent.

Again, take the law of the family in France, which is very different from our own, and which is indeed at once the cause and the effect of that devout family affection which stands to many Frenchmen in the place of a religion. In France a father cannot wholly disinherit his children: a husband must make some provision for his widow: if he does not, the law will do it for him. Is this better or worse than our system which allows a man to leave not a penny to wife or child, but to bestow all his property on some unworthy mistress or on a hospital for cats—a system which drives our judges to find undue influence, and our juries to discover traces of insanity, in cases where a proper will would pass muster. When the University of Wales has produced a clear and simple History of the Law of England, it must next embark on the Comparative History of the Laws of Modern Nations.

You are thinking, no doubt, that I have set you two pretty tough jobs. Well, so I have. But this new Law School is going to aim high. *Αἰὲν ἀριστεύειν* will be its motto. There is, however, one little fragment of legal history which is specially for you.

Wales possesses three most valuable ancient Codes written in the Welsh tongue—the Code of Venedotia (or North Wales), the Code of Demetia (or South Wales), and the Code of Gwent (or South-East Wales). There seems no reason to doubt either their authenticity or their antiquity; and, that being so, they prove that a higher degree of civilization existed in Wales in the eleventh and twelfth centuries than we had previously imagined. These three Codes are now distinct and independent, but they are all avowedly founded on one Code, said to have been made by King Howel the Good with the help of his wise men at the White House on the Taff during Lent in the year A.D. 943. There were probably still earlier compilations of Celtic custom, as it is expressly stated in the preface to the Venedotian Code that 'the wise men there assembled examined the ancient laws; some of which they suffered to continue unaltered, some they amended, others they entirely abrogated, and some new laws they enacted.'

I invite you to embark on a quest in search of these 'ancient laws' which existed before A.D. 943. By collating the three Codes that we have and noting where they *agree*, you could probably reconstruct, out of the portions common to all three, the original Code of King Howel Dda. But ancient customs die hard; they constantly crop up again. Hence it is by studying where the three Codes *differ* that you may hope to arrive at the pre-existing ancient laws of the Britons which the wise men wished to abrogate. These would be worth discovering. It would be interesting, too, to ascertain what impression, if any, had been made on the laws of

the ancient Britons by the laws of the Romans during their occupation of the island and also by contemporary Saxon custom.

I said just now that I thought a beginner should not be set to study our existing law and its history at the same moment. First one and then the other; and, in my opinion, some knowledge of our present law should precede the study of its history. The existing law can be stated clearly—at all events, in outline—without any reference to the earlier law on the subject. And in a student's book it should be stated so. Suppose a workman has been injured through the negligence of the foreman in superintendence over him. Can he recover damages from their common employer? This question can now, at all events, be answered without repeating the long story of the doctrine of 'common employment.' And I venture to think that just as a solicitor would reply to this workman, so ought the professor to teach those who are beginning the study of our law. He ought to tell them the net result of the mixture of common law and statute. If he is writing a book for beginners he should state the existing law in his own words in big print at the head of each chapter; the history can be stated subsequently in different type. The air we breathe is more wholesome mixed; we do not want a professor to divide it back into oxygen and hydrogen before we swallow it.

I admit that no lawyer is fully equipped till he knows both the existing law and its history. So no lady is fully dressed for a ball till she has on two gloves—a right-hand glove and a left-hand glove. But I defy her to put on both at once.

Over and over again I have been assured by students that a tenant-in-tail can bar the entail as soon as he has issue born alive that can inherit. In vain I tell them that that may have been the law once, say in the days of King Henry III, but that it is not the law now. They look at me with an incredulous smile, and refer me to an excellent compendium of the law of real property. And there, no doubt, the proposition on which they rely is to be found at the beginning of the chapter on Estates Tail. Of course the learned author later on explains how the law was altered in the reign of Edward I, and many times since then. But the busy student does not trouble about that; he has found one clear and intelligible statement at the beginning of the chapter; the rest makes no impression on him; he regards it merely as variations of the same air or *motif*; he prefers it as he heard it first in the overture; and so he sticks to that.

You see, if on my journey to this town I had read and tried to remember everything stated in the 'Gossipping Guide to Wales' about every place of interest on the route, I should not be left with

any clear recollection of the three pages about Aberystwyth, to which place I have now arrived. And yet it is just those three pages that would be of the most use to me to-day.

IV.

Lastly, this School of Law will, I trust, aid in giving to our law a better form and a clearer expression. That is what both students and practitioners need most. I am far from saying that the substance of the law of England is perfect; each of us, no doubt, thinks that he could improve it in one or two particulars, though others would probably differ from him as to those very matters and prefer the law as it stands. Such amendments should be made, if at all, with caution and deliberation, and after careful inquiry as to what the law on the point really is; for our present law is far more just and far more sensible than most people imagine. Talk of the Roman law! Ours is infinitely superior. The law of England—when once we can find out what it is—is the best and noblest system which this world has ever seen. But it is sadly defective in its arrangement and the manner of its expression. The great advantage—and I think I may say the only advantage—which the Roman law possesses over ours is that Justinian had the sense to commission an eminent jurist to write an elementary institutional work, which should be an outline and an introduction to the whole law. And further, he had the sense to have this institutional work passed into what was equivalent to an Act of Parliament, without allowing any layman to tinker at it. That is what we need to-day —a Tribonian!

It is essential to the welfare of the community that in every State there should exist an authoritative body of law, readily accessible, easily intelligible, and strictly and impartially enforced. That our law is strictly and impartially enforced, no one will deny; in its substance, I repeat, it is as logical and as enlightened as any body of law which has ever existed on this earth. But it is not easily intelligible, by laymen at all events; and it is not readily accessible to either laymen or lawyers.

Why is this? Why is our law so devoid of scientific arrangement? Why is it so difficult to find an exact and authoritative pronouncement of what we all know is the law?

There are many possible answers to these questions. But perhaps the chief reason for this sad lack of form is that our law has come to us from so many and from such different sources. The law of

England is largely derived from antecedent *custom*. Much of it, and I may say the most valuable part of it, was custom before it was made law. In the thirteenth century legal writers incorporated in their *text-books* large portions of the Roman law, and declared that these were also the law of England. As civilization advanced, our judges endeavoured to mitigate the rigour and the technicality of the common law by means of *legal fictions*. Subsequently the same object was attained in part by means of a separate Court of *Equity*. Later judges regarded the decisions of their predecessors as *precedents*, which they were bound to follow in similar cases; and in following they often extended them. But now changes in the law of England are made almost entirely by *statute*.

And what is the result?

There are more than 1,600 text-books in Messrs. Stevens and Sons' list: and one *must* consult the last edition, for it is unsafe to rely on an edition of a text-book six years old! There are now in the library of the Middle Temple at least 2,000 volumes of reports of English cases alone; and in any one of these may lurk a decision or a *dictum* which may be cited in court on any given point of law. But worse than this is the unnecessary number of hastily-drafted and ill-considered statutes which throw the law into confusion. Every year adds more than a hundred enactments to the Statute Book; enactments often passed in the dead of the night by men who, as a rule, are ignorant of the law, and who are content to trust to a general certificate from the member in charge of the Bill, that 'the law of it is all right.' Few of these statutes are preceded by any serious attempt to master the law already existing on the subject. Very few of those who vote for a measure have realized the precise effect and meaning of the enactment which they are helping to carry into law. Legislation is the only trade which requires no apprenticeship!

Our law-making is at present at a low ebb. Our legislative machinery is out of gear, and does its work badly. It turns out a quantity of material; but it is poor stuff, not closely woven—not good Welsh flannel, all wool. And there is a deal too much of it produced. For three centuries after Parliaments began to assemble there was very little legislation. Now there is undoubtedly too much.

Hence ignorance of law is very excusable in the present day. How can we expect any layman to study our law, so long as it remains in its present unscientific and unattractive shape? Can he wade through thousands of statutes, or through tens of thousands of reported decisions? Who shall warn him which statute is obsolete, which decision overruled? Who shall guide him to the

proper text-book to suit an amateur? Shall he for pleasure undertake the toil of Leolin,

> 'Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances,
> Through which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame'?

Is not this description as true now as when the Laureate wrote it in 1865? The truth is that the present condition of our law is a bar to any real study of it by a layman. It is not the substance of the law, but the way in which it is presented to the non-professional man, which leads him to despise and sometimes even to abuse it.

And yet all the time the State insists that ignorance of the law affords no excuse for any breach of it. The prisoner in the dock, the defendant in a lawsuit, is not allowed to urge in his defence 'I was not aware that I was breaking the law.' One would have thought that this fact alone would be regarded as imposing on the State the duty of expressing its commands in clear and unmistakeable language and of rendering them widely known. But, if so, this is a duty which at present the State wholly ignores. It makes no attempt to teach the law to the people.

And it is not only the non-professional man who suffers. The task of any student who intends to practise the profession of the law is enormously increased by its unwieldy bulk and want of form. But it is to the lawyers themselves that the condition of our law is especially detrimental. Every year it becomes more and more difficult for any solicitor or barrister in active practice to retain familiarity with more than some special branch or portion of the law. Any comprehensive study of the law of England as one compact and organized whole is at present impossible to a busy man. And this renders it so difficult for him to discover and apply those broad common-sense principles which underlie our English law. A real grasp of the primary principles which pervade the whole field of law is rarely attained by a man who has thoroughly mastered only a portion of the subject. Until the law is reduced into better form and order, our study of it necessarily must be fragmentary and probably will be unscientific: and our analysis and definition of legal ideas will be neither accurate nor precise.

How is our law to be reduced into better form and order? We cannot go on much longer as we are doing now. Of course the proper remedy is a Code. Sooner or later the law of England must

be codified. To do this would cost the nation not one-tenth part of the price of a single iron-clad. And it would be well worth the money! I fully admit the value of such measures as the Bills of Exchange Act, the Partnership Act, the Sale of Goods Act, and others recently passed. But far greater benefits would in my opinion flow from a systematic and organized attempt to produce a series of such Digests, covering the whole ground, and arranged in some scientific order. The Acts relating to a given subject should be all repealed and then re-enacted in one compendious and well-arranged statute. Such statutes would be in fact instalments of the future Code.

In the meantime much may be done by this Law School and others to give to our legal system lucid expression and scientific arrangement. And then, when our law is made clear and intelligible and readily accessible to all, when at last its lack of form and defects of expression are removed, then I trust English men and women will know and understand its principles, and every one will recognize and admit that the law of England is logical, sensible and just.

W. Blake Odgers.

THE GORE CASE[1].

IT was said, rightly or wrongly, in 1848, that Lord John Russell, the then Prime Minister, administered an intentional reproof both to the Church of England and to the University of Oxford by the nomination of Dr. Hampden to the Bishopric of Hereford[2]. Whether this were so or not is matter of ancient history. When the see of Worcester, in November, 1901, became vacant by Bishop Perowne's resignation, a Conservative premier (if one may use the word) nominated the Rev. Charles Gore to the see. Mr. Gore was a known Liberal, had been installed as Canon of Westminster on a Liberal Minister's nomination, and had written strongly against the concentration camps[3]. If ever a man could have been, so to speak, acclaimed to the mitre by the general consent of his own Church and of his own University, that man's name was Charles Gore. The writer does not call him Canon Gore. He has too much respect for the English language, and for the memory of a whilom contributor to the LAW QUARTERLY REVIEW. He would not envy the man who dubbed Mr. Freeman professor.

In an article written for, and (if read at all) read by lawyers, there is no need to recapitulate the facts of the *Hampden* case. The title *R.* v. *Archbishop of Canterbury* is confusing, for there are some half-dozen cases so intituled in the books, enough to make the cynic suggest that a Primate of all England has a double dose of original sin. As for the *Hampden* case, is it not recorded *urbi et orbi*, e.g. 11 Q.B. 483, and 6 St. Tr. (N.S.) 409, and is it not fully dealt with in Phil. Eccl. Law (second ed.) i. 40, and Cripps' Church Law (sixth ed.) 79? Above all, did not the late Mr. Richard Jebb bring out his encyclopædic *Report* of the entire proceedings?

In the *Hampden* case, Archbishop Howley's commissaries (Dr. Burnaby V.-G., Dr. Lushington, and Sir John Dodson) had after argument held that they were not empowered to hear objections against the orthodoxy of the bishop-elect. The confirmation being decreed, the ground was shifted to the temporal arena. A rule *nisi* was granted by the Q. B., calling upon the Archbishop and his V.-G. to show cause why a *mandamus* should not

[1] *Rex* v. *Abp. of Canterbury* [1902] 2 K. B. 503, 71 L. J. K. B. 894, 86 L. T. Rep. 79, 50 W. R. 348.

[2] Law Magazine, vol. 39, p. 233, Art. *Congé d'élire.*

[3] *Times*, Oct. 28, 1901.

issue commanding them to permit the opposers to appear, and to hear and determine upon the opposition. At the return, the following showed cause against the rule: Sir John Jervis A.-G. (afterwards C. J., C. P.), Sir David Dundas S.-G., Mr. Matthew Davenport Hill, Dr. Bayford, and Mr. Waddington. With them was Dr. (afterwards Sir Travers) Twiss, but the Court only heard one civilian on each side. For the opposers, Sir Fitzroy Kelly (afterwards C. B.) led Dr. Addams, Mr. Archibald John Stephens, Mr. (afterwards Sir Barnes) Peacock, and last, though by no means least, Mr. Edward Badeley. The law officers of the Crown would seem to have been retained on the instructions of the Treasury, in order to support the Crown's nomination, with the little more than passive concurrence of Archbishop Howley. The judges delivered their judgments on February 1, 1848, Lord Denman C. J. and Erle J. holding that the rule should be discharged, Patteson and Coleridge JJ. that it should be made absolute. This equal division of judicial opinion resulted in a deadlock. No order was, or could be, made. The only spot in the sun of Mr. Jebb's *Report* is that it concludes 'Rule discharged.' See *per contra*, 11 Q. B. 666 and 6 St. Tr. (N. S.) 523: 'No order was made'[1].

Archbishop Howley died on February 11. His successor, Archbishop Sumner, as the first public act of his Primacy, together with the Bishops of Llandaff, Norwich and Worcester, consecrated Dr. Hampden at Lambeth Palace Chapel on Sunday, March 26. On April 27, the Bishop was enthroned in Hereford Cathedral, and his tenure of the see ended by his death in 1868. The legal question has ever since remained undecided in the temporal Courts. But history has a provoking way of repeating itself.

A futile attempt was certainly made to object on similar grounds to the late Archbishop of Canterbury's confirmation as Bishop of Exeter in December, 1869, but Sir Travers Twiss V.-G., after argument, ruled it out[2]. The objectors had not the courage to take their case into the Court of Queen's Bench.

The question slumbered till last year[3]. On the recent death of Sir Jas. Parker Deane, Mr. C. A. Cripps, K. C., M.P., was appointed Vicar-General. The patent was in customary form, in terms committing to him the business of confirmation. The Primate sends his *fiat confirmatio* in every case. As to the strictly limited powers of a Vicar-General see *Smith* v. *Lovegrove*, 2 Lee Eccl. 162, and *Thorpe* v. *Mansell*, 2 Hag. Con. 4. In the present case the Dean

[1] Compare *The Vera Cruz* (No. 2) (1884) 9 P. D. 96.

[2] For an adequate report of Dr. Temple's case one has to go to the *John Bull* newspaper: Phil. Eccl. Law (second ed.), i. 45.

[3] Some unseemly proceedings of late years at Bow Church may be dismissed as exhibitions of partisan wrong-headedness in contact with official fatuity.

and Chapter of Worcester having, on Dec. 27, 1901, duly elected Dr. Gore, and certified his election to the Crown, the Royal Assent to such election was given by Letters Patent, dated January 11, 1902, directed to the Archbishop of Canterbury 'and all other bishops herein concerned,' commanding them 'to confirm the said election' and to consecrate the bishop-elect. On January 16, 1902, the citation of opposers was issued, laying the venue not, as usual, at Bow Church, but at the Church House, Westminster, returnable on the 22nd of that month between 9 a.m. and 2 p.m. Notes were appended—and this was novel practice—that persons claiming to be heard as objectors must deliver notice of their objections in writing at the Provincial Registry before 4 p.m. the day beforehand, and that the V.-G. would sit in chambers at 10 a.m. on the day of confirmation to consider any objections, with an intimation that no opposer who did not appear in chambers and establish his right to appear and be heard could appear or be heard during the business of confirmation. Amongst the written objections lodged were two by laymen named Cobham and Garbett, neither of them residing in the diocese of Worcester, but both said to represent societies located in London. A trustworthy report of the proceedings at the Church House appears in the *Times* newspaper of January 23, 1902[1].

Again, the scene was shifted to the temporal tribunal and three days' argument took place *coram rege*, in other words, before Lord Alverstone C.J., Wright and Ridley JJ. On February 10, the Court gave judgment unanimously discharging the rules. The bishop-elect was consecrated at Lambeth Palace Chapel, on Sunday, February 23, and enthroned in Worcester Cathedral two days later.

As a matter of substantive English law the question turns on the proper interpretation of 25 Henry VIII. c. 20. That Act, with much contemporary legislation, certainly pushed the prerogative-royal as far as possible. But it was clearly felt at the time that confirmation was a distinct act of the spiritualty. It corresponds to the institution of an incumbent. Confirmation gives the bishop-elect jurisdiction in spirituals over his diocese. Consecration makes him a bishop of the Church, not of any particular see. It gives him no sort of claim to local jurisdiction. As long as Dr. Gore's confirmation remained in doubt, there was nobody who could consecrate a church, ordain a priest or deacon, institute an

[1] A singular error, which a reference to the *Times* would have averted, has crept into the reports: [1902] 2 K. B. 509, 71 L. J. K. B. 899, 86 L. T. Rep. 81. Cripps V.-G. is reported to have said 'Worcester' instead of, which he quite correctly did, 'Hereford.'

incumbent, license a curate, or confirm a child, in the Worcester diocese. The Archbishop of Canterbury was guardian of the spiritualities *sede vacanti* only. The argument that the appointment of a bishop by Royal Letters Patent really puts the appointee in an artificial position is difficult to meet. The Legislature certainly sanctioned it in the Bishoprics Act, 1878, 41 & 42 Vict. c. 68, which enacts that so long as there is not a dean and chapter the sees [1] thereby founded shall be filled directly by Letters Patent, 'and those Letters Patent shall be made in the like manner and have the same effect as Letters Patent of her Majesty nominating a bishop in the case of a bishopric where a dean and chapter have not proceeded to elect a bishop in accordance with the licence and letters-missive of her Majesty,' but that on the foundation of a dean and chapter a vacancy shall be filled 'in the same manner as a vacancy in any other bishopric in England founded in the reign of any of her Majesty's predecessors.' That manner is by election and confirmation. Thus the Act of 1878 clearly creates an artificial position, and one that is purely provisional [2].

The confirmation of episcopal elections has given rise to considerable discussion, and there may be said to be two views of it. The one view is that it is a mere ministerial duty on the part of the Archbishop or his V.-G., and that the tribunal is limited to an inquiry as to the identity of the person elected and as to the validity of his election. The other view is that without confirmation the election is inchoate, and the consecration cannot properly proceed, and that the tribunal is entitled, and, if duly asked, bound to inquire into the fitness of the person elected. All the forms used at a confirmation, especially the citation and praeconization of opposers, point to its being a genuine judicial inquiry.

In canon law, confirmation is the process by which the election of a new bishop receives the assent of the episcopate. This can be traced back to the third century. From the fourth century it has been regarded as the definite ratification of the election by the bishops of the province [3].

One can follow, but not endorse, the argument that confirmation cannot be a necessity in England, because some bishops of Provinces in communion with the Church of England are not con-

[1] Liverpool, Newcastle, Southwell, and Wakefield.

[2] It is sometimes said (e. g. Cripps, Ch. Law, sixth ed., p. 79) that the five sees founded under 31 Henry VIII. c. 9 (viz. Bristol, Gloucester, Chester, Peterborough, and Oxford) are Crown donatives in form as well as substance. With unfeigned deference for the very learned author and editor, the present writer is unable to accept that view. The Act was repealed 1 & 2 P. & M. c. 8, and the repeal confirmed 1 Eliz. c. 1. All those sees are filled by election and confirmation. See the Bishopric of Bristol Act, 1884 (47 & 48 Vict. c. 66), s. 3.

[3] See Art. by Rev. W. E. Collins, 'Confirmation of Bishops,' in Encycl. Brit., vol. 27, p. 197 (1902).

firmed. How can the practice of Provinces outside England supply a standard from which to interpret an English Act of Parliament [1]? There is in many of such Provinces a practice of confirmation of the diocesan election by the House of Bishops. Assuming the finality of the decision, one can only re-echo the comment of Lord Alverstone C. J.:—

'It seems to me worthy of consideration, whether the form of public citation which ought to be retained for some purposes should not be modified so as to meet the real case, and remove the possibility of the observation that it is a temptation to people to raise questions at an unsuitable time and place.'

But the experience of the last six years makes one despair of archbishops or their officials taking the hint. The *Gore* case illustrates a peculiarly English preference for doing the right thing in the wrong way.

[1] If one may go to a Gallican precedent, it is not unimportant to note that the Civil Constitution of the Clergy, which was Erastianism at its high-water-mark, recognized the right of the Metropolitan, or senior bishop, to examine the elect on his doctrine and his morals (*sur sa doctrine et ses mœurs*), and to refuse confirmation, leaving the elect to his remedy by appeal *comme d'abus*.

W. Digby Thurnam.

EARLY SLAVONIC LAW[1].

PROFESSOR SIGEL, of Warsaw, has written a quite fair manual on the history of Slavonic law. The book contains a series of lectures delivered at the University of Oxford. The want of space of course prevented him from entering into any details concerning the development of the different institutions of private or public law he had to treat of. To use a well-known German expression, the Russian legist has endowed the English-speaking public with the external and not the internal history of Slavonic law; or to put it in plain English, he has told us only the story of the sources of law, not that of its evolution. But, although briefly, he succeeds in tracing the close correspondence between the political history of the Slavonic nations and the development of their written and unwritten law. I cannot say that he was well inspired when he tried to reduce the latter to three periods. Such a division is easily to be found in the history of Russian law, and that for no other reason but the removal of the centre of the whole political life from Kief to Moscow and from Moscow to Petersburg. But why should the Polish or Bohemian law be similarly treated under three divisions? I see no plausible reason for it, and the author does not give any serious explanation of his predilection. Another objection I have to address to the distinguished author of this small but very valuable volume is that he not only uses but abuses historical parallels. Some of them are really too paradoxical to find general acceptance. Let me give an instance: Professor Sigel compares the evolution of the Western and Eastern Slavs and believes he has found the key of their different ways by saying: the Western Slavs sought for liberty, ready to sacrifice to it the well-being of the lower classes; as to the Eastern Slavs, they wanted social justice and acquired it under the rule of autocracy. But if so, how do you explain the origin of personal servitude and the prominent part which in the establishment of serfdom has been played by the same autocracy from the time of Boris Godonnov to that of Catherine II, the friend of Voltaire and the encyclopaedists? It is true that our author speaks of serfdom only on account of its abolition by Alexander II, but how can we be ignorant of the fact

[1] Lectures on Slavonic Law: being the Ilchester Lectures for the year 1900. By Feodor Sigel. London: Henry Frowde. 1902. 8vo. vi and 152 pp.

that the emancipation of millions of peasants only undid the work of this Tsar's remote predecessors?

Mr. Sigel begins with an introduction the scope of which is to establish the existence of a general old-Slavonic customary law, partly written according to the testimony of Procopius and the analyst of Fulda. He thinks that some features of this earliest law have transpired in the legal measures of the Byzantine emperors of the dynasty of Isaurius. Following in the steps of the regretted Petersburg professor of history, Wassilievski, he explains the rules concerning village communities, contained in these laws, by Slavonic influence. According to Mr. Sigel, the Slavs began their social development by the establishment of a clannish or gentile organization and of large family communities. This, of course, is a foregone conclusion, drawn from a later state of things described by legal documents, such for instance as the recently discovered oldest statutes of Ragusa. Direct information is very scarce so far as we have to deal with the first Slavonic settlements. The testimony of Byzantine and Arabic authors is rather favourable to such an hypothesis, but it does not agree with that of the well-known ecclesiastical writer Cosmus of Prague, or of the earliest Russian chronicle, which both speak of certain Slavonic tribes, Western and Eastern, as not being familiar with the institution of marriage.

The first country, the enigma of whose legal condition Professor Sigel tries to unravel, is old Bulgaria. The Bulgars are not a Slavonic people, but their state reduced to obedience a number of Slavonic tribes, leaving to them at the same time a certain amount of autonomy. The celebrated Simeon who ruled over this country from 888 to 927 is known to have been a great admirer of Byzantine civilization. He ordered the translation into Bulgarian of the Ecloga, the Prochyron, and the 'Agricultural Laws' of the empire. Professor Sigel gratuitously supposes that these translations, the text of which has not come to us, were rather adaptations of Greek law to Slavonic conditions. The example of Theodoric, the Gothic king, anxious to maintain Roman law among his German subjects, is not quite fit to support such a conclusion. The author endorses in this case the opinion of a well-known Polish historian and legist, Romuald Hube. In a French monograph on the Roman and Byzantine law among the Slavs Hube called attention to the fact that, side by side with the translation of larger legal tracts, Simeon of Bulgaria favoured the publication of smaller Greek codes, in which some modifications are introduced in the text of the law. So, for instance, mutilation, spoken of in the private compilation ascribed to Constantine, disappears in its Bulgarian translation, to be replaced by money fines. I do not think that this fact can be brought

forward as a proof of the maintenance of Slavonic law. It only gives material evidence of the regulating power of the Bulgarian prince, a power similar to the Königs-Bann of the German rulers, so conclusively established by Professor Brunner. The Bulgarian princes, like the German barbarian kings, made use of it in order to modify the rules of written or unwritten law prevailing in their dominions.

I find more originality in those pages which Professor Sigel dedicates to the legal history of early Servia. Our author began his already long scientific career by giving us a new edition, with commentary, of one of the best versions of the code of Stephen Dushan, which has been followed by a more complete edition of the different manuscripts containing the same code, published by Professor Florinsky, of Kief, who in a full and well-worked-out commentary gave also his judgment as to the preference to be accorded to this or that version. The code of Stephen cannot be considered as an early monument of Slavonic law, being of the middle of the fourteenth century and imbued with Byzantine legal ideas. Its comparatively late origin does not allow any supposition as to its influence on the earliest Russian legal relics. But the same cannot be said of the Bulgarian translations of Byzantine laws. According to Professor Kluchevsky of Moscow, they had a wide diffusion in Russia. The first introducers of Christianity, Cyril and Methodius, being themselves Southern Slavs, the education of the Russian people in the new creed was naturally entrusted to our predecessors in the knowledge of Christian doctrine and inventors of the Slavonic alphabet. It is very likely that they took also a prominent part in the first legal codes that were compiled in the time of Yaroslav, the son and successor of St. Vladimir. The very fact that our earliest 'mirror of justice,' the Pravda, contains a certain number of South Slavonian words, speaks in favour of such a supposition, first expressed by my former colleague at Moscow. Another instance of the same Bulgarian influence on early Russian legal thought is given by the old Slavonic version of the Byzantine 'Agricultural Laws,' recently published by Professor Pavlov. I regret to see that Mr. Sigel has not called the attention of his English readers to this transmission of legal work from old Bulgaria to Russian principalities of the tenth and eleventh centuries. What our author says about the maintenance of many a rule of the Pravda of Yaroslav in the statute of Lithuania (fourteenth century) is excellent and in full conformity with recent works of Leontovitch, Boudanov and Lubarsky, which show that all the south-western part of Russia, contrary to the north-eastern, and more especially to Moscovy, presents an uninterrupted development of legal rules,

already expressed in the Pravda of Yaroslav. The customary law of the so-called Little Russia, which formed the subject of an official compilation in the second part of the eighteenth century, contains to a great extent regulations drawn from the statute of Lithuania.

Mr. Sigel follows the history of the codification of North Russian law from the time of the legal compilations made in Novgorod and Pskov for the use of courts of justice to the last, but not least, collection of Russian laws made in 1832, under the direction of Speransky, whose admiration for the Code Napoléon is apparent in our modern code, notwithstanding the formal order of the Emperor Nicolas I not to introduce any rule not directly taken from the orders or ukas of the Tsars and Emperors. This topic has been ably treated by Mr. Vinaver, whose general conclusions are accepted and reproduced by Mr. Sigel, his master.

Coming to speak of the Bohemian law, the Ilchester lecturer makes large use of the rich literature in which the general history of Bohemian law by Professor Chelakovsky, of Prague, is the last expression. English readers may be interested in the prominent part which the courts and their decisions played in the development of the Bohemian law. The majority of the private legal compilations, some of which received an official acknowledgment, contained nothing but such precedents. Bracton and Britton found their imitators even in Bohemia. Such were, for instance, the unknown landlord of Rosenberg and the Alderman or Starosta Andreas, of Doub. Professor Sigel shows the way in which German law first appeared in Bohemia as the statute law of certain municipalities. No one has illustrated with greater science and sagacity the extraordinary growth of that foreign law, called by and by to supersede the common law of the country, than Professor Chelakovsky. He not only has written a series of papers on the different municipal laws of German origin to be found in Bohemia, but is the editor of a most important publication containing the text of all these statutes. By examining them we come to the conclusion that, as the result of a mixed migration of Saxons and Swabians, Bohemian cities and boroughs borrowed their municipal regulations both from the Saxon and the Swabian 'Mirrors.' The fatal battle of the White Mountain put an end as well to the political as to the legal autonomy of Bohemia. The Emperor-king Ferdinand II entrusted only German judges with the right of applying to the decision of legal suits the different prescriptions of his code. Germans alone were called to sit in the high court by imperial order of 1627. This fact alone accounts for the disappearance of Slavonic customary law from among the sources of Bohemian jurisprudence. Unaware of the judicial precedents of

former ages, which constituted, as we had occasion to say, the common law of the country, the judges of the high court referred exclusively to the German code. Professor Sigel is right therefore in declaring that the natural evolution of Bohemian law ends with the first quarter of the seventeenth century.

In Mr. Sigel's lecture on the history of Polish law, which forms a separate chapter of his book, the English public will find another instance of the great part which customary law has taken in the development of the Slavonic civil law. The first attempts to give a written customary law were made in those parts of Poland which were occupied by the Teutonic Order. No wonder that the language used by the compiler was the German. Mr. Vinaver studied minutely this monument, which is worthy to attract the attention of all students of ancient law, on account of the great number of juridical archaisms it contains, such as ordeals, compositions, &c. Professor Sigel, although confining his study to the sources of law, tries nevertheless to give some information on the social and political state of the country at the time of their appearance. This leads him to speak of the relation of the people to the land in the twelfth and thirteenth centuries, a period at which the first legal rules were formulated. He thinks that the common people enjoyed freedom and the possession of the soil, considered, as it first was, to be tribal property and only afterwards that of the king. I do not think that this last point has ever been established, or that the acceptance of it agrees with the fact recognized by Mr. Sigel himself, that the oldest documents of customary law already speak of inheritance in immovable property as well as movable, and of the relations existing between proprietors and landholders. I am inclined to think that the possession of the whole land area by the king in Poland is a gratuitous supposition, just like the one which Antonius Possevin, a Jesuit traveller in Russia in the middle of the sixteenth century, made as to the Muscovite Tsar being the only owner of his dominions. This fancied exclusion of private proprietary rights did not prevent the existence in Russia of lands passing from father to son (*otchina*—a kind of *terra aviatica*), and of benefices or lands granted in remuneration of public service (*pomestie*). Has it not been said also, of course by foreigners, that William the Conqueror became the only proprietor of the kingdom he had conquered, and such expressions used by him as *terra mea*, *dominium meum*, interpreted in the sense, not of political dominion, but of private ownership?

The want of space prevents me from following Mr. Sigel in all he says about the different sources of Polish law. I intend only to call the attention of the reader to the large legal autonomy

enjoyed by different provinces which constituted the kingdom. In this way Mazovia had its own legal code until the year 1576. The same may be said of Lithuania, which received in 1588 a revised edition of its old statute. Great and Little Poland had each its own customary law, both codified in the middle of the fourteenth century—Great Poland, the statute published at Petrokov; Little Poland, the statute of Vislitza.

With the history of the Republic of St. Mark, or Venice, is involved to a certain extent the history of that part of the southern Slavonians who either escaped Turkish bondage or liberated themselves from it. Such was the case of the city and village republics of Dalmatia. Professor Sigel devotes the fifth and last lecture of his course to a short sketch of their legal development. The oldest monument of Dalmatian law is that of Vinadol, compiled in Croatian in the year 1283. It is certainly one of the most genuine and interesting documents of Slavonic law. It has been published several times. The best edition is that given in Petersburg by Professor Jagič, now Professor of Slavonic Philology at Vienna. A French translation made by Mr. Jules Preux appeared in 1897 in the *Revue de droit français et étranger*.

Another legal relic of a later date is the statute of Politza, a small Dalmatian republic, situated close by Spalato. This little code, published a few years after the time when Politza passed from the Turkish supremacy to that of Venice, in the year 1485, contains partly old customs, never written, partly those which had been already included in an earlier statute of 1440. The statute of Politza is much richer in regulations of civil law than that of Vinadol. Amongst other curious institutions mentioned by it we find the house community, known in our days to Southern Slavs under the name of *Zadruga*. The word employed by the statute to designate the same is *Verv*; we find it also in the oldest code of the Russians—a fact showing first of all the antiquity of the institution and then the part taken in the compiling of our earliest law by scribes of South Slavonian origin.

Besides the two already mentioned documents, Mr. Sigel speaks also of municipal statutes, published at the time of the Venetian supremacy, such as those of Zara and Ragusa. We should be mistaken in admitting that these compilations are the first in time. Mr. Bogišić, the well-known codifier of the civil law of Montenegro, has recently published in the *Revue de droit français* a very interesting paper on the old statute of Ragusa, which is of the thirteenth century. The same well-known scholar is now publishing at Agram, in the memoirs of its Academy, the text and interpretation of this very important document. The fact alone

that the statute of Ragusa proves the existence side by side of two different types of family organization—the 'house community' and the 'small family' (*inocosna*)—is made to confirm the theory of the same writer, according to which the small family is but a separated branch of the joint family to be found both in town and country. The early Slavonic legists were of an opposite view; they thought the *Zadruga* to be peculiar to the village and the 'small family' to the town. This gratuitous supposition found even an expression in the Croatian code.

It is to Mr. Bogišić that Professor Sigel is also indebted for the greater part of the information he gives on the development of Croatian law. A monograph 'on the written law among the Southern Slavs' long ago attracted on Mr. Bogišić the attention of the scientific world, which only increased after the appearance of his collection of South Slavonic customary rules. Whilst Dalmatia early fell under the supremacy of Venice, Croatia became dependent on Hungary. This did not prevent her from retaining a legal autonomy, the right of calling together a kind of diets, known under the name of *Generales Congregationes*. This rather aristocratic institution from the thirteenth century selected regularly for a year the chief justice, the so-called 'Jupan.' It also made the laws of Croatia, creating thus the first foundations of its juridical development. In the year 1273 the judges received written instructions compiled by the states. In the same century appeared the statute of the principal city, Agram, and the privileges of the nobility. Two centuries later was published a series of criminal laws, and the rights of the Croatian kingdom were confirmed by Hungary. It is only from the sixteenth century that the Croatian diet loses the right of legislation without the intervention of the Hungarian king. Before this period the sanction to the legal decisions taken by the states was given by the highest official of the country, the Bann. Notwithstanding this limitation of its autonomy, the Croatian diet continued to assemble until the year 1848.

The book we have just revised ends with a general view of the Slavonic law, in which one point deserves special attention. Mr. Sigel is quite right in saying that, with the exception of England and Scandinavian states (why not also of France?), the juridical development of Western Europe shows the defeat of national laws and customs by Roman law. The Slavs, on the contrary, maintained their own legal rules. As such they present a greater resemblance to the juridical development of the English nation than any other people of the Continent. I hope that the confirmation of this view, which the English reader will find in Mr. Sigel's small volume, may be an inducement for historical

students, more especially those interested in legal antiquities, to consult the sources of Slavonic law, some of which are accessible even to those ignorant of the language; the more so as some of these documents are written in old German or medieval Latin, whilst others are translated, or in course of being translated, into French or German. I suppose that in writing his book, Mr. Sigel had no other end but that of disclosing the rich materials which the old Slavonic laws and juridical compilations contain on the earlier forms of civil institutions. It will be therefore a great satisfaction to him to see some one in England entering upon the same line of studies.

MAXIME KOVALEVSKY.

[It is impossible to expect any appreciable number of English historical students to master two or three Slavonic languages. A uniform French or German translation—French by preference—of the principal documents of early Slavonic law seems much to be desired.—ED.]

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Company Law. By FRANCIS BEAUFORT PALMER. Fourth Edition. London: Stevens & Sons, Lim. 1902. La. 8vo. l and 631 pp. (12*s.* 6*d.*)

IN January and February, 1897, Mr. Palmer delivered six lectures upon Company Law at the request of the Council of Legal Education, and the first edition of the work before us, which came out early in 1898, was based on the lectures. The work was duly appreciated by the profession, and before the end of the year a second edition was published. On the title-page of the second edition the author described the work as 'A Practical Handbook for Lawyers and Business Men,' and in the third and fourth editions the use of the second title has been continued, and in the third edition all reference to the lectures was omitted. In the fourth edition, now under notice, the author refers to the lectures in his preface only. Three 'large' editions, as he tells us, have been sold since the first publication in 1898, and the size of the last exceeds that of the first by 127 pages. Nevertheless, the price has not been increased. In commenting on the Companies Act, 1900, Mr. Palmer has had an easy task, as the statute has been recently dealt with by him in his eighth edition of the first volume of 'Company Precedents,' but he has been watchful of and critical as to recent decisions on the Act—for example, *Keatings* v. *Paringa Consolidated Mines*, with which the author does not agree.

The fourth edition is quite up to the standard of its predecessors, and may be recommended for perusal, not only by the lawyers and business men for whom it is primarily intended, but by the numerous students who would hesitate to tackle any of the larger books on the same subject.

F. E.

The A B C Guide to the Practice of the Supreme Court, 1903. By FRANCIS A. STRINGER. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1902. 8vo. xv and 144 pp. (5*s.*)

MR. STRINGER is 'of the Central Office of the Supreme Court,' and he is the author of a book on Oaths and Affirmations. He is also one of the editors of the Annual Practice and of Daniell's Chancery Practice. The colour of his binding is white, like that of the Annual Practice, and his new volume is put forth by the same publishers and is a kind of *annexe* to that work, to which it frequently refers. It is not an index to the Annual Practice, however, but is intended to give within a small compass 'the practical information necessary for the conduct of actions and matters in the Chancery and King's Bench Divisions . . . and in the Court of Appeal, and to give that information in such a manner as to make it easily and rapidly accessible in every part.' It tells the legal practitioner

how, when, and where 'he may take such step in procedure as he may decide to take,' and purports 'to define the mode, time, and place with precision.' If any body acts on the book and goes wrong, Mr. Stringer will probably hear of it promptly, especially as he invites suggestions for the improvement of his book.

The Annual Practice is an excellent work, but it has grown to a great bulk, and might we think be now advantageously flattened out into royal octavo. Mr. Stringer's volume, however, can be easily carried in a medium sized pocket, yet it contains much practical matter in a readily accessible form. Take the title 'Appearance.' Under this title we are told how to enter an appearance, and where to appear in an action commenced in a district registry. Information is also afforded as to giving notice of appearance, conditional appearance, and as to what is to be done in the case of companies, corporations, and other bodies which are made defendants, as well as in the cases of persons under disability, landlords, persons served with notice of judgment or a third-party notice, added defendants, and trustees in bankruptcy. We are also told how female defendants should be described, what appearance 'gratis' is, how appearances may be amended, and the limit of time for entering them. The above is a fair example of the information given under the various titles, which are arranged alphabetically; and the book will, we think, be found useful in ordinary practice. F. E.

Principles of the Law of Contracts. By the late S. Martin Leake. Fourth Edition by A. E. Randall. London: Stevens & Sons, Lim. La. 8vo. lxxxiii, 916 and 60 pp. (32*s.*)

Elements of the Law of Contract. By A. T. Carter. (Students' Series.) London: Sweet & Maxwell, Lim. 1902. 8vo. xiii and 198 pp. (7*s.* 6*d.*)

The late Mr. Leake's treatise, which may now be called classical, retains in the learned editor's hands its character of an accurate digest of the law of contract, not attempting to explain the history of the law, and severely reticent as to the author's personal judgment of doubtful points. Thus the statement as to agreements in restraint of trade has been duly made to embody the actual results of the *Nordenfelt* case; but no reader would discover from it the fact that the decision of the House of Lords made a revolution in the accepted doctrine. Nor would any one discover from Mr. Leake's language at p. 436 that his two propositions, namely that 'a person may promise to a third party to do what he is already bound to do by contract with another,' and that on the other hand 'the performance of a legal duty affords no consideration for a contract,' involve—especially when coupled with the significant and certainly deliberate omission to cite *Shadwell* v. *Shadwell*, 9 C. B. N. S. 159, as bearing on either branch of the doctrine—a decided solution of one of the most difficult and subtle problems in the law of Consideration, over which learned persons have differed for many years. Leake's solution agrees with Mr. Langdell's, and is in the present writer's opinion correct; though we do not think the authority cited for the second proposition really bears it out. But the student must learn elsewhere with what searchings of heart the result was probably arrived at, and also that it is at first sight opposed to the weight of existing authority. We do not in the least intend

to censure Mr. Randall; he has faithfully preserved Leake's method, as he was bound to do.

We are rather puzzled by the plan of Mr. Carter's book. It purports to be 'written not so much perhaps from an academical as a professional standpoint.' But it is much too short to be used in practice, and on the other hand, if it is intended to be a very elementary book preparing the way for Sir W. Anson's, it contains many things which ought not to be put before mere beginners, or not without warning. Thus *Shadwell* v. *Shadwell* is stated with inadequate explanation, and without the least hint that there is any difficulty. What will the poor student say when he turns from Mr. Carter to Sir William Anson, not to mention Mr. Langdell and Mr. Ames? We have mentioned the silence of Leake; a reader going straight to Leake with no other guidance than Mr. Carter's would be tempted to wonder how an author who omits to cite important decisions has acquired an almost unique reputation for accuracy.

It is disappointing, again, to find it stated without qualification that 'an acceptance *must be communicated* by writing, words, or conduct,' while *Carlill* v. *Carbolic Smoke Ball Co.* is given as an illustration without any comment on the obvious fact that in that case the acceptance was not, in any ordinary sense, communicated at all. There is much to be said for Mr. Langdell's view that when the consideration asked for by the offer of a promise is not a promise but an act, the performance of the act as requested suffices, and there is no question of communication. It is also allowable to say that the proposer is estopped from raising any such question if the conditions proposed by himself have been satisfied. But at any rate a point of principle which is sure to puzzle intelligent beginners should not have been left wholly unexplained.

This is the more to be regretted because the short but very sound exposition of the doctrine that 'all valid considerations are present considerations,' a few pages later, shows that the learned author is perfectly capable of giving the required explanation.

There is a chapter on rules of evidence and construction, but we do not find anywhere the fundamental rule that 'the language used by one party is to be construed in the sense in which it would be reasonably understood by the other' (Blackburn J., 3 B. & S. at p. 929, 32 L. J. Q. B. at p. 159).

We find no trace of acquaintance with the work of Mr. Langdell, Mr. Ames, or Mr. Harriman, to mention only the best known of the learned American lawyers who have done so much to elucidate both the theory and the history of the subject.

Then there is an appendix on Consideration and the history of Assumpsit, quite out of place in such an elementary treatise. But, being there, it should have been accurate. We read on p. 181: 'A. leaves his horse with B. to shoe. B. runs a nail into the hoof and injures it. The plaintiff brings trespass on the case.' So far good. The action is on the case because, the operation being with the plaintiff's consent, there is no actual trespass to his goods. Instead of this perfectly well-known explanation, however, the next sentence is a gloss which we can only call astounding: 'If he had been in possession [of the horse] he could have brought trespass [no, certainly not, if the shoeing was at his request], but the wrong suffered was the same whether the horse was in the owner's stable or the smithy' [true but irrelevant: Mr. Carter, or his assistant Mr. Fox, appears never to have heard that some unauthorized acts even by a bailee in lawful possession may amount to a trespass, being held to

determine the bailment]. Then follows a reference to 46 Ed. III, 19, pl. 19; a student might well think that the bad reason as well as the facts comes from the Year Book, where, of course, there is nothing of the kind. The actual question was on the omission of the words *vi et armis* from the writ. It is almost worse that on the preceding page the action of Debt is stated to have lain 'for the recovery of a sum certain alleged to be due, *founded on a contract express or implied.*' This confuses the whole history by importing into the ancient action of Debt the ideas and terms developed much later in Assumpsit. Certainly the word 'contract' was used in connexion with Debt, but long before it had acquired its modern implication of obligation created by promise. The action of Debt had nothing to do with promise: it was 'an action of Property' (*Edgcomb* v. *Dee*, Vaugh. 101), a writ of right for chattels.

We are sorry to be compelled to censure a well-meant piece of work of which, no doubt, the greater part is sound, and which may, for aught we know, have its particular uses. But we cannot help thinking, and thinking we are bound to say, that a text-book produced by a teacher at Oxford and in the Inns of Court might and ought to have been a great deal better. There is an apology for the book not having been finished by the learned author himself, by reason of illness, and handed over to Mr. W. F. Fox. But why could it not wait? Perhaps the reason is to be sought in the exigencies of publication in a 'series.' If so, it is not the first time they have spoilt promising material.

British Rule and Jurisdiction beyond the Seas. By the late Sir Henry Jenkyns, with a Preface by Sir Courtenay Ilbert. Oxford: Clarendon Press. 1902. 8vo. xxiii and 300 pp.

This book will be of much interest, alike on account of its contents and of its author, though perhaps in both cases to a limited circle of readers. What manner of man was Sir Henry Jenkyns—lovable, if somewhat austerely self-centered, and wholly devoted to public duty—may be gathered from the admirable semi-biographical preface which Sir Courtenay Ilbert, the colleague, and afterwards the successor of Jenkyns in the office of Parliamentary Counsel to the Treasury, has contributed to this posthumous volume of his friend's essays. The more solid results of the literary activity of Sir Henry Jenkyns are bound up in the thirty volumes of the statute-book which appeared between 1869 and 1899. During all those years, Jenkyns was bestowing upon measures which, besides having ultimately to stand the test of forensic discussion, had first of all to be carried through Parliament, an amount of time and thought of which the uninitiated can have little conception. What he accomplished in this way was rendered possible only by an unrivalled knowledge of the existing law upon all the subjects with which, from time to time, he was called upon to deal.

The present volume is a mere *excursus* to those labours of a lifetime. It contains a series of careful memoranda, such as would be required before legislation upon the topics of which they treat could safely be attempted. But the book has a unity, which is expressed by its title. The essays which Jenkyns was engaged in putting into shape, when he was cut off by death, all relate to jurisdiction exercised by the British Crown outside of the United Kingdom. They travel, it will be observed, over some of the same ground which was covered in 1894 by the late Mr. W. E. Hall, in his *Treatise on the foreign powers and jurisdiction of the*

British Crown[1]. The later has less of scientific method than the earlier work, but is, of course, better brought up to date, and although two years have elapsed between the death of its author and its publication, the interval has been spent in much useful revision by Sir Courtenay Ilbert, assisted by Mr. Graham Harrison. One chapter, that on 'self-governing colonies,' has been entirely re-written by Mr. J. A. Simon, a step which seemed to be called for by the passing of the Commonwealth of Australia (Constitution) Act of 1900. Although, therefore, Sir H. Jenkyns was not spared to put the finishing touches to his valuable essays, they contain, with the collective guarantee of Sir Courtenay Ilbert and his colleagues, a mass of information which, so far at least as it relates to the colonies, may be vainly sought for elsewhere.

The volume opens with a short chapter, classifying and defining the territories within which British jurisdiction may be exercised. The second chapter describes the general relations between the United Kingdom and British Possessions. Then come chapters dealing with the various classes of British Possessions, chapter iii dealing with such as are not, and chapters iv and v with such as are, 'Colonies.' Of these two chapters, the former treats of self-governing, the latter of Crown, Colonies. Chapter vi gives information of a somewhat supplementary character about Colonial Governors, as exercising, in a self-governing Colony, the powers of a constitutional sovereign, in a Crown Colony, those of an actual ruler. The author here quotes, and in the main adopts, the clear description of a governor of the former kind given by Mr. Herman Merivale, who remarks that 'the really onerous part of his duty consists in his watching that portion of Colonial policy which touches on the connexion with the mother country.' Chapters viii–ix differ from those which precede them in that they relate to jurisdiction exercised in places not within the British Dominions, the subject of Mr. Hall's treatise, already mentioned. The text of the work is followed by a useful appendix of documents, including also an account of the pre-federation constitutional history of the Australian Colonies.

A treatise upon the law of Copyright in the United Kingdom and the dominions of the Crown, and in the United States of America [with appendix of Acts, conventions, and other documents]. By E. J. MacGillivray. London: John Murray. 1902. La. 8vo. xxxvi and 403 pp. (25*s*. net.)

This is a full text-book in the nature of a digest. The learned author has rightly kept his personal opinions in the background for the most part, but in the preface he justly complains that 'it is now twenty-eight years since the Royal Commission on Copyright was appointed, and still nothing has been done to ameliorate the lamentable condition in which the Commissioners then found the law.' We have tested the work on some nice points, such as the history of copyright before the Act of 1842, copyright in reported speeches, and the common-law right—often erroneously called copyright—to restrain the unauthorized publication of unpublished matter, and in every case we have found it sound and trustworthy. The arrangement is as good as the subject and the state of the law permit.

The American section will add greatly to the utility of the book for the profession, and still more, perhaps, for publishers and others who have to

[1] See L. Q. R. x. 276.

acquaint themselves to some extent with copyright law. We may say the same of the documents conveniently collected in the Appendix.

It is refreshing to see a law-book produced in handsome print and with an ample page, though we are not sure that practising lawyers would not have preferred a less bulky form.

An Encyclopaedia of Forms and Precedents other than Court forms by Eminent Conveyancing and Commercial Counsel. Under the General Editorship of ARTHUR UNDERHILL, assisted by CHARLES OTTO BLAGDEN and WILLIAM E. C. BAYNES. Vol. II. Apportionment to Building Schemes. London: Butterworth & Co. 1902. La. 8vo. xliii and 653 pp.

THIS volume contains the subjects 'Apportionment' to 'Building and Engineering Contracts,' inclusive. It would perhaps be impossible to write within the space at our disposal an exhaustive review of a book of such extent and variety. The general character of the work is high, and it may fairly be recommended as a safe guide to those who consult it. There is a great number of precedents containing forms which are not to be found in the ordinary books. For example, under the head 'Apprentice' there are twenty precedents of deeds of apprentice and of instruments relating thereto. The fact of Mr. Muir Mackenzie being one of the authors of the heading 'Arrangements and Compromises with Creditors' is in itself a guarantee that the preliminary note and the precedents are good. The reader will find under the head of 'Arrangement and Compromise' some instruments which he would have hardly expected to have found under that head, for example, separation deeds between husband and wife and between a man and his mistress, and agreements for compromise of Actions, and to withdraw opposition to a bill in Parliament. We are not aware of any other book in which the forms relating to auctioneers which are in this book can be found. There is a large collection of banking documents. It may perhaps appear to some that the insertion of a letter of inquiry as to the financial position of a customer of a bank and the reply of the bank thereto was hardly necessary, but we consider that the editors exercised a wise discretion in inserting these forms, as inquiries of this nature must be of constant employment. There is a large number of guarantees to bankers adapted to various circumstances. Perhaps one of the most interesting parts of this volume is 'Building and Engineering Contracts,' by Mr. Strahan. The preliminary note contains a good deal of information, some of which will be new to many of our readers; for example, few people are aware that contracts for work where both parties to them are of high standing and integrity are often made in a very informal fashion, even without any writing.

There is, however, one point which appears to have been overlooked, or as to which possibly Mr. Strahan does not agree with us. The form of Building Contract adopted by the Royal Institute of British Architects (given at p. 587) provides in effect that the architect may sanction additions to the buildings without consulting the owner. No doubt from the point of view of the architect this is desirable, but we venture to submit that it is a power that ought not to be placed in the hands of any professional man. It would be simple enough to provide that no additions costing in the whole more than a certain sum should be paid for unless the landowner consents in writing to their being made. The danger of using this clause in the form adopted by the Royal Institute of British

Architects is stated in an unanswerable manner by Lord Grimthorpe in 'Beckett on Building' at p. 42 et seq.

The volume is singularly free from clerical errors, but there is a reference to a wrong section of the Conveyancing Act, 1881, in the note on p. 8 which is somewhat misleading. The precedent to which the note is annexed is 'Apportionment of Rent reserved on a lease where the reversion is sold in lots the lessee not being a party.' The scheme of the deed is for the vendor to demise the land to a trustee whose duty it is to collect the rent from the original lessee and to divide it among the purchasers of the reversion. According to the usual and correct practice the term created by the demise to the trustee is longer by one day than the unexpired term granted by the lease. The note explains that it is doubtful whether this is now necessary in the case of leases made since the coming into operation of the Conveyancing Act, 1881, s. 44. It is submitted that there is some error in the note. At the time when the vendor demised to the trustee he was seised of the land in fee subject to the original lease. In other words, he was entitled to the reversion expectant on the term granted by the lease, and when he demised to the trustee it made no difference whether the term granted to the trustee was equal to or less or greater than the residue of the term granted by the lease, as in either case the trustee as assign of the reversion would be entitled to the rent reserved by the lease and the benefit of the lessee's covenants under the Conveyancing Act, 1881, s. 10.

Woodfall's Law of Landlord and Tenant. Seventeenth Edition. By J. M. Lely. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1902. La. 8vo. lxxvi and 1158 pp. (38*s.*)

This is not merely the seventeenth edition, but also the centenary edition of a book which is entering upon its second century with a reputation and prestige of authority not surpassed, and scarcely rivalled by any other work on the same subject.

The book, however, bears traces of old age, the removal of which requires a somewhat more drastic treatment than it has lately received, for though the latest authorities are plentifully cited it is not always easy to ascertain from the text how far they have modified the older cases and authorities which are there still retained unaltered.

For instance, Comyn is cited at p. 289 in support of the proposition that under a continuing covenant to keep in repair the assignee of a term may be made liable in respect of dilapidations which accrued previously to his assignment, and from the context of Woodfall it would appear that the original lessee might enforce the liability by way of implied indemnity. But the case of *Moule* v. *Garrett*, (1870) L. R. 5 Ex. 132, is elsewhere cited in Woodfall to show that the implied liability of the assignee of a term to indemnify the original lessee against breaches of covenant is limited to breaches which have been committed by the assignee during the continuance of his own estate; and on an examination of *Moule* v. *Garrett* it will be found that the lessee who was there suing the assignee in respect of breaches of a continuing covenant to keep in repair, prudently limited his claim under the implied indemnity to the dilapidations which had occurred during the continuance of the assignee's estate.

This fully justifies and supports the proposition for which *Moule* v. *Garrett* is cited, but at the same time it would seem to require some modification of the other passage in which the authority of Comyn is cited.

Again at p. lxii it is stated as a leading proposition that a lease for more than three years is void unless made by deed, but the qualifications introduced by decisions, both at law and in equity, as to the effect of such a lease, should be supplied to make the proposition accurate.

A Treatise on the Jurisdiction and Practice of the English Courts of Admiralty Actions and Appeals, being a Third Edition of Williams and Bruce's *Admiralty Practice*. By the Hon. Mr. Justice Bruce and C. F. Jemmett, assisted by G. G. Phillimore. London: Sweet & Maxwell, Lim. 1902. La. 8vo. li and 789 pp. (32*s*.)

The last edition of Williams and Bruce was published in 1886, and a new edition was much wanted. The law of the Admiralty, as compared with other branches of English law, is largely unformed. In no other Court does 'judge-made law' grow so quickly. Moreover, the Judicature Acts, the County Court Acts, and other modern statutes have introduced many novelties and some confusion into its practice. One need mention only two or three recent cases, such as the *Zeta*, *Gas Float Whitton No. 2*, the *Gemma*, and the *Dictator*, to show that elementary points of Admiralty law were until the other day undecided, and that any day questions may arise in the Admiralty Division which make it necessary to trace the growth of the Admiral's jurisdiction from its very origin.

The very considerable addition to the length of the table of cases in the present edition, some 3,000 cases in all as against about 2,000 in the second edition, indicates that a considerable addition has also been made to the text. Many of the new cases cited must be of earlier date than 1886, for it cannot be that 1,000 reported cases have been decided since that date. Some of the additional cases are, it is true, unreported; and the number of these unreported cases cited is not altogether a satisfactory feature. Reporters in the Admiralty, as in other Courts, do not err on the side of omission.

There does not appear to be any considerable alteration in the body of the book; and the Introduction, which deals with the history of the jurisdiction, shows little change. This and the text throughout might have been amplified, and in some cases corrected. For example, the existence of contemporary copies of the alleged agreement of 1575 between the Common Law and Admiralty judges as to the limits of the jurisdiction should have been mentioned (p. 9); as also the similar agreement of 1632, which is to be found at the Record Office, with the signatures of the judges at its foot. The important supersedeas of a commission to common law judges in a case of piracy of the year 1361 is set out in Selden Series, Admiralty, vol. i, p. xlv, but the learned editors only give us (p. 4, note i) a reference to what Cockburn C. J. said that Hale C. J. has about it. Again, the long note or appendix to the Introduction (p. 18), in which the recent decisions in the *Gemma* and the *Dictator* are criticized, cites Clerke's Praxis, but contains no reference to the existing records of the court, which are surely better authority than the Praxis. Upon the point discussed in this note, namely whether in an action *in rem* judgment can go against the appearers in a sum larger than the value of the *res* or the amount of the bail, at least one decided case (*Parkinson* c. *Pitt*, Selden Soc. Adm. ii. 195) should have been mentioned. A careful search amongst the court records would probably throw further light upon this important question. It is a matter which in the near future may engage the atten-

tion of Parliament, in view of the demand which is being made by British shipowners that the measure of their liability in case of collision should be the same as that of shipowners in other countries. In discussing it the learned editors have perhaps attached too much weight to decisions of Dr. Lushington and subsequent judges who appear not to have been aware of the earlier records. It should, however, be added that the records referred to tend to show that the view taken by the editors of Williams and Bruce is more in accordance with the early practice of the court than that taken by the President and by the Court of Appeal in the *Gemma* and the *Dictator*.

The history of the Admiralty Court has yet to be written, and Williams and Bruce does not say the last word on the subject. As a practical treatise it stands almost without a rival; and in point of accuracy, fullness, and caution in dealing with modern decisions, it is admirable. The alteration in the size of the volume makes it far more easy to handle.

An Essay on the Principles of Circumstantial Evidence. By the late WILLIAM WILLS. Fifth Edition. Edited by Sir ALFRED WILLS, one of His Majesty's Judges of the High Court of Justice. London: Butterworth & Co. 1902. 8vo. xxv and 458 pp.

IT is evident that the work of editing his father's book has been to Mr. Justice Wills a labour of love. Not only has the text been carefully revised and brought up to date, but the paper is of the best, the print excellent, and there is a full and complete index. One of the most interesting chapters in the book is that which deals with the testing of documents by internal evidence, and we propose to apply one or two of the rules given on page 197 for testing the genuineness and authenticity of written instruments from a critical examination of the internal contents to the book at present under review. In the first place we notice on page 267 and again on page 270 a statement that the judge who presided at the trial of Madeleine Smith was the Lord Justice Clerk Cockburn. We do not think that Lord Cockburn ever presided over the Second Division, and it would seem that he died on the 26th of April, 1854, or nearly three years before the trial in question took place. What is the inference which the higher critic writing some five or six hundred years hence with the biographies of Lord Cockburn and Mr. Justice Wills before him will draw from this passage? May he not fairly say that a critical examination of these pages 'betrays their fraudulent origin,' because the date of the death of so celebrated a judge as Lord Cockburn is 'an event or a circumstance which must have been known' to such an able and accurate writer as Mr. Justice Wills?

Again, the attention of our higher critic will be arrested by the statement on page 203, that 'the law of England recognizes several presumptions *juris et de jure* which create entire or partial exemption from criminal responsibility,' and he will be at once struck by the word partial and by the fact that the phrase *presumptio juris et de jure* is being used in a sense different to that in which it is used by the civilians. He will ask himself whether the application of this expression alike to the presumption that an infant under the age of seven years cannot be guilty of crime and to the presumption that an infant above that age and under fourteen years shall be prima facie adjudged *doli incapax* is 'in harmony with the known character, opinions, and feelings of the pretended writer.' He will

then turn to page 24 where he will find the true distinction between *presumptiones juris et de jure* and *presumptiones juris* accurately drawn, and no hint that the former expression is ever used in any wider sense, and he will say to himself that the passage on page 204 must be spurious. We notice these two slight slips because they seem to us to illustrate and to emphasize the great truth that 'the most important part of the inductive process . . . is the *correct* exercise of the judgment in drawing the *proper inference* from the known to the unknown from the facts proved to the *factum probandum*.' It is to be regretted that this edition has come out just too soon to deal with that which we have lately been told is perhaps the most accurate of all circumstantial evidence, namely identification by means of finger-prints. The note on page 423 should provide some material for a skilful cross-examiner, and we can imagine the surprise of an ordinary house surgeon who has been called to speak to blood stains found on the prisoner's clothes when he is asked whether he has treated those stains with haemotoxic rabbit serum. Every page of this book contains something of value to those who are brought into contact with the Courts of this country. The advocate who has to examine a scientific witness should remember that 'science is never final and new facts are every day found to disturb or modify long established convictions.' The counsel who has to deal with damaging statements alleged to have been made by his client should bear in mind the wise words of Mr. Justice Foster cited on page 56. He says, 'Words are transient and fleeting as the wind; they are frequently the effect of sudden transport easily misunderstood and often misreported.' To the person upon whom suspicion has been unjustly thrown we commend the story of the wicked uncle, which Lord Coke says he has reported 'for a caveat to the innocent and true man that he never seek to excuse himself by false and undue means lest thereby he, offending God (the author of truth), overthrow himself as the uncle did.' The cases, which are chiefly taken from the criminal law, are full of human interest, and should prove excellent reading for a judge during a long train journey on circuit. We can without hesitation recommend this edition to the newly appointed member of the Bench who is anxious to obtain a due appreciation of the proper value to be attached to circumstantial evidence before he is called upon to preside at the Central Criminal Court or in the Crown Courts on Circuit.

The Law of Evidence. By SIDNEY L. PHIPSON. Third Edition. London: Stevens & Haynes. 1902. 8vo. cviii and 665 pp.

THE present edition of Mr. Phipson's book on the law of evidence seems to us to fulfil admirably the purpose which he originally set before himself in his preface to the edition published in 1892. The fact that over 700 cases have been added to those cited in the last edition is sufficient to show that he has managed to steer clear of that Scylla known to us as Stephen's Digest of the Criminal Law, and one has only to look at the present volume to see that he has also successfully avoided the Charybdis of that other 'great repository of evidentiary law' to which he refers. The plan adopted in former editions of giving at the end of each chapter illustrations of admissible and inadmissible evidence in parallel columns is again made use of and should prove helpful to the student of the Law of Evidence. We are rather surprised in a book dealing with this subject to find no mention in the index of the expression 'Lex Fori,' but perhaps we may have missed some statement in the text that the admissibility or

inadmissibility of evidence does not depend upon the law of the country where for example a contract is entered into, but on the law of the country before whose tribunals the remedy is sought to be enforced. We do not however find *Leroux* v. *Brown* (12 C. B. 801), one of the leading cases in which this subject has been dealt with, in the very lengthy table of cases which extends from page xxi to page cviii. We notice on page 16 a statement that 'Scotch Colonial or *foreign* law must be proved as a fact by skilled witnesses except in the House of Lords or the Privy Council, where what was in the Court below a question of fact to be proved by evidence becomes a question of law to be judicially noticed.' The latter part of this statement is clearly not correct as regards foreign law, and is really negatived by the case cited, *Cooper* v. *Cooper* (13 App. Cas. 88). The judicial knowledge is an incident of jurisdiction. We doubt, therefore, whether the Judicial Committee could assume judicial knowledge of Scots law. The author himself correctly states the rule on this subject at pages 341–2 of this book. Most of the new editions of Works on Evidence which have been so plentiful during the last two or three years probably owe their existence to the passing of the Criminal Evidence Act, 1898. With this subject Mr. Phipson appears to us to deal adequately in the space at his disposal. The text of the Act is set out at page 612, and the principal decisions under the Act have been collected on pages 413–6. So far as we have been able to test this edition it seems to be accurate and up to date, and it should prove useful to a large class of persons.

Accidents to Workmen. Second Edition. By R. M. Minton Senhouse. London: Sweet & Maxwell, Lim. 1902. La. 8vo. lxviii and 432 pp. (25*s.*)

We learn from some of Mr. Minton Senhouse's prefaces not only that the Lords Justices have often referred in kind terms to the first edition of this work, but that the County Court judges have used it and that it has had 'a very great distinction conferred upon it. The House of Lords has discussed the submissions contained in it. It is without precedent for a legal work, while in its first edition, and during the life-time of the author, to be cited and adopted in the Court of Appeal' [not so as regards the Court of Appeal, see e. g. *Dalton* v. *Fitzgerald* [1897] 2 Ch. at p. 90] 'and in the House of Lords.' In the face of these guarantees of superlative merit praise from us would seem as superfluous as condemnation would seem impertinent. But 'Accidents to Workmen' is in fact a good enough book to hold its own without praise from the author.

Mr. Minton Senhouse has one quality which is too rare in writers of legal treatises. He fearlessly grapples with unsolved questions and is not afraid of hazarding his opinion on questions likely to arise. His opinions earn our respect if not always our assent. He has thoroughly mastered his subject, and his notes on the Workmen's Compensation Acts, Employer's Liability Act, and Lord Campbell's Act are generally excellent. In the appendix will be found a useful collection of rules, forms and other relevant matters.

We could wish that the author had followed some uniform system of citation in the body of the work. It is annoying to have to turn to the table of cases for the reference to the Law Reports.

The note on the question—certainly a difficult one—of 'scaffolding' is not written with the acumen and precision which characterize most

parts of the book. In the first place it is now beyond doubt that the question whether a particular structure is or is not scaffolding is not a mere question of fact. In *Hoddinott* v. *Newton, Chambers & Co.* [1901] A. C. 49, though the question was spoken of as one of mixed fact and law, the majority of the lords seem to have really treated it as one of pure law. The arbitrator is to find the facts necessary to determine the question, such, for instance, as the mode in which the materials are put together and the materials used, and then, as Lord Brampton says, whether upon the facts so found the arrangement so constructed is a scaffolding is a question of law. It is rather hard to see how a question of the construction of a statute can be otherwise. It is unfortunate that after this the Court of Appeal has continued to treat the question as one of 'mixed fact and law.' The result is that *Marshall* v. *Rudeforth* [1902] 2 K. B. 175 and *Veazey* v. *Chattle* [1902] 1 K. B. 494, together with *Wood* v. *Walsh* [1899] 1 Q. B. 1009 (which Collins M. R. regards as overruled by *Hoddinott* v. *Newton, Chambers & Co.*, whilst Mathew L. J. seems to regard it as still binding), seems to be, as our author points out, that two men may be injured whilst working on the same ladder, and in the case of one a County Court judge may find that the ladder is a scaffolding, while in the case of the other another County Court judge may find upon the same evidence that the same ladder is not a scaffolding; and in both cases the Court of Appeal will say that unless they can come to the conclusion that the County Court judge misdirected himself in arriving at the finding that the ladder was (or was not) a scaffolding, they have no power to interfere. The result is that the task of advising as to whether a given structure—say a common ladder—is or is not a scaffolding is no simpler than before.

Possibly each County Court judge may get into the way of following his own finding as though it were one of law, and this prospect may justify Mr. Minton Senhouse in quoting as freely as he does the decisions of County Court judges as though they were authorities.

Apparently the book is intended to deal with the law of Scotland as well as that of England. A good many cases from the Scottish Courts are referred to; but others equally important are not. For instance, there is no reference to *Clement* v. *Bell & Sons* (36 S. L. R. 725) and *Legget & Sons* v. *Burke* (39 S. L. R. 448) on the question who are dependants under s. 7 (2) *b* of the Workmen's Compensation Act.

Digest of Cases decided under the Workmen's Compensation Acts, 1897 and 1900. By Max A. Robertson and A. T. Clegg. London: Stevens & Sons, Lim.; Edinburgh: William Green & Sons. 1902. La. 8vo. xvi and 244 pp. (10*s.* net.)

This book purports to be a digest of those cases 'which seemed to the authors to be of importance' 'decided under the Workmen's Compensation Acts, 1897 and 1900, in the House of Lords, Courts of Appeal in England and Ireland, Divisional and High Courts [*sic*] in England and Court of Session in Scotland down to the end of August, 1902.' The arrangement of the work is novel.

The cases are arranged not according to subjects, or alphabetically, but in order of date. They are not set out in full as in the Reports, nor are the headnotes only given as is usual in digests. A short summary of the facts in each case is given, then the decision, and finally in most cases a short quotation from one or more of the judgments. This is certainly

not an adequate substitute for the full reports, and we cannot think it a convenient form of reference digest.

The Digest is followed by a copy of the Acts with short references to the cases digested or reported in the earlier portion of the book, and lastly there is an excellent analytical index to the digest and the annotated Acts.

The Digest would have been more useful if the authors had been careful to indicate when cases have since been overruled or commented on. For instance, *Maude* v. *Brooke* and *Wood* v. *Walsh* were both discussed unfavourably if not overruled in *Hoddinott* v. *Newton, Chambers & Co.* [1902] A. C. 49; and in *Veazey* v. *Chattle* [1901] 1 K. B. 494, Collins M. R. took the view that 'we are not incumbered to-day by the decision in *Wood* v. *Walsh*.' Yet these cases are digested without any reference to their treatment in the House of Lords. Actual reversals are indeed noted, but this is not sufficient. The authors have at any rate shown ingenuity in devising and producing a book wholly unlike any other of the many treatises on the Workmen's Compensation Acts.

Studies in Australian Constitutional Law. By A. Inglis Clark, Judge of Supreme Court, Tasmania. Melbourne: Charles F. Maxwell (G. Partridge & Co.). 1901. 8vo. xv and 446 pp.

A good deal of information respecting Federal Constitutions has been collected by the learned author of these Studies. The distribution of the executive, legislative, and judicial powers among the several bodies in which they are respectively vested, and the functions of those several bodies, are fully discussed, and the author has evidently bestowed much time and labour on his comments on these subjects. He has made a careful study of the Constitution of the United States, and of the judicial decisions on many of the points which have arisen in the practical working out of its provisions; and while making copious quotations from American authorities, he is at some pains in pointing out the extent to which, in his opinion, these are applicable to the Australian Constitution.

While the book contains much useful information, we cannot help regretting the absence of the happy faculty of condensation. The style too frequently obscures the author's meaning, and many of the sentences are extremely long and involved.

The author questions the legality of the Letters Patent and the Instructions that have been issued to the Governor-General. The form in which the power of pardon is conferred on the Governor-General, being virtually identical with that in which the power is conferred on the governor of each State, is said to have been denounced by the late Chief Justice Higinbotham of Victoria as a piece of 'flagrant illegality.' The author appears to have forgotten, or to be unaware, that since and in consequence of the Chief Justice's remonstrance addressed to Lord Knutsford, the form in 1892 underwent a very material alteration, so that the above-mentioned quotation is misleading. Moreover, the author appears to be in some doubt as to the precise meaning of the Chief Justice's criticisms, although it might well be thought that the full and masterly statement of them which he addressed to Lord Knutsford, whether one does or does not agree with his views, possessed at least the merit of lucidity.

When chairman of the Judiciary Committee of the National Australasian Convention of 1891, Mr. Clark took an active part in opposing those who desired that an appeal should lie from the new Federal High Court to

the Privy Council, and in the present book he enforces these views at considerable length, though in a manner hardly likely to carry conviction to those who can appreciate the quality of the judicial work which has been performed by the Privy Council. The line of argument is not always easy to follow. His Majesty, it appears, was wrongly advised in giving to the Duke of Cornwall a commission to open the first Parliament of the Commonwealth, because, in the author's opinion, no one could legally open it but the Governor-General. 'Such advice,' he adds, 'is not a hopeful augury of the manner in which the provisions of the Constitution of the Commonwealth will be interpreted by the majority of the members of the Judicial Committee of the Privy Council.' Assuming the author's view respecting the Duke of Cornwall's commission to be sound—and this we venture to think is a very bold assumption—the argument (if it can be so designated) appears to be that as the Law Officers have given His Majesty erroneous advice on one point, the majority of the Judicial Committee are not likely to give sound advice on other points. Several cases are set out at considerable length in which decisions of the Privy Council have been subsequently questioned or even dissented from, nor do the decisions of the House of Lords appear to stand in a much better position, since 'on one occasion, at least,' what that house declared to be the law of Scotland was 'within twelve years' altered by legislation! If these instances are intended to show that no human tribunal is infallible, they seem somewhat unnecessary as well as irrelevant. If they are intended to convey the impression that the decisions of the Privy Council generally are not entitled to the greatest respect, and do not carry very great weight, they are what Charles Reade used to call 'false samples.'

There appears to be some confusion of thought in the author's treatment of the uniformity of decision which must undoubtedly be promoted by retaining the appeal to the Privy Council from all outlying parts of the Empire, instead of constituting Courts of final appeal in various parts, as though it were synonymous with what he calls 'unity of law,' which, he observes, cannot exist without unity of legislation. At the same time, uniformity of decision would appear to his mind to be often more injurious than beneficial, as calculated to retard the 'expansion of legal doctrines to meet the exigencies of social and industrial development,' and, so enamoured is the author of everything that prevails in the United States, that even divergent declarations of the common law in relation to similar facts appear to him to possess distinct advantages. The latest American editions of legal text-books afford abundant evidence of the results of such divergence, the editors often filling many pages with the conflicting decisions of different State Courts, and being apparently quite unable to deduce any rule of law whatever from the farrago—'*rudis indigestaque moles.*' Such is the mode of this admired 'expansion of legal doctrines to meet the exigencies of social and industrial development,' meanwhile

> 'Chaos umpire sits
> And by decision more embroils the fray
> By which he reigns.'

We cannot agree that such a state of things is desirable from any point of view, whether we regard the interests of litigants or the science of law.

A Comparison between the Federal Constitutions of Canada and Australia. By Richard Clive Teece. Sydney: W. E. Smith, Lim. 1902. La. 8vo. v and 71 pp.

In this, the Sydney Beauchamp Prize Essay, 1902, Mr. Teece gives a clear and succinct account of the two chief Federal Constitutions established within the British Empire, including a general view of their political organization, with occasional references to the constitution of the United States. Those who desire to obtain a clear idea of the new Australian Constitution will do well to turn to this interesting and readable little book, where they will find its main features crisply depicted.

The chapter on the powers of the Parliament touches on several of the difficult problems which are likely to give rise to dispute between the Federal Parliament and the Parliaments of the States. The author, who is a recognized authority on questions of finance, regards the financial clauses of both the Canadian and Australian Constitutions as very unsatisfactory. In Canada they are a constant source of jealousy, friction, and unrest, and have encouraged agitation in the Provinces for 'better terms' from the Dominion Parliament. Similarly, the Australian Act leaves the way open for designs on the Federal Treasury, and is, in the author's opinion, 'pregnant with grave consequences in the shape of constant plots to plunder the Commonwealth for the benefit of needy, greedy, and extravagant States.'

With reference to the stringent provision whereby the seat of any member of Parliament is vacated if he takes any fee for services rendered to the Commonwealth or in the Parliament to any person or State, the author observes that it is peculiar to Australia, and that, by preventing a member of Parliament from accepting a brief for the Commonwealth in the Courts, it will, in his opinion, deter leaders of the bar from entering Parliament, and thus inflict injury to the country by depriving it of their services. The weight of this opinion is not diminished by the fact that Mr. Teece is a layman.

The Land Transfer Acts of New Zealand. By David Hutchen and Henry Cecil Wright. New Plymouth, N.Z.: Thomas Avery. 1901. 8vo. xxv and 152 pp.

It is noteworthy that although the Torrens system of registration of title has been in operation in New Zealand for over thirty years, no work on the subject has, prior to this, been published in that Colony; and in presenting the existing Land Transfer Acts and the decisions thereon in a compact form the authors have done good service. Their aim has been to give the effect of all the cases decided in New Zealand and in the Privy Council in notes to the various sections, but they have not considered it necessary to cite cases decided in Australia which have not come before the Privy Council. To do so would no doubt have added considerably to their labours and to the size of the book, but it is certainly to be regretted that all reference to such cases has been omitted.

The bold effort made by Sir Robert Torrens, a layman, to simplify the transfer of land in South Australia by registering the title itself instead of merely registering deeds was carried through in that Province in 1858; and the success of his system was sufficiently established for it to be adopted within the next four years in Queensland, New South Wales, Victoria and Tasmania, while New Zealand followed suit in 1870, West

Australia in 1874, and Fiji in 1876. Since many of the provisions of the various Land Transfer Acts are in similar and sometimes identical terms, the cases decided in the Supreme Courts of the different Colonies throw a good deal of light upon those provisions; and we therefore think it a matter for regret that no reference has been made in this book to some of the principal decisions in other Colonies. Moreover, such a task would have been made considerably lighter by the good work already done in this direction by Mr. Canaway's Real Property Acts of New South Wales (1887), and the very complete treatise of Messrs Duffy and Eagleson on the Transfer of Land Act of Victoria (1895).

The present work, however, although in this respect not so complete as could be wished, appears to be carefully executed, and the introductory chapters as well as the notes on the principal Act of 1885 make it a book which ought to be in the hands of all who have to deal with the title to land in New Zealand.

A Concise and Practical View of Conveyancing in New Zealand. By THOMAS FREDERIC MARTIN. Christchurch, Wellington, and Dunedin, N.Z.: Whitcombe & Tombs, Lim. 1901. 8vo. li and 378 pp.

THIS is a clear and well-arranged book on the conveyance and mortgage of property, both real and personal, in New Zealand, with a number of useful precedents and a good index. The author has shown much industry in his collection of authorities, both Australasian and English, bearing on his subject. The four different tables of statutes relating to real property and conveyancing will be found useful. One is of Imperial Statutes in force in the Colony at its foundation; another of Imperial Statutes which have come into force there since; a third of New Zealand Statutes; and lastly a comparative table of the sections of the Property Law Consolidation Act, 1883, with other enactments. The book as a whole seems likely to prove a valuable guide to the intricacies of conveyancing in New Zealand.

The chapters on the land transfer system, and on advising, will be of special use to the younger members of the profession. In the latter, reference is made to an observation by Lord Macnaghten in *Eccles* v. *Mills* (1898), A. C., at p. 369. In that case, an opinion had been given by Sir Roundell Palmer and Mr. (afterwards Mr. Justice) Archibald without stating reasons, and had been acted upon for many years by trustees in New Zealand, but, when their action was subsequently disputed, counsel in New Zealand were unable to support the opinion, although it was afterwards upheld by the Privy Council. Lord Macnaghten said: 'The learned counsel, of course, gave no reasons with their opinion.' It is perhaps somewhat difficult to say precisely what was meant by this observation coming from a learned lord who possesses a keen sense of humour, but the inference which Mr. Martin, perhaps not unnaturally, draws, that it is the practice of counsel in England to give opinions without any statement of reasons, is in fact not well founded. Clients may, in the case of very eminent counsel, be content with a short answer to a specific question unaccompanied by any statement of reasons, but the majority of opinions given are not of this nature, and complaint is sometimes heard when such opinions are given.

The Law relating to Waters—Sea, Tidal, and Inland. By H. J. W. COULSON and URQUHART A. FORBES. Second Edition. London: Sweet & Maxwell, Lim. 1902. La. 8vo. xxxi and 736 pp. (35*s.*)

THE authors of this comprehensive work may be congratulated on the great improvement made in the second edition. In the twenty-two years that have elapsed since the publication of the first edition many notable cases have been decided, and of these, as well as of such books as Mr. Stuart Moore's valuable History of the Foreshore, intelligent use has been made.

In the earlier chapters, which treat of the common law of the Sea and Seashore, Rivers and Fisheries, the law is set out correctly, though a little more skill might have been used in arrangement and compression of statement. We have not in every case found easily what we searched for, but have not failed ultimately to find it, and find it accurately stated.

But the authors' ambition leads them to treat of the whole law so far as it may have water for its subject-matter, thus including many branches of the law connected together, from the legal point of view, only by accident. Thus we have chapters on easements connected with water, canals and docks, bridges and ferries, water-supply by companies and by local authorities, pollution and navigation. And unless the book is to swell to inconvenient dimensions many of these subjects must necessarily receive but inadequate notice. A few pages devoted to navigation, consisting mainly of the rules of the road without notes or comment, and a very brief summary of parts of the Merchant Shipping Act are almost useless. So too are the scanty summaries of the statute law relating to water-supply and to sea- and fresh-water fisheries. Each of these subjects is much too large to be satisfactorily compressed into a few pages, or even a few chapters, and the result is, as might be expected, that there are slips, omissions and inaccuracies. For instance, we are told that in *Caygill* v. *Thwaite* (33 W. R. 581) it was held that a person who took or attempted to take cray-fish in a private fishery was *not* guilty of an offence under sec. 24 of the Larceny Act, 1861 (or, as the authors call it, the Larceny Consolidation Act). In fact the Court decided exactly the contrary, Mathew J. giving his reason succinctly, if not convincingly, by saying 'my reason being that fish are fish.' Again, it is said that no person may fish for salmon in any fishery without a proper licence. Surely a licence is only necessary in a fishery district under a board of conservators. True, most salmon rivers are within fishery districts, but we believe not all, e. g. the Itchen.

In connexion with oyster-fishing we are told that the Convention of 1868 with France is not yet in force, and would appear to be binding only on the subjects of France and England so far as it relates to the sea beyond the territorial limits of either country—a curious result of its not being in force. The Convention of 1843 is entirely overlooked. The true position appears to be (though it is not easily discovered) that the Convention of 1843 is in force as regards French boats, but not as regards British boats or British subjects, whilst the Act of 1868, but not the Convention of that date, is in force as regards British subjects everywhere and French boats within British waters. It seems, on the whole, that as regards French boats there is a close season for oysters from May 1 to August 31, and as regards British boats from June 16 to August 31—a curious and probably unforeseen result of which the authors give us no inkling.

On the subject of damage done to oyster fisheries by vessels we miss *The Swift* [1891] P. 168, and *The Octavia Stella*, 6 Asp. M. C. C. 182, and

in connexion with pilchards, we wonder that there is no reference to the Act of 1 Jac. I. c. 21 which in the counties of Cornwall, Devon, and Somerset allows 'balkers, huors, condors, directors or guidors' to enter and go upon private lands to 'balk, hue, cond, direct and guide the fishermen' and permits the drawing of 'seans' upon private lands. This is an Act of vast importance to the pilchard fisheries of those counties. Without it we imagine pilchard fishing as now carried on would be impossible—and it is of some interest historically. Nor can it be said to be generally unknown. Special attention was called to it, for example, in a handbook of fishery law prepared for the International Fisheries Exhibition in London twenty years ago.

The moral is that even learned authors should not attempt to write an encyclopaedia in one volume.

The Law of Land, &c. By H. S. Theobald, K.C. London: Wm. Clowes & Sons, Lim. 1902. 8vo. xxix and 255 pp. (*12s. 6d.*)

Mr. Theobald has performed the uncommon feat of writing a new and useful law-book which does not fall within any recognized category. 'The point of view from which the book has been written is to take a person who is the owner of land, and to inquire what are his rights and obligations, what use he can make of his land, how far are his rights affected by those of his neighbours.' Thus we have conveniently brought together many small outlying subjects, such as the law of boundaries, for which many good lawyers would not have known off-hand where to find the authorities, while even familiar rules gain a kind of novelty by Mr. Theobald's concise and eminently practical treatment. Discussion of doubtful points is avoided, but the judicious reader will not fail to find profitable hints, for example on the distinction between nuisance and continuing trespass (p. 55). We have noted only one error, and that a minute one. In *Bird* v. *Holbrook*, 4 Bing. 628, 29 R. R. 657, it is literally true that the final decision was given after the Act which made setting spring-guns an offence, but the cause of action arose before it, and there was only incidental mention of the Act, with a suggestion that perhaps it was declaratory.

The Inner and Middle Temple: legal, literary, and historic associations. By Hugh H. L. Bellot. London: Methuen & Co. 1902. 8vo. xx and 412 pp. (*6s.*)

Mr. Bellot has not written the history of the Inns of Court or even of the Temple, but he has made a pretty and readable book of miscellaneous information and anecdotes, not the less readable for being desultory. The illustrations are numerous, well chosen, and as well produced as is compatible with the small size of the page. Few readers of such a book will trouble themselves about strict accuracy. The late Mr. Justice John Williams, however, was a remarkable person, and it is cruel of Mr. Bellot to deprive him of a characteristic story and attribute it to Mr. Montagu Williams. The real story is thus told by the late Sir F. Pollock in his Remembrances (i. 148). 'When at the bar John Williams was once defending a prisoner on his trial for murder, before the Prisoners' Counsel Act, so that he could make no speech to the jury, and his function was confined to examining and cross-examining the witnesses. Before putting a question to one of the witnesses for the prosecution, the answer to which was of

vital importance, he explained this to the attorney who was instructing him, and was assured that the answer would come out favourably to their client. Then he put the question, but it was answered the wrong way, upon which Williams turned round to the attorney and said, "By God! we are hanged; and when you meet your client in hell, as you will do, you must take off your hat and make a low bow to him, and ask his pardon for making me put that question."'

Again, we do not expect learned writers at this time of day to repeat the idle and exploded conjecture that the black cap is put on by the judge who passes sentence of death 'in token of grief.' It is really the completion of the full judicial costume.

Mr. Bellot retails some very wild talk about the Templars and freemasonry, but we are bound to say that he does not profess to believe it.

The bibliography appended to the book is workmanlike and in a general way full, including a good many American as well as English publications. But we are surprised at the omission of Judge Dillon's 'Laws and Jurisprudence of England and America' and Manning's classical 'Serviens ad Legem.' Serjeant Manning, indeed, does not seem to be mentioned anywhere.

Crime in its Relation to Social Progress. By ARTHUR CLEVELAND HALL, Ph D. (Columbia University Studies.) New York: Columbia Univ. Press; The Macmillan Co. London: P. S. King & Co. 1902. 8vo. xvii and 427 pp.

HAD this book appeared ten years ago, we should have been inclined to doubt its usefulness. For it is, in the main, an attempt to refute a transparent fallacy; and that should be a needless task. But fallacies have a stubborn vitality, especially when they can be used for controversial purposes. And the recent revival of obscurantism in this country has given a new lease of life to many a venerable sophism.

The particular fallacy which the book attempts to combat is the assertion, that the increase of crime, as recorded by criminal statistics, indicates social decay. It is unnecessary to dwell on the fascination of such an argument for the politician who wishes, let us say, to abolish School Boards. In spite of popular education, statistics show that crime has increased, not only absolutely, but relatively to the increase of population. Therefore, popular education is a failure.

The legal reader need not, of course, be told that the fallacy centres in the use of the word 'crime.' If we could be sure that 'crime,' in the comprehensive sense of immorality, or anti-social conduct, was on the increase, we should have to confess that our civilization was a failure. But criminal statistics do not, it is obvious, use the word in that sense; for the simple reason that exact records of immorality are unobtainable. The 'crimes' which figure in the columns of official returns are merely offences for which the offender has been punished by the State, or, at the most, offences for which he would have been punished if he had been caught.

The immensity of the gap between the two senses of the word is measured, or, at any rate, suggested, by two considerations, (1) the activity of the State in selecting from the category of evil acts a list which it will treat as punishable offences; (2) the vigour and success of the State in carrying out its self-imposed task of vindicator of the national conscience—in other words, the efficiency of its police system. With the latter of these

two considerations, Dr. Hall deals but slightly; his work is, mainly, a development of the former idea.

Dr. Hall defines a crime, very fairly, as 'any act punished by society as a wrong against itself' (p. 171); and he insists on the necessity of adhering rigidly to this definition. Thus, he will not admit that offences which fall within the scope of the criminal law are 'crimes,' if, as a matter of fact, such offences are habitually practised with impunity. 'In the utter anarchy of Stephen's reign, crime practically ceased' (p. 168); and this, though a hard saying, is strictly true, according to Dr. Hall's argument. We are not, however, sure that he is always quite consistent; and we think that his sponsor, Professor Franklin Giddings, has given the reader a wise caution on this point in his Introduction. But we sympathize so strongly with the view of law upon which the definition is based, that we are not inclined to be critical of it.

Dr. Hall's main argument is, that it is just precisely when civilization is really making way that we may expect to find an increase in crime, i. e. in convictions for crime, and that this is exactly when we do find it. The more genuine the progress, the more alert is the national conscience, the more ready to proscribe anti-social conduct and bring it within the reach of the law, the more resolute to insist on the enforcement of the law.

This argument is enforced by appeal to two kinds of evidence. One may be termed the evidence of history, the other the evidence of contemporary statistics.

In the historical part of his work Dr. Hall is not entirely satisfactory. He devotes too much space to what we may call the anthropological epoch of history, i. e. to those primitive types of society about which we really, at present, know too little to generalize with safety. He even speculates, somewhat unprofitably, upon the existence of social punishment among animals. Nevertheless, we think he is right in saying that even savage communities recognize and punish crime, e. g. incest and witchcraft, possibly also cowardice.

Passing to later stages, Dr. Hall practically attempts, in the course of six chapters, to sketch the history of English criminal law, from the earliest recorded times, making use for the purpose (and he could hardly do better) of such classical works as those of Pollock and Maitland, Hale, Blackstone, Pike, and Sir James Stephen. An attempt of this kind must, necessarily, be sketchy; but, such as it is, Dr. Hall's summary is in general sound, though he occasionally makes startling slips[1]. Moreover, we think he makes out a fair case for his assertion, that, all through English history, epochs of genuine progress have been marked by increasing activity in criminal justice, and, consequently, by increase of 'crime.'

The second kind of evidence adduced by Dr. Hall in support of his thesis is drawn from contemporary statistics. And here he does show, very convincingly, that there is at least an apparent synchronism of crime with civilization. In England, Scotland, Germany, and Italy, for example, there is, taking the figures for the past sixty or seventy years, a very marked increase in the proportion of convictions for crime to the numbers of the community. But a little examination shows that, while the grosser forms of crime—murder, theft, arson, rape, and the like—are steadily diminishing, the increase in the figures is accounted for by the convictions

[1] One of the most curious of these is the repeated assertion (pp. 213 and 252) that forcible entry was not a crime until the Tudor epoch. What would Henry FitzEmpress have said if he had heard such blasphemy?

for adulteration of food, failure to comply with Education Acts, breaches of sanitary regulations, misuse of roads and other public conveniences—offences which, a hundred years ago, were not within the scope of the criminal law at all. On the other hand, the one civilized country in which the number of convictions tends steadily to diminish, in proportion to the population, is Spain; and here, evidently, because of the indifference of the State towards many forms of anti-social conduct which, in other countries, it attacks with vigour.

On the whole, we think that the subject chosen by Dr. Hall for his thesis is interesting and well worthy of study, and that his book, if not an exhaustive or very profound, is, at least, a suggestive attempt to deal with it. In details there is much to be desired. The spelling of proper names (especially in the List of Authorities) is distinctly weak; but we must, probably, pardon Dr. Hall for speaking (p. 242) of Bucks as a 'neighbor' county of Devonshire.

A History of English Legal Institutions. By A. T. Carter. London: Butterworth & Co. 1902. 8vo. 4 leaves (not numbered) and 302 pp. (14*s.*)

This is an enlarged and much improved recension of the learned author's earlier work 'Outlines of English Legal History' (L. Q. R. xv. 208). The new chapter on the early history of the Law Merchant, originally published here last year, L. Q. R. xvii. 232, is of great interest. In the account of the Court of Chancery it might have been more clearly shown that a large number of the early petitions related to mere common law causes of action such as trespass and assault, the complaint being not that there was no remedy at law, but that by reason of the defendant's local power and influence—'horrible maintenance' was one current phrase—he was able to defy the ordinary process of the Courts. As to that process in its developed form, we should have liked to see some mention of the quaint and characteristic fact that in the eighteenth century the original writ and all intermediate steps before the *capias* or *testatum capias* had become fictitious (Blackst. ii. 282). Appendix I is the only unlucky part of the book. It is substantially identical, though differently entitled, with Appendix B to Dr. Carter's 'Elements of the Law of Contract,' which we have noticed above.

The Principles of Bankruptcy. By Richard Ringwood. Eighth Edition. London: Stevens & Haynes. 1902. 8vo. xl and 400 pp. (10*s.* 6*d.*)

That Mr. Ringwood's work has reached an eighth edition indicates that it is largely used by those for whom it is chiefly intended—law students and candidates for the examinations of the Institute of Chartered Accountants. It is perhaps a misfortune that law students should be expected to know anything about bankruptcy—a subject as ill-fitted as any for training the mind in legal principles. However, as it has to be learned it cannot be better learned than from Mr. Ringwood's lucid epitome, wherein the outlines of the law and practice are clearly and intelligently set forth.

Into the new edition the author has woven the recent cases with skill and judgment, and for the most part the text seems to be as accurate and complete as can be expected to be in a work of this size.

We have, however, come across some slight inaccuracies in the fringe of the subject. For instance, in the list of offices for which a bankrupt is disqualified membership of a sanitary authority and highway board is still included. Those authorities are now superseded by parish and district councils. Nor do we find any reference to s. 25 (1) of the Trustee Act, 1893.

We regret the exclusion of the complete text of the Bankruptcy Acts, 1883–1890. No doubt all the sections are referred to and in substance set out in their appropriate places, but it would have been convenient to have these Acts complete in the appendix.

Bankers' Advances on Mercantile Securities. By ARTHUR REGINALD BUTTERWORTH. London: Sweet & Maxwell, Lim., and Effingham Wilson. 1902. 8vo. xv and 208 pp. (*7s. 6d.*)

THIS admirable little work is founded on a course of lectures delivered by the author before the Institute of Bankers. The lecturer has a thorough grasp of his subject, and is gifted with a lucid and accurate style of exposition. Though adapted specially for the use of those to whom the lectures were given, it is a book which a lawyer may well read with profit and pleasure. It contains a good deal of information not hitherto collected in a single volume and some really valuable discussions of difficult points of law.

De Necessariis Observantiis Scaccarii Dialogus; commonly called *Dialogus de Scaccario.* By RICHARD Son of NIGEL, Treasurer of England and Bishop of London. Edited by ARTHUR HUGHES, C. G. CRUMP, and C. JOHNSON. Oxford: at the Clarendon Press. 1902. 8vo. viii and 250 pp. (*12s. 6d.* net.)

THIS is an excellent edition of a work which has long needed editing. The Dialogus de Scaccario, for so it will continue to be called in spite of its new title, was frequently cited by the lawyers of the Elizabethan age and, written as it was before the year 1179, much interest will always attach to it as being the oldest treatise on English law. It is concerned chiefly with fiscal and administrative matters, but it supplies some useful, though not entirely trustworthy, information about *murdrum*, *actio furti*, and other subjects which were frequently discussed in the courts of justice of the twelfth and thirteenth centuries.

The introduction contains a study of the origin of the Exchequer of Henry II, in which the editors arrive at the conclusion that the officers of the Treasury, which was closely connected with the Lower Exchequer, show signs of a pre-Conquest origin, that the monetary system leads back to the same era, and that the main portion of the staff of the Upper Exchequer was of foreign origin. Their conclusion is reached after a carefully written summary of the evidence afforded by the text of the Dialogus, the Pipe Rolls, and various other documents at the Public Record Office. Some of their inferences may be doubtful, more especially those which relate to the monetary system; and it is probable that further research will throw fresh light on the history of the staff of the Exchequer. But they appear to have made good use of the material at their disposal, and their introduction is scarcely less valuable than their text.

So much light has in recent years been thrown upon the history of the Exchequer as a financial department, that it is to be hoped that its history as one of the superior courts of common law may now receive some attention. Very much less is known of its procedure and jurisdiction than is the case with the King's Bench and Common Pleas. The editors speak of the Court of Common Pleas as originating in the Exchequer and not in the Curia Regis, a statement which needs some qualification. They proceed to suggest that this origin explains the subsequent position of the Exchequer Chamber as a court of appeal. But the jurisdiction in error of the Exchequer Chamber was purely statutory, so that this explanation can hardly be accepted as it stands.

The chief defect of the book is that the introduction and seventy-eight pages of notes which follow the text are not indexed. The only index which it contains, a Glossarial Index to the text, is good, but it would have been more convenient if it had referred to the pages instead of the chapters.

We have also received:—

The Licensing Act, 1902. By JOSHUA SCHOLEFIELD and GERARD R. HILL. London: Butterworth & Co. 1902. XV and 76 pp. (3*s.* 6*d.*)—This is an annotated edition of the Act, with an introduction to and summary of its provisions. It is a small and handy book which comes in good time, having regard to the fact that most of the provisions of the Act came into force on January. Section 14 came into effect on the passing of the Act on August 8, 1902. The statute is a very important one in many respects, affecting many persons besides the keepers of licensed houses and those who frequent their premises. Habitual drunkards will now have to control themselves, or they may be summoned by their husbands or wives, as the case may be, before justices, to show cause why a separation order, equivalent to a decree for judicial separation, should not be made against them. The comparatively harmless person who is found *simply drunk* in a public place or on licensed premises may be bound over to be of good behaviour. A drunk and incapable person, so found in a public place or on licensed premises, may be apprehended. The habitual drunkard is not for three years from the date of conviction to be allowed to buy intoxicating liquor at licensed premises, or even at a registered club, without liability to penalties on the part of both the seller and purchaser of the drink. Premises habitually used for the purposes of a club, and in which any intoxicating liquor is supplied to members or their guests, must be registered. Enough has been written to show that, even outside the profession, a handy book on the new Act is likely to have a large circle of readers.

Redress by Arbitration. By the late H. FOULKS LYNCH. Fourth Edition by D. F. DE L'HOSTE RANKING. 1902. London: Effingham Wilson. XV and 98 pp. (5*s.* net.)—Dr. Ranking only claims to have incorporated the most recent decisions in bringing up to date, in a fourth edition, one of the useful legal handy books published by Messrs. Effingham Wilson. The late Mr. Foulks Lynch's object was to provide a handy book for the use of arbitrators and students. Both these classes, and many full-blown lawyers, will benefit by a perusal of the ninety-eight pages which the book contains and which are not put forth as being exhaustive of the subject

dealt with, but give references where necessary to larger works on the same subject. An arbitrator or umpire may carry a little book like this in his pocket consistently with his dignity, and before his award or 'umpirage'—the correct word, according to this work, when an umpire gives his decision—appears, he will have ample time to look up in bigger books any crooked points which are left untouched in 'Redress by Arbitration.'

A Practical Exposition of the Principles of Equity, illustrated by the leading decisions thereon. By H. ARTHUR SMITH. Third Edition. London: Stevens & Sons, Lim. 1902. 8vo. lxvi and 892 pp. (21*s.*) —As this book has reached a third edition, we suppose it is found useful; but as a rational introduction to the principles of modern equity it leaves much to be desired. The jurisdiction to give relief, in important classes of cases, against misrepresentation or non-disclosure which may be, in a moral point of view, perfectly innocent is lumped in with Fraud after the manner of the old-fashioned books. We doubt whether the student would ever learn from Mr. Smith that there is such a thing as a contract *uberrimae fidei*. Again, he will not learn here that *Allcard* v. *Skinner*, which is put off with one reference, and that only in the form 'and see,' is really the leading modern case on Undue Influence; nor that many of the so-called equitable doctrines are and always were good common law. The total absence of any historical explanation of the jurisdiction of the Court of Chancery and its relations to the King's Courts of Common Law is also to be regretted.

The Law relating to Contract of Sale of Goods. Six lectures delivered at the request of the Council of Legal Education. By WILLIAM WILLIS, K.C. London: Stevens & Haynes. 1902. 8vo. vi and 184 pp.—Judge Willis's semi-popular course of lectures on the Sale of Goods is addressed only to commencing students, and seems well fitted to be useful to them. His Honour seems to have a strong opinion that s. 4 of the Sale of Goods Act altered the law by making agreements merely not enforceable which under the 17th section of the Statute of Frauds were wholly void. Now it is true that learned opinion varied a good deal about the effect of that section, and Judge Willis's opinion was perhaps the better supported one a quarter of a century ago. But has the learned judge referred to Lord Blackburn's very positive dictum the other way, *Maddison* v. *Alderson*, 8 App. Ca. at p. 488? The draftsman of the Act was, we conceive, bound to follow Lord Blackburn as the latest and best authority. However, Judge Willis tells his students to read and digest Blackburn on Sale, which is such excellent advice that it would be ungrateful to dwell on any little points of difference.

Ruling Cases. Arranged, annotated and edited by ROBERT CAMPBELL. With American Notes by IRVING BROWNE and LEONARD A. JONES. Vol. XXVI. Index and Table of Cases prepared by EDWARD MANSON. Revised by JOHN M. GOULD. London: Stevens & Sons, Lim. Boston, Mass.: Boston Book Co. 1902. La. 8vo. vii and 773 pp. (25*s.*)—This volume brings Ruling Cases to a close. It contains a full subject-matter index compiled on the usual plan of text-book indexes and separate tables of English and American Cases. There is also a short Preface by Mr. Manson. In his comparisons of English and American law Mr. Manson states that American law repudiates the maiming or killing of trespassers by traps or spring guns, but that under English law

notice makes the difference. Has Mr. Manson forgotten that since 7 & 8 Geo. IV. c. 18 (now repealed and substantially re-enacted by 24 & 25 Vict. c. 100, s. 31) setting spring guns or man traps is a criminal offence in this country?

The Stamp Laws, being the Stamp Acts of 1891*; with the Acts extending and amending the same, including the Finance Act,* 1902. By NATHANIEL J. HIGHMORE. Second Edition. London: Stevens & Sons, Lim. 1902. 8vo. lxiv and 380 pp. (10*s.* 6*d.*)—Mr. Highmore's position as Assistant Solicitor of Inland Revenue enables him to speak with some authority on the working of the Stamp Acts, and his book is now the recognized work on the subject. Although most of the law is contained in the Stamp Act, 1891, and the Amending Acts, there are more than a hundred statutes in which some provision affecting the law of stamp duties is stowed away. Mr. Highmore has collected all these provisions and has set them out. In this edition too he accounts for the legislation and cases of the past three years, including decisions of Scottish and Irish Courts.

The Students' Conveyancing for the use of candidates at the Final and Honours Examinations of the Incorporated Law Society. Seventh Edition. By ALBERT GIBSON and WALTER GRAY HART. London: 'Law Notes' Publishing Offices. 1902. La. 8vo. lxxxii and 640 pp. (25*s.*)—The last edition of this work (which appeared less than two years ago) was reviewed at some length in L. Q. R. xvi. 431. The present edition has been partly re-arranged. To quote from the Preface 'The long chapter on Conditions of Sale has been entirely rewritten, and those on the Capacity of Parties and the Abstract of Title have been largely recast.' A good many new cases have been added, but we cannot find any reference to *Hunt* v. *Luck* [1902] 1 Ch. 428, C. A. (constructive notice) or *Puckett & Smith's Contract* [1902] 2 Ch. 258, C. A. (Rescission of Contract on Misrepresentation). Nor is there anything to show that the decision of Farwell J. in *Whitbread* v. *Watt* was affirmed by the C. A., [1902] 1 Ch. 835. On p. 324 there is a reference to *Ewart* v. *Fryer* in the C. A., but the decision in the H. L., *Fryer* v. *Ewart* [1902] A. C. 187, is not cited. Nor is there any reference to *Fryer* v. *Ewart* on p. 325, where one would naturally look for it in conjunction with *Horsey Estate, Lim.* v. *Steiger.*

These may be small blemishes on a useful work, but we do not think they should occur in the second edition of what the authors claim to be 'an up-to-date manual of the law and practice of conveyancing.'

La ragione ed il contenuto del 'Tort' nel diritto inglese. Nota del dottor MARIO SARFATTI. Torino: C. Clausen. 1902. La. 8vo. 19 pp.—An interesting little study for the benefit of Italian readers. The learned author does not seem to be aware of the necessity for consulting the latest editions of text-books. If Pollock on Torts is worth quoting at all, it should be quoted in the current edition (the sixth) of 1901, and not in the original one of 1887, which is quite out of date, and would now be certainly misleading on many points.

Digest of Public Health Cases. By J. E. R. STEPHENS. London: Sanitary Publishing Co., Lim. 1902. 8vo. xxxv and 626 pp. (21*s.*)—The author states in the Preface that although there are many books on Local Government and Public Health Law there has been no work previously published 'dealing solely with Public Health decisions in one volume and in alphabetical order of subjects on the lines of the present

work.' The cases are brought up to the end of Easter Term, 1902. The book should be useful to all connected with Local Government affairs as well as to lawyers. There is no index, but the alphabetical arrangement and full table of Contents are almost—if not quite—sufficient excuse for its omission.

The Law of Burial: including the Burial Acts . . the Cremation Act, 1902 and the Official Regulations of the Home Office and Local Government Board, with notes of Cases. Third Edition. By JAMES BROOKE LITTLE. London: Shaw & Sons; Butterworth & Co. 1902. 8vo. xl, 758 and 89 pp. (*22s. 6d.*)—This edition incorporates the Local Government (Joint Committees) Act, 1897, the Burial Act, 1900, and the Cremation Act, 1902. The notes show legislative modifications of the law of burial and account for recent decided cases on the subject.

Finland: its Public and Private Economy. By N. C. FREDERICKSEN. London: Edward Arnold. 1902. 8vo. xi and 306 pp.—Chapter iii of this book is on the Land Laws of Finland. It appears that the acquisition of large estates by Russian landlords who took an extreme view of their rights gave rise to an agrarian question which in the course of the nineteenth century (no exact dates or particulars are given) was disposed of by a scheme of compulsory purchase. The rest of the work is chiefly economical, and not within the scope of this REVIEW.

A Compendium of the Law of Torts: specially adapted for the use of students. (Students' Series, No. 7.) By HUGH FRASER. Fifth Edition. London: Sweet & Maxwell, Lim. 1902. 8vo. xxiv and 218 pp. (*8s.*)—The utility of Mr. Fraser's Compendium is well established. In the present edition he says as little as possible about *Quinn* v. *Leathem*, which is certainly the safest course for an elementary writer, and perhaps the only practicable one.

The Origin of the Knowledge of Right and Wrong. By FRANZ BRENTANO. English translation by CECIL HAGUE. [London] Westminster: A. Constable & Co., Lim. 1902. 8vo. xiv and 125 pp. (*5s.* net.)—As a consequence of his theory of the nature of good and of moral preference (which cannot be examined in this REVIEW), the author accepts *ius naturale*, in a limited sense, as the foundation of positive law.

Who's Who, 1903: an annual Biographical Dictionary. Fifty-fifth year of issue. London: Adam & Charles Black. 1903. 8vo. 1532 pp. (*5s.* net.)—This work now consists almost entirely of biographies, the remaining tables, with one or two exceptions, having disappeared from the book.

The Law and Practice of a Case stated by a Court of Summary Jurisdiction for the opinion of the High Court with Precedents of a case, &c. By A. C. FORSTER BOULTON. London: Butterworth & Co. 1902. 8vo. xx, 154 and 16 pp. (*6s.*)

The Yearly Supreme Court Practice, 1903. With practical notes. By M. MUIR MACKENZIE, S. G. LUSHINGTON and JOHN CHARLES FOX, assisted by A. C. MCBARNET and ARCHIBALD READ. In one volume. London: Butterworth & Co. 1903. 8vo. cli, 1086 and 156 (index) pp. (*20s.* net.)

The Private Street Works Act, 1892. A Practical Guide to the working

of the Act with all necessary Forms and Precedents. By JOSHUA SCHOLEFIELD and GERARD R. HILL. London: Butterworth & Co. 1902. xxi and 161 pp. (7*s.* 6*d.*)

A Guide to Criminal Law intended for the use of Students for the Bar Final and for the Solicitors' Final Examinations. By CHARLES THWAITES. Sixth Edition. London: Geo. Barber. 1902. 8vo. xi and 192 pp. (10*s.*)

Introduction to the Study of the Law of the Constitution. By A. V. DICEY, K.C. Sixth Edition. London: Macmillan & Co., Lim. New York: The Macmillan Co. 1902. 8vo. xvi and 533 pp. (10*s.* 6*d.* net.) —Review will follow.

The Acts relating to the supply of Gas and Water by Companies and Local Authorities. Compiled by JOSEPH REESON. London: Butterworth & Co. 1902. 8vo. xx and 818 pp. (21*s.* net.)

The Englishwomen's Year Book and Directory, 1903. Edited by EMILY JONES. Twenty-third year (fifth year of new issue). London: Adam & Charles Black. 1903. 8vo. xxxv and 340 pp. (2*s.* 6*d.* net.)

Principles of Equity. By WALTER ASHBURNER. London: Butterworth & Co. 1902. 8vo. lvi, 729 and 49 pp. (21*s.*)—Review will follow.

The Licensing Acts. By the late JAMES PATERSON. Fourteenth Edition. By WILLIAM W. MACKENZIE. London: Shaw & Sons; Butterworth & Co. 1902. 8vo. c, 498 and 88 pp. (15*s.*)

The Law of Licensing in England. Second Edition. By JOHN BRUCE WILLIAMSON. London: W. Clowes & Sons, Lim. 1902. 8vo. xlii and 781 pp. (18*s.*)

Supplement to Montgomery's Licensing Laws, containing the Intoxicating Liquors (Sale to Children) Act, 1901, *the Licensing Act*, 1902. By R. M. MONTGOMERY. London: Sweet & Maxwell, Lim. 1902. 8vo. xvi and 116 pp. (3*s.* 6*d.* net.)

The Student's Guide to Procedure in the King's Bench Division and to Evidence. By JOHN INDERMAUR and CHARLES THWAITES. Third Edition by CHARLES THWAITES. London: Geo. Barber. 1902. 8vo. 140 pp. (5*s.*)

The Statutes of the Commonwealth of Australia (of Practical Utility). Vol. I. 1901. With Index. Compiled by H. M. COCKSHOTT and S. ERNEST LAMB. Melbourne and Sydney: Law Book Co. of Australasia, Lim. 1902. La. 8vo. xxxviii and 310 pp.

A Catalogue of notable Middle Templars, with brief biographical notices. By JOHN HUTCHINSON. Printed for and at the expense of the Honourable Society of the Middle Temple. Sold by Butterworth & Co. 1902. 8vo. xiv and 284 pp. (10*s.* 6*d.* net.)

Taxation of Land Values: the case against. By CHRISTOPHER T. RHODES. Second Edition. London: Jordan & Sons, Lim. 1901. 8vo. v and 176 pp. (2*s.* 6*d.* net.)

The Revised Reports. Edited by SIR F. POLLOCK, assisted by O. A. SAUNDERS and ARTHUR B. CANE. Vol. LVII. 1841–1843. (9 Cl. & Fin.; 1 Younge & Coll. C. C.; 2 Q. B.; 2 G. & D.). London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1902. La. 8vo. xii and 876 pp. (25*s.*)

Der Eid: ein Beitrag zu seiner Geschichte. Von RUDOLF HIRZEL. Leipzig: Hirzel. London: Williams & Norgate. 1902. 8vo. 225 pp.

Every Man's Own Lawyer. Fortieth Edition, carefully revised, including legislation of 1902. London: Crosby, Lockwood & Son. 1903. 8vo. xvi and 790 pp. (6*s.* 8*d.*)

Comparative Principles of the Laws of England and Scotland: Courts and Procedure. By J. W. BRODIE-INNES. Edinburgh: Wm. Green & Sons. London: Stevens & Sons, Lim. 1903. La. 8vo. cx and 868 pp.

A Treatise on the Law of Contracts. By C. G. ADDISON. Tenth Edition. Edited by A. P. PERCIVAL KEEP and WILLIAM E. GORDON. London: Stevens & Sons, Lim. 1903. La. 8vo. cxxiv, 1245 and 107 pp. (42*s.*) —Review will follow.

The Law of Employers' Liability and Workmen's Compensation. Third Edition. By THOMAS BEVEN. London: Waterlow Bros. & Layton, Lim. 1902. 8vo. lxv, 570 and lviii pp.

The Taking of Evidence on Commission. By W. E. HUME-WILLIAMS and A. ROMER MACKLIN. Second Edition. London: Stevens & Sons, Lim. 1903. 8vo. xx and 338 pp. (12*s.* 6*d.*)

The Modern Lawyer's Office; being suggestions for improvements in the organization of Law Offices. By a Solicitor. London: Stevens & Sons, Lim. 1902. 8vo. vii and 107 pp. (6*s.*)

The Yearly County Court Practice for 1903. By G. PITT-LEWIS, K.C., SIR C. ARNOLD WHITE and ARCHIBALD READ. With a chapter on Costs and Precedents of Costs by MORTEN TURNER. Two vols. Vol. I, General Jurisdiction and Jurisdiction in Admiralty. Vol. II, Enactments conferring Special Jurisdiction upon the County Courts. London: Butterworth & Co.; Shaw & Sons. 1903. 8vo. Vol. I, xcvii and 1004 pp. Vol. II, xxix and 584 pp. (25*s.*)

The Lawyer's Remembrancer and Pocket Book, 1903. By ARTHUR POWELL, K.C. London: Butterworth & Co. 12mo. iv and 150 pp. (2*s.* 6*d.* net.)

Digest XVII. 2. *Pro Socio.* Edited with translation and notes by C. H. MONRO. Cambridge: at the University Press. 1902. 8vo. vi and 84 pp.

Carson's Real Property Statutes. Being a tenth edition of Shelford's Real Property Statutes. By THOMAS H. CARSON, K.C. and HAROLD M. BOMPAS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1902. La. 8vo. cvi and 928 pp. (35*s.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE

LAW QUARTERLY REVIEW.

No. LXXIV. April, 1903.

NOTES.

The Sale of Goods Act, 1893.

I.

THE second section of the Sale of Goods Act, 1893, is as follows: 'Capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property, provided that, where necessaries are sold and delivered to an infant or minor or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.'

In order to ascertain the effect of this section and the liability of an infant for goods sold to him, it must be remembered that, by the Infants Relief Act, 1874, all contracts entered into by infants for goods supplied or to be supplied, other than contracts for necessaries, are absolutely void, and not merely voidable as at common law, and further that at common law the infant was bound by his contract for necessaries. The result therefore of the legislation is that all contracts with an infant for the sale of goods are void, but that where necessaries are sold and delivered to him, he is liable to pay a reasonable price therefor. In short the infant is not liable at all *on* a contract for the sale of goods, but when the contract is for the sale of goods which are necessaries, and these are delivered to the infant, he is bound by statute *quasi ex contractu* to pay a reasonable price therefor.

As regards persons incompetent to contract by reason of mental incapacity or drunkenness, they are at common law liable, on their contracts, unless the party contracting with them was aware of their incapacity. This rule is not affected by the second section of the Sale of Goods Act. The result therefore is, that a contract for the sale of goods to such incapacitated persons is valid and binding,

unless the one party was aware of the incapacity of the other, and that even when the seller does know of the incapacity of the buyer, the latter is liable to the former in respect of such goods (being necessaries) as have been delivered to him. He is not liable *on* the contract, but he is liable *quasi ex contractu* to pay a reasonable price for the goods delivered.

II.

I propose briefly to direct attention to sections 39 and 41 of the Sale of Goods Act, 1893, because they seem to me to be somewhat inaccurately framed and to be apt to mislead.

When the property in goods which are the subject-matter of a contract of sale has not passed to the buyer, and still remains in the seller, the latter may do with them whatever he pleases; he may sell, pledge, consume, or destroy them without incurring any liability whatever to the buyer for so doing.

Although this proposition appears self-evident, it has not, I think, been always steadily borne in mind by text-writers or even by judges, and there has consequently arisen some confusion in the statement of the law relating to the rights and liabilities of unpaid sellers. It is, for instance, for this reason that although the case of *Valpy* v. *Oakeley*, 16 Q. B. 941 was rightly decided, the judgments in that case will, on careful examination, be found to be far from satisfactory or consistent.

It is, then, only when the property has passed to the buyer that the seller's power over the goods is limited, and it is only then that it can become necessary to define under what circumstances the unpaid seller may retain or resume possession of the goods or dispose of them.

Now section 41 of the Sale of Goods Act treats of the unpaid seller who is in possession of goods the property in which has passed to the buyer, and states the circumstances under which he is entitled to retain possession and withhold delivery of those goods.

Section 44 and the following sections relating to stoppage *in transitu* treat of the unpaid seller who is not in possession of the goods and who has parted with such possession in order to transmit the goods to the buyer, and they state the circumstances under which the seller is entitled to resume possession. Finally section 48 shows in what manner an unpaid seller who has a lien on the goods or who has stopped them *in transitu* may deal with them.

There seems therefore to be no necessity for the first subsection of section 39, which relates to the rights of the unpaid seller of goods, the property in which has passed to the buyer. It tends only to confuse the subject.

As regards the second subsection, it is as follows: 'Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage *in transitu* when the property has passed to the buyer.'

Now this enactment, relating as it does to goods the property in which has not passed to the buyer, cannot, for reasons already stated, be intended either to give the seller any power or to restrict his power over such goods. It has therefore no proper place in Part IV of the Act which is headed 'Rights of unpaid sellers *against the goods*.' The object of the subsection is evidently only to embody the law laid down in the well-known cases of *Valpy* v. *Oakeley*, 16 Q. B. 941, *Griffiths* v. *Perry*, 28 L. J. Q. B. 204, and *Ex parte Chalmers*, L. R. 8 Ch. 289.

Griffiths v. *Perry* is entirely founded on *Valpy* v. *Oakeley*, and although the judgments in the latter case are not perfectly satisfactory or logically consistent, the decision was undoubtedly right, and it is unnecessary to discuss the reasons given in those judgments since the whole law on this subject is settled by the admirable judgment of Mellish L. J. in *Ex parte Chalmers*. These cases show under what circumstances the unpaid seller may, without incurring any liability for breach of contract, abstain from making delivery under a contract of sale, when the buyer becomes insolvent, and they also show what is the measure of damages, if the seller has committed a breach of his contract and the buyer afterwards becomes insolvent. It is therefore, I submit, clear that the second subsection does not belong to Part IV of the Act which treats of the unpaid seller's right *against the goods*, but ought to be placed either in Part V which treats of *Actions for breach of the Contract*, or in Part III which treats of the Performance of the Contract.

ARTHUR COHEN.

After the observations of the Lord Chancellor, confessing himself the draftsman of the Companies Act, 1900, we must take it that the decision in *Hilder* v. *Dexter* [1902] A. C. 474, 71 L. J. P. C. 781—the option-underwriting-commission-case—represents the intentions of the framers of the Act; but that the point was not free from difficulty is plain from the Court of Appeal having twice taken a different and unanimous view of the language of the section. The controversy really centred in the word 'indirectly' in s. 8 (ii). 'Save as aforesaid no company shall apply any of its shares or capital money either directly or indirectly in payment of any commission discount or allowance to any person

in consideration of his subscribing or agreeing to subscribe either absolutely or conditionally for any shares in the company:' those are the words. What the company had done was to give every allottee an option to take up, within a year, for every £1 share subscribed, another share, at par. The shares rose to a premium of £2 17*s.* 6*d.* and the option holder exercised his option and cleared more than £13,000. The question was whether this was not applying the shares of the company 'indirectly' in payment of commission. The Court of Appeal held that it was; the Law Lords that it was not. No doubt it was not strictly a payment out of capital because the premium was problematical at the date of the bargain, but it resulted in a capital loss to the company of £13,000. The policy of the underwriting commission section was, while sanctioning such payment, to guard against abuse by letting intending subscribers know exactly from the prospectus and articles what is being paid in the way of commission. This is impossible when the commission takes the form of a speculative option.

The judgment of the Court of Appeal in *Read* v. *Friendly Society of Operative Stonemasons* [1902] 2 K. B. 732, 71 L. J. K. B. 994, C. A. and the judgment of Bigham J. in the *Glamorgan Coal Co.* v. *South Wales Miners' Federation* [1903] 1 K. B. 118, 71 L. J. K. B. 1001 (noted p. 2, above), are in no way inconsistent with one another, though they may at first sight present an appearance of inconsistency.

Read's case determines that if *X*, for the promotion of his own interest, or for the sake of damaging *A*, 'induces' *N*, in the strict sense of the word 'induce,' i. e. puts pressure upon *N* by way either of reward or of punishment, or of threat of punishment, to break *N*'s contract with *A*, *X* comes within the principle of *Lumley* v. *Gye*, 2 E. & B. 216, *Bowen* v. *Hall*, 6 Q. B. Div. 333, *Quinn* v. *Leathem* [1901] A. C. 495, and being guilty of a wrong to *A*, is liable to an action by *A* for any damage *A* may have suffered by *X*'s wrongful act, but that the wrongfulness of the act is taken away if *X* has any lawful justification for what he has done,

The *Glamorgan Coal Co.* case, on the other hand, establishes, as far as the authority of that case can do so, that, if *X* having no interest in the matter, and not intending to injure *A*, merely advises *N* to break and thereby in a certain sense induces him to break his contract with *A*, *X* does not come within the principle of the line of cases which begin with *Lumley* v. *Gye*, and having done no wrong to *A*, is not liable to an action by *A*. In other words, disinterested advice is privileged.

So far in fact from there being any necessary inconsistency

between *Read's* case and the *Glamorgan Coal Co.* case, the doctrine established by the latter is really the complement of the doctrine established by the former, and various difficulties suggested by *Lumley* v. *Gye* and the cases which have followed it are removed by laying emphasis upon the difference between the interested inducement by which *X* leads *N* to break a contract with *A*, and the disinterested advice given by *X* to *N*, which leads to the consequence that *N* breaks a contract with *A*, but does not otherwise induce him to do so. It was rightly held that an action lay against Gye for inducing Miss Wagner to break her contract with Lumley; but no one supposes that, if Miss Wagner had consulted her solicitor, John Jones, and he advised her that she would gain more by breaking than by keeping her contract with Lumley, Lumley would have had a right of action against Jones. Interested inducement to commit a breach of contract is one thing, fair advice, which leads another to break a contract, is another and a quite different thing. Let it too be noted that not only is there no real inconsistency between *Read's* case and the *Glamorgan Coal Co.* case, but that they both rest upon one and the same principle, namely, that if *X* causes damage to *A*, he is prima facie guilty of a tort, though he may escape liability for a tort if he can show legal justification for an act which, in the absence of such justification, would be wrongful (see 18 L. Q. R. p. 1).

But, though there is no essential difference of principle between *Read's* case and the *Glamorgan Coal Co.'s* case, yet the judgment of Bigham J. in the latter case is open to criticisms of which more may be heard in the Court of Appeal.

(1) The use in the judgment of the ambiguous term 'malice' produces, as it always does, confusion.

(2) The statement, or suggestion, that there was no intention on the part of the Miners' Federation to injure the masters, but only an intention to promote the interest of the workmen, appears to be, even if true, irrelevant. There certainly was an intention to interfere with the legal rights of, i. e. do an injury to, the masters by leading the workmen to break their contracts with the masters.

(3) Was the position of the Miners' Federation, it may well be asked, merely the position of disinterested advisers? To this inquiry it would be difficult to give an affirmative answer, but a negative answer would shake the whole basis of Mr. Justice Bigham's judgment.

The two cases taken together, assuming them to be ultimately both upheld, suggest that the exceptions to the rule of liability laid

down in *Lumley* v. *Gye* are analogous and parallel to the immunity of privileged communications in the law of defamation. But this can at present be put forward only as a speculative opinion.

One of the most important of the cases recorded in the Law Reports of this quarter is assuredly *Howden* v. *Yorkshire Miners' Association* [1903] 1 K. B. 308, 72 L. J. K. B. 176, C. A. It establishes, as far as the judgment of the Court of Appeal goes, a broad principle which vitally concerns all trade unionists, namely that an action is maintainable by the individual member of a trade union for an injunction to restrain a misapplication of the society's funds for purposes not sanctioned by its rules, or rather in distinct contravention of these rules, and that such an action is not prohibited under the Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4, sub-s. 3 (*b*), inasmuch as it is not a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the union to provide benefits to members. The Court of Appeal in effect follow the judgment of Fry J. in *Wolfe* v. *Matthews*, 21 Ch. D. 194, and hold that it is in no way inconsistent with *Rigby* v. *Connol*, 14 Ch. D. 482, or with *Chamberlain's Wharf, Ltd.* v. *Smith* [1900] 2 Ch. 605, C. A. That this decision is in conformity with every one's notion of common fairness is obvious; it cannot be just that a trade union or any other society, such for instance as an employers' federation, should be allowed to commit breaches of trust, and a careful consideration of the judgments pronounced by the members of the Court of Appeal will convince most persons that, though *Howden* v. *Yorkshire Miners' Association* undoubtedly raises a question of some nicety, the interpretation put by the C. A. on the Trade Union Act, 1871, s. 4, sub-s. 3 (*b*) is in conformity with the letter as well as with the spirit of the statute.

It is common knowledge that some trade unionists, or certainly some of their parliamentary representatives, are indignant at the various judgments which within the last year or two have proved that under the existing law trade unions, just because they are lawful societies, are not free from the legal liabilities which fall upon other associations. They have rights, but they have not privileges. The irritation of any man, whether an employer or a workman, at an interpretation of the law which imposes upon him liabilities common to other persons, from which he thought he was exempt, is natural, but it is not wise; and we venture upon a caution, which is, probably, in the case of many artisans quite unnecessary, against the folly of claiming exemptions from liability

condemned by common sense and common fairness. It is quite arguable that the time has come for giving to trade unions the full rights (and duties) of corporations; it is not arguable that a trade union should be allowed exemptions from legal liability which are not conceded to any individual or to any other body of individuals.

Clarke v. *Army & Navy Co-operative Society* [1903] 1 K. B. 155, 72 L. J. K. B. 153, C. A., is an interesting case. The Court of Appeal has confirmed, and put on broader grounds, the rule of caution imposed on dealers in dangerous or possibly dangerous wares by a decision of the Court of Exchequer given as long ago as 1869, in which the reasoning of the Court is not altogether satisfactory (*George* v. *Skivington*, L. R. 5 Ex. 1, 38 L. J. Ex. 8). Here the defendant's company sold tins of a disinfecting powder, seemingly of an irritant nature, which for some unexplained reason was apt to fly in the faces of people who opened the tins without special care. The manager had been told of such accidents before the sale to the plaintiff, who knew nothing of any such risk, and was injured by a 'sort of explosion' in opening the tin. In fact the manager had given instructions that no more of these tins were to be sold without warning, but the salesman disregarded them. The sale was on terms expressly excluding any warranty, and the Court did not decide whether this exclusion extended to the implied condition (Sale of Goods Act, s. 14) of goods being reasonably fit for the purpose for which they are supplied. Apart from any such question, the Court held that (in the words of Romer L.J.) 'there is a duty cast upon a vendor, who knows of the dangerous character of goods which he is supplying, and who knows that the purchaser is not, or may not be, aware of it, not to supply the goods without giving warning to the purchaser of that danger.' It would seem, with great respect for some incidental expressions in the judgment of the M. R., that the duty is altogether independent of the contract of sale and arises merely from the delivery of the thing, by a person who knows it to be dangerous, to one who does not know and cannot reasonably be expected to know the danger of using it in the ordinary course. If so, there appears to be no reason why the duty should not extend to the protection of a sub-purchaser from an innocent purchaser, as it was held to do, now half a century ago, in New York: *Thomas* v. *Winchester*, 6 N. Y. 397. It is extraordinary that no reference was made either in the principal case or in *George* v. *Skivington* to *Dixon* v. *Bell*, 5 M. & S. 198, 17 R. R. 308, the strongest English case of this class, which has never yet been fully considered by a Court of Appeal. If it is good law, the facts

that it was decided in 1816, and that the instrument of accidental mischief was a flint-lock gun, do not make it obsolete.

X and *Y* are a firm of grain merchants; it is part of their business to obtain by legitimate means information with regard to contracts made with brewers or buyers of grains by competing firms. *Y* obtains such information by bribing a clerk of *A*'s, a competitor in business, and thus inducing the clerk to break his contract of service by dishonestly communicating to *X* knowledge obtained in the course of the clerk's employment. The whole of the business is in fact left to the management of *Y*. Both *X* and *Y* are responsible in damages to *A* for the conduct of *Y*. This is the effect of *Hamlyn* v. *Houston & Co.* [1903] 1 K. B. 81, 72 L. J. K. B. 72, C. A. following in substance, though very few authorities were cited, a long line of decisions on the responsibility of the firm for wrongful acts of a partner about the partnership affairs. The case may seem, as regards *X*, who may have known nothing of *Y*'s dishonourable conduct, to be a hard one, but the principle on which it is decided extends to every kind of agency and is well settled. A principal is liable for the fraud or other misconduct of his agent if it lies within the scope of his employment, or, in other words, within the kind of business in which he is employed, including manifest trespasses such as false imprisonment, and even assault, provided he is not acting for some private interest or 'frolic of his own.' A matter simple in itself is often confused by the loose use of the word authority. In one sense an agent is hardly ever authorized or instructed to do an unlawful act; what he is instructed to do is to carry on a particular business; but the principal, in a case such as that under consideration the fellow partner, is responsible not only for the acts which the agent is authorized or instructed to do, but also for a very different thing, the wrongful acts which an agent is not instructed to do, but which are in reality done in the course of the authorized line of business. As regards liability, at any rate for a tort, the responsibility of a principal for an agent's wrongful acts depends not upon the agent's actual authority but upon the scope of his employment.

In *Aflalo* v. *Lawrence & Bullen* [1903] 1 Ch. 318, 72 L. J. Ch. 107, the Court of Appeal had to construe one of the clumsiest sections of one of the clumsiest Acts of Parliament under which we suffer. The Copyright Act of 1842 is one of the latest examples of the bad old style of parliamentary drafting, and it would be hard to find a worse one. Section 18, dealing with copyright in con-

tributions to periodical, serial and encyclopaedic works, is peculiarly fitted to be taken as a warning by the young draftsman. Difference of opinion, therefore, is not surprising. Still Lord Justice Vaughan Williams's elaborate dissent does not shake our belief that in the present case Joyce J. and Romer and Stirling L. JJ. were right. The point of law decided is that, when a writer is employed to contribute to any such work as above mentioned, it is a question of fact in each case whether the employment is 'on the terms that the copyright . . shall belong to' the person described in the Act as 'such proprietor, projector, publisher, or conductor,' and the mere employment, without further express agreement or special circumstances, does not raise any legal inference or presumption that the contributor intended to part with the copyright. The section makes an exception to the ordinary rights of an author if and when certain conditions exist, and it is for the proprietor or publisher who sets up a claim against the author to show that they all did exist in the particular case. 'The Legislature has expressly said that, in addition to employment and payment, it must be established that the employment was on the terms that the copyright should belong to the proprietor. It cannot be, therefore, that those terms must of necessity legally be implied from the facts of employment and payment' (Romer L. J.). In order to take this view it was necessary for the Court to disagree with some of the language used nearly half a century ago in *Sweet* v. *Benning*, 16 C. B. 459, a decision which may or may not have been correct on the facts. The practical moral is that the parties to such contracts ought to make the terms clear from the first; but if not, contributors ought to be very careful as to the form of any receipts they sign.

Morel Bros. & Co. v. *Earl of Westmoreland and Wife* [1903] 1 K. B. 64, 72 L. J. K. B. 66, C. A. illustrates the complexity added to the law as to the liability of a husband for his wife's debts by the possibility of a creditor, when supplying goods for a man's household, giving credit at once to the husband and to the wife. The claim of Morel Bros. & Co. was originally a claim for payment for goods supplied against both the Earl and the Countess of Westmoreland. Ultimately judgment was given against the Earl. On appeal by the Earl judgment was entered in his favour on grounds which, if the view taken by the Court of the facts found by the jury be correct, would appear to be clearly sound. They may, it is submitted, be thus summed up.

(1) There was no adequate evidence whatever of joint liability.

(2) The plaintiffs, having attempted to establish a joint liability against the defendants, could not, when they failed in this, be

allowed to turn round and charge against the Earl a separate liability, as contracting through his wife as an agent, which was absolutely inconsistent with his wife's joint liability.

It is agreed on all hands that a husband's liability for debts incurred by his wife, unless when she is living lawfully apart from him, depends upon the law governing the relation, in matter of contract, of principal and agent. The husband is bound by the contracts of his wife if he has either in so many words or tacitly authorized, i. e., in popular language, instructed her to make them, or if he has *held her out* to a third party as authorized to make them. Why then, since all this is clear, are there constant questions in which the Courts take one view and the public are apt to take another as to the liability of the husband for debts incurred by the wife? It is worth while to state what are the real answers to this question.

(1) There is an essential difference of opinion between the judges and the public, especially the public of tradesmen, as to what constitutes 'holding out.'

The Courts clearly hold that the mere fact of two persons living together as man and wife in the ordinary way does not of itself hold out the wife to a tradesman as authorized to incur debts on the husband's behalf for the ordinary household expenses (*Jolly* v. *Rees* (1864) 15 C. B. (N. S.) 628; *Debenham* v. *Mellon* (1880) 6 App. Cas. 24; *Morel Bros. & Co.* v. *Earl of Westmoreland and Wife* [1903] 1 K. B. 64, 72 L. J. K. B. 66, C. A.).

Tradesmen as distinctly suppose that the husband does under the circumstances mentioned hold out the wife as authorized to contract such debts on his behalf. The difference is vital, because upon it depends the effect of a denial or a revocation of authority by the husband unknown to the tradesman. Such denial or revocation, in the view of the Courts, frees him from liability (*Jolly* v. *Rees*), but in the opinion of tradesmen it does not. Let it be noted that in *Jolly* v. *Rees*, Byles J., a judge thoroughly acquainted with business, shared the opinion of men of business. The law is now well settled, but it is possible to regret that the judgment in *Jolly* v. *Rees* was followed in later cases.

(2) There is apt to be a confusion in the mind of ordinary men between the right of a wife to bind her husband for necessaries supplied to her when lawfully living apart from him, which is really a right not depending at all upon contract, and her right to bind him as his agent when living with him.

(3) The whole matter is now complicated by the possibility that any married woman may possess property of her own, and the

further possibility that a prudent tradesman may follow a course which may in a short time become customary, that is supply goods for the family upon the joint credit of the husband and wife.

Rules of practice contain and establish principles of jurisdiction. This truism, the full bearing of which is not always recognized, is admirably illustrated by the *Duc d'Aumale* [1903] P. 18, 72 L. J. P. 11, C. A.

The case merely decides that under R. S. C., Order XI, r. 1 (g) a plaintiff, who has brought an action against a defendant who is in England, may issue a concurrent writ and serve notice thereof against other defendants, French citizens who are out of England.

This seems a merely technical matter, but it shows that under the Order in question, as now judicially interpreted, the High Court has immensely extended its extra-territorial jurisdiction. A foreigner, who is not in England and who has never been in England, may now almost invariably be made co-defendant in an action wherever one of the parties is in England, and the action is properly brought against the defendant in England. Let the student note that in the case of co-defendants the common law principle that the Courts have no jurisdiction over any person who cannot be served in England with a writ is all but annulled, and this whatever be the nature of the action.

For a solicitor to keep a gift from his client needs an almost Machiavellian astuteness, as *Wright* v. *Carter* [1903] 1 Ch. 27, 72 L. J. Ch. 138, C. A. shows. It is not merely that the Court starts with a presumption all but irrebuttable of undue influence on the solicitor donee's part so long as the relation of solicitor and client is subsisting, but even after the relation has terminated it recognizes that the influence may remain, and, if it does, no formal interposition of a separate solicitor will make the gift good. The policy of English law is to secure the most complete confidence between client and solicitor. It is this policy which gives privilege and protection to professional communications passing between the two, and it is this same policy—not merely the quasi-fiduciary relationship or moral ascendancy as in the case of guardian and ward, doctor and patient, lady superior and novice—which is at the root of the jealousy with which the Court regards gifts by clients to their solicitors. Destroy disinterestedness on the solicitor's part (saving his legitimate remuneration) and you poison the confidential relation—sap the foundations of that implicit reliance which a client ought to place on his legal adviser; it is impossible for the client to be sure that the advice is not tainted by some self-regarding

motive. The practical result is that an unimpeachable sale from client to solicitor is difficult to accomplish, but possible; an unimpeachable gift all but impossible.

The Legislature has in s. 8 of the Companies Act, 1900, sanctioned the payment of underwriting commission, but it has done so only on certain well-defined conditions: the company must be offering its shares or debentures to the public, and the prospectus must state the 'amount or rate per cent.' of commission and the articles authorize it. What was sought to be done in *Booth* v. *New Afrikander Gold Mining Co.* ([1903] 1 Ch. 72 L. J. Ch. 125, C. A.) was to use the statutory power of paying underwriting commission for the purposes of a reconstruction. A gold mining company wants more capital—all its own is paid up: so it resorts to a not uncommon device of reconstructing by selling the business to a new company for shares in the new company to be allotted to the shareholders in the old company with 12*s.* credited as paid up and 8*s.* therefore at call. But to make such a scheme successful it is essential that the shareholders of the old company should come in and take up the shares in the new, and sanguine as is the shareholder's temperament you cannot always rely on his not 'jibbing.' So the New Afrikander Company met the difficulty by getting the capital of the new company underwritten, and for this purpose the underwriters posed as an intermediary company which was to buy from the old company and sell to the new, and was to take the profit on the resale—some £12,000—as commission for the underwriting risk. It was ingenious, and there was nothing wrong about it if the law allowed it, but did the law allow it? The Court of Appeal held it did not. By no artifice of construction could it be said that the new company was offering its shares 'to the public for subscription': it was equally impossible to say that the lump sum of £12,000 was a 'rate per cent.' Possibly, as Stirling L. J. suggested, the plan might be altered so as to be brought within the section, but as it stood it was *ultra vires*. There seems no reason (except that the Legislature has said so) why underwriting commission should be confined to an offer of shares to the public. Public caprice is no doubt the most important contingency that promoters have to guard against, but it is not the only one.

Du Pasquier v. *Cadbury, Jones & Co.* [1903] 1 K. B. 104, 72 L. J. K. B. 78, C. A. has an interest of a peculiar kind; it illustrates for students the constantly forgotten fact that rules of pleading which are looked upon as purely artificial constantly turned upon real if subtle distinctions. The whole case depends upon deter-

mining the distinction between an action founded on tort and an action founded on contract, and further on deciding whether an action of detinue in which a plaintiff recovers the thing claimed in specie is an action founded on tort within the meaning of the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116. There would seem to be no doubt that the Court of Appeal came to the right conclusion, that the section did not apply and that the plaintiff was entitled to costs on the High Court scale. Historically, as is now well known, detinue is neither an action in tort nor an action in contract, but a writ of right for chattels.

The Life Assurance Companies Act, 1896, allowing companies to pay policy moneys into Court, where in the opinion of the board of directors no sufficient discharge can otherwise be obtained, has been a great boon to the insurance offices, but there are two sides to everything, and the convenience to the offices presents itself in quite a different light to the people with claims. It means to the claimant the cost of a petition or summons to the Court to get the money out, and in the next place the necessity of proving his title strictly which involves more expense and which very likely is just what he cannot do. That the power may be used oppressively is recognized by O. 54 (c) of the Rules of Court providing for the company paying the costs where it has acted unreasonably in paying the money into Court. In *Harrison* v. *Alliance Assurance Co.* [1903] 1 K. B. 184, 72 L. J. K. B. 115, C. A. the difficulty was caused by the policy having been lost—a not uncommon occurrence. The policy holder had, however, notified the loss to the company and had gone on paying the premiums, and the company accepting them for twenty years, and no notice of any assignment had been registered. Under the circumstances it seemed to the claimant vexatious conduct on the part of the company to put him to so much trouble for so slight a risk. However, the Court of Appeal held that the company was acting within its rights under the Act, and left the claimant to his problematic remedy of getting his costs out of the company. Why in such cases should not the company agree with the claimant to cover the risk by an insurance? The cost of doing so would be much less than of paying into and out of Court.

The policy of our law as regards the bankrupt has been to take all his available property, distribute it as far as it will go among his creditors, and then let him start again a free man with the chance of becoming once more a self-supporting and useful citizen; but a bankrupt who remains undischarged has not earned this privilege of emancipation from his liabilities; what he acquires he acquires

for his creditors, and the trustee may intervene and claim it: but he is not to be made the mere bond-slave of his creditors. Extinguish hope, destroy the incentive of self-interest, and you snap the mainspring of industry; and the law recognizing this makes an exception in favour of a bankrupt's personal earnings. This principle is now well recognized and the decision in *Bailey* v. *Thurston and Co.* ([1902] 2 K. B. 397, 71 L. J. K. B. 800, affirmed [1903] 1 K.B. 137)—though it is a new point, and Phillimore J. seems to have had some doubts in deciding it—is really only a corollary from it. If an undischarged bankrupt is to have the benefit of his personal earnings he must have the means of enforcing his rights; and when an action for damages for wrongful dismissal is analysed it merely means an action for the loss of future earnings under the contract of employment, subject to certain equitable deductions as for payment of such earnings in a lump sum and of what the discharged servant has or might have earned. The contract of employment in *Bailey* v. *Thurston and Co.* was prior to the bankruptcy, but the cause of action did not arise till after the bankruptcy, and, when it did arise, was a personal right of action.

A policy of marine insurance contains this clause: 'General average payable according to foreign statement if so made up.' *A* the shipowner charters the ship thus insured to *N*. By terms of the charter-party it is provided that the ship may carry a deck-load of timber, and that 'in case of average . . . jettison of deck cargo for the common safety shall be allowable as general average.' The ship during the currency of the policy sails for Antwerp, and during the voyage in consequence of perils insured against jettisons part of the deck cargo. On arrival at Antwerp an average statement is made, and the average adjuster includes the jettison of deck cargo in general average. By Belgian law, apart from the special provisions of the charter-party, the jettison of deck cargo would not be the subject of general average, but Belgian law recognizes the express provisions of the charter-party. In an action by *A* against the underwriters for an indemnity in respect of the contribution he had to make for general average the defence is raised that the average adjustment was not made in accordance with the law of Belgium. *De Hart* v. *Compania Anonima de Seguros* '*Aurora*' [1903] 1 K. B. 109, 72 L. J. K. B. 64. The King's Bench Division have determined that the adjustment was made in accordance with the law of Belgium, i.e. in accordance with any rules which, whether part of the ordinary law of Belgium or not, Belgian Courts recognize and enforce. This decision is of importance as an illustration of the meaning which according to English Courts ought

to be given to the term 'law of a country,' a point as to which there is in reality a difference of opinion between writers on private international law. With our Courts at any rate it always means any rule which the Courts of a given country apply to the solution of a particular case (see Dicey, Conflict of Laws, p. 75).

A company's memorandum of association now nearly always contains a power to sell the undertaking as a going concern for cash or shares, and such a power is found a very convenient one. It enables a syndicate to sell speculative property to a company which it has formed to buy it: it also enables a working company to reconstruct without the detriment to its credit involved in a voluntary winding-up; and to reconstruct without conforming to the troublesome, if salutary provisions of s. 161 of the Companies Act, 1862. Whether the Legislature ever contemplated such an evasion of the statutory machinery of s. 161 may be doubted. Buckley J. owns he always had a difficulty in grasping the decision of Chitty J. in *Cotton* v. *Imperial &c. Agency Corporation* [1892] 3 Ch. 454 (which first sanctioned such a power of sale), his view being that the powers in the memorandum must be confined to the living objects of the company; but the true objection seems to be in the sale being for *shares* in another company: if it were for cash there would be nothing against it, but compelling a shareholder to accept shares in a new undertaking is a different matter, and this is why the Legislature was careful in s. 161 to enact provisions for a shareholder who objected to join the new concern being paid out. A sale under a power in the memorandum must however be by the company, not by its liquidator; for in the latter case it becomes a sale by a liquidator upon terms not justified by s. 161: *Doughty* v. *Lomagunda Reefs Limited* [1902] 2 Ch. 837, 71 L. J. Ch. 888.

Assignments of expectancies are regarded with suspicion in this country as well as in the United States, as means whereby spendthrift heirs may go on trafficking with an expected bounty—like Charles Surface on the 'little Nabob'—making it a fund to supply the wastes of dissipation and extravagance. In *In re Ellenborough, Towry-Law* v. *Burne*, 72 L. J. Ch. 218, however, there was nothing of this sort: nothing that was not meritorious. The lady for prudential reasons assigned her expectancy to trustees by way of voluntary settlement, but taking the lady's privilege she changed her mind before the expectancy—now become property in possession—had been transferred to the trustees, and then the question arose whether the trustees could coerce her into fulfilling her original design. Buckley J. held that they could not, and his

reasoning is unanswerable. The assignment of the expectancy passed nothing; it operated in equity only as an agreement to assign when the time came, and this agreement was *nudum pactum*, there was no consideration moving from trustees to support it. The point, by the way, was not raised whether on the principle of the old case of *Coggs* v. *Bernard* (which however was not really a case of contract at all) the confidence reposed in the trustees might not serve as a consideration to support the implied agreement to assign. In any case there is no ground for what is called in the last edition of White and Tudor's Leading Cases 'the better opinion' that *Meek* v. *Kettlewell* (1 Ha. 464) is overruled by *Kekewich* v. *Manning* (1 De G. M. & G. 176); and when we look at the rationale of the thing, why should not an intending voluntary settlor change his or her mind at any time before it is too late? It is not even like an incomplete gift where expectation may be disappointed. Every one is not a prodigal needing to be protected against himself.

Formalism, which the labours of Bentham and his disciples have more or less expelled from civil procedure, appears to be still potent in the realm of criminal procedure. This at least is a reflection likely to be suggested by such a case as *Smith* v. *Moody* [1903] 1 K. B. 56, 72 L. J. K. B. 43. Consider these plain facts. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39, sub-s. 1, enacts that in proceedings before Courts of summary jurisdiction 'the description of any offence in the words of the Act . . . creating the offence, or in similar words, shall be sufficient in law.' Smith is under the Conspiracy and Protection of Property Act, 1875, s. 7, charged with and before the Court of Quarter Sessions for the County of Durham, convicted of the offence that he 'with a view to compel' Moody 'to abstain from working for Messrs. J. B. & Partners, Limited, at F. Colliery, which he had a legal right to do, wrongfully and without legal authority did injure the property' of Moody. The words of the Act creating the offence, namely the Conspiracy and Protection of Property Act, 1875, s. 7, are precisely followed, yet the conviction is quashed by the King's Bench Division because it does not specify what property of Moody's had been injured. The decision, we doubt not, though Channell J. acquiesced in it with hesitation, is sound, i.e. is in accordance with precedent, but it is open to two criticisms. It runs directly against the obvious meaning of an Act of Parliament, the Summary Jurisdiction Act, 1879, s. 39, sub-s. 1. There is a difficulty in believing that in the administration of criminal law technical formalism is conducive to substantial justice. 'Trover for bottles, without naming how

many bottles, is ill: but for a pair of boots and spurs, without naming how many spurs, it is well enough; for it shall be intended of the spurs belonging to the boots, which is a pair.' (We quote fr. a memory, but are sure of the substance.) Such are no longer the principles of civil pleading; but in criminal jurisdiction it seems to be otherwise.

To sever an individual's personality—to 'part him from himself,' as Tennyson says—savours to the layman of quibbling or casuistry. To the moralist an obligation *in foro conscientiae* is not divisible, but to the lawyer familiar with the doctrine of *personae* no such difficulty presents itself. *A*, for example, being owner of Blackacre, grants *B* a lease of a house on the property and covenants for quiet enjoyment of the property by *B*. Then *A* acquires Whiteacre and builds on it in such a way as to make *B*'s chimney smoke—an undeniable interference with *B*'s quiet enjoyment. Says *B* to *A*, 'This is a breach of your covenant.' 'No!' returns *A*, 'I covenanted with you as owner of Blackacre, not of Whiteacre. As owner of Whiteacre I am a different person with an independent title, and am not answerable for a legitimate user of my Whiteacre property because it makes your chimney smoke'; and this view was upheld substantially by Byrne J. (*Davis* v. *Town Properties Insurance Corporation* [1902] 2 Ch. 635, 71 L. J. Ch. 900). It would constitute a very serious extension of liability under the covenant if it were to grow as the covenantor acquired fresh property. *Holloway Brothers* v. *Hill* ([1902] 2 Ch. 612, 71 L. J. Ch. 818), before the same judge, illustrates the other side. The question there was whether the word 'assigns' in a restrictive covenant bound a lessee of the covenantor, and Byrne J. held it did. Indeed a lessee with notice in such a case may be restrained though assigns are not mentioned at all.

King James I's description of a 'crowd of statutes crossing and cuffing one another' has lost nothing of its appositeness since his day: the state of our modern statute law may well make 'the judicious grieve.' Here, for instance, is a bishop taking steps under the Clergy Discipline Act, 1892, s. 30, to vacate the living of one of his clergy (*Sweet* v. *Bishop of Ely* [1902] 2 Ch. 508, 71 L. J. Ch. 771). The clergyman in question had been convicted of persistent cruelty to his wife, and an order had been made against him by the Justices in Petty Session for a judicial separation under the Summary Jurisdiction (Married Women) Act, 1895. Now under the Clergy Discipline Act, if (*d*) an order for judicial separation is made against a clergyman in a divorce or matrimonial cause, or (*e*) a separation order is made against a clergyman under the Matrimonial Causes

Act, 1878, the clergyman's preferment is to be declared vacant. The bishop was therefore bound to take steps to vacate the living if the case fell within one of the clauses, and he naturally believed that it did; indeed he was so advised, viz. that by force of the Interpretation Act, 1889, the reference to the Clergy Discipline Act, 1892, must be read as equivalent to a reference to the Summary Jurisdiction (Married Women) Act, 1895; but the Court was driven to the conclusion that neither clause of the section, construing it strictly as penal, fitted the case; so the delinquent clergyman won the day, and the bishop was mulcted in costs. But how can any one, clerical or lay, tread safely in such a legislative quagmire as these Married Women's Property Acts and Married Women's Summary Jurisdiction Acts?

Halbronn v. *International Horse Agency and Exchange, Ltd.* [1903] 1 K. B. 270, 72 L. J. K. B. 90, is a strange case in the fact that the circumstances giving rise to it are peculiar, but the principle on which it is decided appears to be clear enough and to be almost self-evident. *P*, the owner of a horse of the name of 'Pentecost,' instructs *A*, an auctioneer carrying on business at Paris, to advertise the horse for sale and sell it. *P* gives *A* a number of particulars with regard to the horse which are repeated in *A*'s advertisement. Every statement made by *P* and advertised by *A* is true. Owing however to the fact that a Frenchman, *N*, owns a horse also called 'Pentecost' the description causes damage to *N* by decreasing the value of *N*'s horse. *N* sues *A* in the French Court, and, on some ground which to an English critic is not very comprehensible, recovers damages. *A* brings an action against *P* for indemnity. It is held by Bruce J. that *A* has no right to recover compensation from *P*, since the damage suffered by *A* was due to the judgment of the French Court and was not caused by any wrongful act on the part of *P*. The only ground on which, as it appears, exception might possibly be taken to the judgment of Bruce J. is that the action against *P* was not an action for any wrong done by *P*, but depended upon the general right of an agent to be indemnified by his principal against any loss the agent suffers, even when there is no fault on his part, by carrying out the instructions of his principal. But most critics will incline to the conclusion that in the absence of the most distinct authority a judge would be rash to sanction so wide an extension of a principal's liability to indemnify an agent against loss indirectly caused by his carrying out the orders of his employer.

In that fine scene in *Guinevere* when the King takes farewell of his guilty Queen, not the least touching incident is where she hears

the King charge the nuns 'To guard and foster her for evermore.' It is part of Arthur's characteristic nobility of nature, but there are people to whom this tenderness for a guilty wife is unknown, as *Ashcroft* v. *Ashcroft* ([1902] P. 270, 71 L. J. P. 125, C. A.) shows, and who would leave her to destitution or starvation. Happily there is more humanity in our law, and the Court has jurisdiction under s. 32 of the Matrimonial Causes Act, 1857, to compel a husband, as a condition of making a decree of dissolution, to provide for the wife notwithstanding her misconduct and his own impeccability. There can be no grievance in a man with £750 a year paying a pound a week to a divorced wife in weak health, and incapable of earning a livelihood. Sufficient for such an one the privation of her children, and 'the world's cold scorn.'

The consequences of upsetting a person's will in a country like England, which allows such freedom of testamentary disposition, are so serious that the Court may well struggle to avoid such a result. The benevolent jurisdiction was, however, severely strained in *In the Goods of Peverett* [1902] P. 205, 71 L. J. P. 114. 'Is it a will at all?' was the question which Jeune P. had to ask himself about the documents propounded. The internal evidence went to show that it was, but there was no attestation clause, the alleged witnesses had signed above the testatrix's signature, and, both being dead, there was nobody to speak to the transaction. However, the Court saw its way, on the strength of *In re Puddephatt* (L. R. 2 P. & D. 97, 39 L. J. P. 84) and *Vinnicombe* v. *Butler* (3 Sw. & W. 580, 34 L. J. P. 18), to uphold the instrument. In the latter case Lord Penzance said that the Court ought, if possible, to act on the maxim 'Omnia praesumuntur rite acta esse.' *In re Peverett* goes, however, a step beyond *In re Puddephatt*, as in the latter case there was an attestation clause. It is to be hoped that indulgence by the Court may not lead to laxity on the part of testators.

Thomas v. *Pritchard* [1903] 1 K. B. 209, 72 L. J. K. B. 23, following *Moore* v. *Smith*, 1 E. & E. 597, in effect decides that the Crown may be bound by an Act in which the Crown is not expressly named, if from the nature of the enactment it may be reasonably inferred or implied that the enactment was intended by Parliament to bind the Crown. This conclusion is sensible enough, but raises the question whether the time has not come when the rule, that the Crown is not bound unless it be expressly or impliedly named, should be treated as obsolete. Such a rule of construction may have been proper in the time say of Edward VI, when there might really be an opposition between the personal interest of a king and the

interest of the subject. It is inappropriate and misguiding in the reign of Edward VII, when the king represents in all proceedings the interest of the nation.

A learned correspondent writes:—

'*X* on Monday contracts with *A* to serve him for a year from Tuesday. The contract is not a contract which is not to be performed within a year, under the Statute of Frauds, s. 4, or, in other words, it is a contract to be performed within a year. *Smith* v. *Gold Coast and Ashanti Explorers* [1903] 1 K. B. 285. In this instance, as in every case which limits the effect of the Statute of Frauds, s. 4, justice was done as between the parties, but rules of law which ought to be perfectly clear are complicated by the introduction of undue subtleties. In spite of the dicta in *Cawthorne* v. *Cordrey* (1863) 13 C. B. (N. S.) 406, and in *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123 it may be doubted whether the best way of construing a statute is not to give to every word of it its obvious and natural sense. If *X* had contracted on the Monday to serve *A* for a year from the Wednesday then the contract would admittedly have been within the terms of the Statute.' We agree that many provisions of the Statute of Frauds do much more harm than good, but we cannot share our correspondent's scruples in this case. A year must be reckoned from some day, and the only question here was from what day it should be reckoned.

Sir Robert Reid contributes an excellent address on international arbitration to the December number of the Juridical Review (Edinburgh). He is thoroughly clear and sound on the two points of difficulty which lay enthusiasts almost always overlook. Before you can have an effective arbitration you must first have a definite matter in difference, as distinguished from a point of honour or conflicting national ambitions, and agree upon the issue or issues to be determined, and then you must find an arbitrator or tribunal who will command the confidence of both sides. On the whole, however, Sir Robert Reid is hopeful, and we think rightly so. He states incidentally a truth which all lawyers know but few have the courage to proclaim. 'As a matter of fact the most technical persons of my acquaintance are laymen who dabble in law. No one is more troubled with the little things, and less regardful of the weightier matters.'

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

WAR *SUB MODO.*

HOW far the steps recently taken against Venezuela were politically expedient, or diplomatically correct, are questions which cannot yet be fully answered. It must, however, be confessed that those steps were, from the point of view of International Law, anomalous, and perhaps open to the censure pronounced by Kinglake, with reference to the events of 1853, upon acts 'which tend to throw down the great landmark between peace and war.'

I. It is trite knowledge that unfriendly pressure, and that of a very serious kind, may be brought to bear upon a state, without going to war with it. Such pressure is described by the general term 'Reprisals,' which, in the language of Bynkershoek, 'locum non habent nisi in pace.' Reprisals may be, and have been, exercised in many ways; e.g. by occupying territory belonging to the offending state, by impounding its customs, by seizing its ships, and by blockading its coasts. The advantages of a resort to such measures rather than to war are considerable, especially when the state employing them is unquestionably superior in strength to the state against which they are directed. The pressure need not go beyond what is absolutely necessary to secure the object in view, so can be graduated and localized; it does not, except incidentally, interfere with the trade of other nations (we hear nothing of 'Prize Courts,' 'Contraband,' or 'Visit and Search'); and friendly relations can be promptly and fully restored between the disputant powers without any treaty of peace. The nature of the blockade which may properly be exercised by way merely of reprisals, described, therefore, as a 'pacific blockade,' after giving rise to much discussion, is now fairly settled. This species of pressure, first heard of in 1827, was no doubt on several occasions so applied as to interrupt the commerce of powers taking no part in the quarrel; in a way which would only have been justified, had those powers been placed, by the existence of a state of war, in the position of 'Neutrals.' According to the view almost universally held in recent years, though grudgingly, if at all, admitted by some German authorities, a 'pacific blockade' can be enforced only against the flag of the offending power. This view, supported as it is by the action of the British Government in the matter of the Formosan blockade of 1884, and of the allied powers with reference to the blockade of the coasts of Greece in 1886, was

formally adopted by the Institute of International Law, at its Heidelberg meeting in 1887, in a resolution which runs as follows: 'L'établissement d'un blocus, en dehors de l'état de guerre, ne doit être considéré comme permis par le droit des gens que sous les conditions suivantes: 1. Les navires de pavillon étranger peuvent entrer librement malgré le blocus, &c. &c.'

In the *ultimatums* delivered by the allied powers, before proceeding to actively offensive measures against Venezuela, and in their public utterances while engaged in seizing the gunboats belonging to that State, or even in landing blue-jackets to enforce the release of their imprisoned fellow-countrymen, not a word was said which implied the existence of a state of war. The phraseology employed ('stronger measures,' 'such steps as may be necessary,' 'overt action,' 'putting pressure,' 'measures of coercion') was that which is appropriate and customary when nothing more far-reaching than reprisals is in contemplation. First, the gunboats were to be seized, 'until the British demands are complied with.' Should this not produce the desired effect, 'it would be necessary to decide what should be the next step.' A pacific blockade would have been a next step *eiusdem generis* with those which had preceded it; but, for reasons which have not been made public, an entirely new departure now took place, and language was used by members of the Government, both in this country and in Germany, which could only mean that war was imminent, if indeed it had not already commenced.

II. On December 20, 1902, occurred an unmistakable act of war. A blockade was proclaimed of the coasts of Venezuela, applicable to vessels of 'neutral' powers, as well as others. 'Neutrality' is, of course, the correlative of 'Belligerency.' The transition from reprisals to war was marked by no declaration, a formality which, though never strictly necessary, is often desirable; more especially so, when semi-hostile acts have previously occurred, having all the characteristics of reprisals only. Be this as it may, on December 20, Great Britain and Germany, one must suppose, were at war with Venezuela; although no notification to this effect appeared in the London Gazette, nor did any Power subsequently take the trouble to announce its neutrality. It is true that the Governor and Vice-Admiral of Trinidad, on December 22, issued a 'Gazette Extraordinary,' to the effect that, 'being satisfied thereof by information received by me, I do hereby proclaim that war has broken out between His Majesty and the United States of Venezuela.' The effect of this proclamation was, however, merely, under the Colonial Courts of Admiralty Act, 1890, and the Prize Courts Act, 1894, to call into activity the

dormant commission of the Supreme Court, as a Colonial Court of Admiralty, to act as a Court of Prize.

Thereafter not only were the usual rights of a blockading force exercised against neutral as well as enemy vessels, but enemy vessels were captured, as such, in large numbers. The Germans, indeed, seem to have made prize of fishing-boats, the capture of which, at any rate if they are engaged in the coast-fisheries, is, in modern practice, exceptional, and has even been declared by a recent judgment of the Supreme Court of the United States, in the case of the *Paquete Habana*, to be forbidden by modern International Law. But further than this, except by the not yet fully explained action of German vessels, in bombarding forts Solano and San Carlos, hostilities were not carried. The allies refrained from the exercise of the unlimited *licentia laedendi* incident to belligerency. Hostilities were confined to the sea; and in two other striking particulars the normal results of a state of war were absent. In the first place, on the cessation of hostilities, the ships, public and private, which had been captured were restored to the Venezuelan Government, and to their private owners, respectively. Secondly, the war was brought to a close, not, as might have been expected, by a treaty of peace between the belligerent powers, but by an exchange of protocols; and it is curious, after all that had happened, to read in the British protocol, as a reason for the, as one would suppose, very necessary provision for the renewal of treaties, a recital to the effect that '*it may be contended* that the establishment of a blockade of the Venezuelan ports by the British naval forces has, *ipso facto*, created a state of war between Great Britain and Venezuela, and that any Treaty existing between the two countries has been thereby abrogated.'

The acts of reprisal which took place in the early part of December last were spoken of in some quarters as acts of war. The true nature of the state of things by which, on the 20th of that month, they were superseded seems to be left by the protocol an open question. Let us call it a state of 'war *sub modo*.'

The object of the preceding remarks has been to point out the ambiguous character of the steps taken to obtain redress from Venezuela, and the undesirability, if it can be avoided, of obliterating the dividing line between peace and war. It is of course possible, nay probable, that the allies were influenced throughout by good diplomatic reasons in the course which they adopted.

T. E. Holland.

STUDIES IN CRIMINAL SENTENCING.

[THE International Congress of Comparative Law, which met in Paris in the Autumn of 1900, appointed a Commission to investigate the methods adopted by the Judiciary in various countries when awarding sentences for crime. The aim and composition of the Commission were defined in the following resolutions, which were passed at the closing sitting of the Congress:—

(1) Une commission scientifique internationale, se réunissant à Paris, est chargée de rechercher les idées directrices qui pourraient être recommandées aux juges dans la mesure des peines.

(2) Cette commission pourrait étendre ses travaux à l'étude des peines, considérées au point de vue législatif (non plus seulement au point de vue judiciaire), et considérées au point de vue de leur nature (non plus seulement au point de vue de leur durée).

(3) Comme moyen d'action, cette commission provoquerait dans les Congrès (internationaux ou nationaux) l'étude des propositions qui lui paraîtraient désirables.

(4) La commission se composera de l'auteur de la proposition, M. Crackanthorpe, d'un délégué de la Société de Législation Comparée, d'un délégué de la Société Générale des Prisons, d'un délégué de l'Union Internationale de Droit Pénal.

Each of the Associations mentioned in the fourth resolution nominated members of the Commission, the Société Générale des Prisons nominating two. The five Commissioners so appointed co-opted two others, making seven in all.

The first meeting of the Commission was held in Paris in May, 1901, when it was decided to communicate with the Judiciary, with the Bar, and with other experts in criminal administration with a view of ascertaining the extent (if any) to which sentences are, or should be, influenced by general conceptions of the object of punishment, or by matters bearing either on the offence itself or on the character of the individual committing it. To this end circulars were issued in English and French propounding four main questions, viz.:—

Question 1.—Does the judge, in fact, when awarding a sentence, act on any theory as to the object of punishment, such as retribution, expiation, example to others, reformation of the offender, or the like?

Question 2.—Does the judge, in fact, keep the same end in view in the case of all offences, or does he make a distinction between one offence and another?

Question 3.—When he makes a distinction between one offence and another, on what is the distinction based? On the character of the punishable act looked at from a moral standpoint? On the greater or less frequency of the crime in the district? On the greater or less risk to which it exposes the community, or on any, and what, other circumstances?

Question 4.—When he makes a distinction between one individual and another, does the distinction turn on the offender's antecedents as shown by his judicial record, or on his degree of intelligence and education, or on any other, and what, circumstance? Is the age or sex of the offender taken into account, and if so, to what extent? Is it desirable that any, and which, of the distinctions mentioned above should be made?

A large number of answers to these questions have been received in London and Paris. An interim Report on those received in London was prepared by Mr. Crackanthorpe, K.C., and published last November in the *Nineteenth Century and After*. A separate Report on the answers received in Paris will, we are informed, be published there shortly.

The subjoined communications reached London too late to be noticed in Mr. Crackanthorpe's Report, and are here printed *in extenso* with his permission. They throw light not only on the practice of sentencing which obtains in Egypt and Denmark, but also on the constitution of the tribunals which administer criminal law in those countries. Probably some of our readers will envy the two Copenhagen Judges their mastery of a tongue which is not their own.—Ed.]

I.

(By a Judge of the Native Egyptian Court of Appeal.)

BEFORE answering the questions in the circular, I ask leave to say a word about the field in which my experience of punishing has been gained, and about the general subject dealt with by the Commission.

The Egyptian Native Court of Appeal, of which I have been a member for six years, consists of twenty-two judges, ten of whom are Europeans and the rest Egyptians. For purposes of work it is divided into chambers of three judges, except in capital cases and cases 'in cassation,' when the number is five. Some time in the month of May the divisions (or chambers) are made up for the coming judicial year, and are assigned four to the Criminal and two to the Civil side. This arrangement remains in force for the whole of the judicial year, so that during that period a judge sits with

the same colleagues and does the same kind of work. He does not, as in England and elsewhere, sit sometimes in the Crown and sometimes in the Civil Court.

The number of cases tried is very large. In 1901 the average for each of the three divisions of 'Petit Criminel' (cases where the maximum penalty is fifteen years' penal servitude) was 680. This year the figures are even higher. It follows that in my four years on the criminal side I have taken part in passing about 2,000 sentences. The cases which come before these divisions range from homicide (other than murder) to petty breaches of urban regulations; but the great bulk of them are concerned with thefts of every degree of seriousness, and with acts of violence of all kinds, from common assault upwards. Forgeries are not uncommon.

The law administered is a code modelled upon the French Penal Code. It differs from its original in details, and almost always for the worse, being a hasty adaptation compiled with little regard to the circumstances of the country. A Commission is occupied with its revision.

The population to which this code applies is mainly agricultural, and, for the most part, extremely ignorant. The percentage of men able to read and write is very small; while the number of women who can do either is infinitesimal. Little or no stigma attaches to imprisonment or to punishment in general. Religious prepossessions or prejudices are strong and universally entertained; and they come to the surface in curiously unexpected places. But apart from this, public opinion in the sense understood in Europe does not exist. Society, the conscience of which is taken by some theorists as their starting-point, is represented by the injured person and his family, and in ninety-nine cases out of a hundred by nobody else. Among the Bedouin, of whom there are not a few, it was, and to a diminished extent still is, considered disgraceful to appeal to the Courts. The bulk of the people are divided in mind, and entertain with equal hospitality two apparently contradictory sentiments—an intense delight in legal proceedings, and a rooted suspicion of all government action. The first adds a gusto to the revenge which takes (only too often) the form of a lying accusation: the second manifests itself (among other ways) in an extreme disinclination to assist in the discovery or proof of crime. This must not be taken to mean that Egyptians shrink from giving evidence: on the contrary, to appear as a witness is one of the common offices of friendship.

Until very recently the prison system left everything to be desired. Those condemned to penal servitude were made to work

at the face of the stone in conditions of unnecessary rigour. Prisoners sentenced to 'détention' (which corresponds roughly to the 'réclusion' of French law) were set to work of a lighter kind. But the great bulk of the condemned—those undergoing simple imprisonment—were herded together in the prison yard without order or discrimination. They received their food and any comforts which they could afford from their friends outside: they were subject to little or no discipline, and spent the term of their punishment in almost unbroken idleness. These conditions have been happily modified. With reasonable exceptions, all prisoners are made to work, and order has taken the place of disorder. But while acknowledging the magnitude of the change, I am bound to say that it is only a step, though a very great one, towards a sound administration; and I cannot admit that our prisons are calculated to bring forth the fruits of repentance.

This being the state of the case, it is difficult to hold with conviction, still more to administer with consistency, any particular theory of punishment, or any particular amalgam of theories. The deterrent has no doubt many attractions. It seems to harmonize best with the intentions of the legislature as exemplified in the penalties of the code; it possesses the simplicity common to partial statements; and it lends itself to the illusion that you must succeed if only you are sufficiently severe. Yet as against it stands the fact that the number of recidivists is very large. How large I am unable to say, for complete and trustworthy statistics are things of yesterday: but in cases of theft and in certain large classes of assaults the proportion of prisoners who have served a previous term (and very often more than one) is extremely high. Where punishment has so little effect upon those who have experienced it, with what confidence can we speak of its action upon those to whom it is unknown? Especially when, as has been said, it carries with it little disgrace, and, except in the case of penal servitude, the physical discomfort entailed is slight.

The reformatory theory is so hedged about with difficulties that it would almost appear as if governments had tacitly agreed to ignore it in their dealings with adult criminals; while the provisions they make for juvenile offenders amount to little more than an admission that the theory may be held without extravagance. Egypt is no exception to the general rule. The machinery which this theory presupposes can hardly be said to exist.

There remains the theory of expiation. I confess that I find the greatest difficulty in attaching any clear meaning to this formidable word: nor have I ever met a reading of it which could serve as a basis for actual practice. The conception has left its mark upon

almost all penal systems; but it appears to me that its influence diminishes as the distinction between sins and crimes becomes clearer. This, however, is a question for the historian: what appears abundantly clear to the workaday mind is that the idea of expiation can be taken as a guide to action only when embodied in some religious or moral sanction universally accepted and held to with something of the tenacity of faith. There have been times and countries where these conditions were realized: it is not so with the Egypt of to-day. The Mahommedan religion, it is true, is not wanting in moral doctrines and precepts; but the divorce of religion from conduct is even more complete here than in Christian countries. Social feeling with regard to crime does not exist. Exceptionally a particularly heinous offence arouses general indignation, or curiosity is excited over the fate of a prominent criminal: but the rule is indifference.

I am sometimes tempted to think that we must be content to look upon punishment simply as a substitute for private war. People do their own justice far too often for me to suppose that they consider the alternative satisfactory: indeed it is sometimes ludicrously evident that a party has appealed to the law simply because he felt too weak to take the older and more congenial way. This view, like some others, has the merit of simplicity and the advantage of yielding at once a practical rule of conduct. But I fear it has too primitive an air, and I mention it only to illustrate the difficulty of forming any consistent doctrine which will apply to Egypt.

There is another circumstance which I cannot altogether pass over. The Courts as they exist at present are no spontaneous outcome of the national development: and their sentences are not (as, to some extent at least, they are in Europe) the expression of the general conscience. Whatever their utility, they are no organic part of the social body, but a strange thing imposed from without. Furthermore they have no popular element. In Egypt there are no juries. The final appeal of the prisoner is to a tribunal, half the members of which are divided from him by race, faith, and language: while those judges who are his own countrymen have received a foreign education, and administer a foreign law by the light of foreign ideas and foreign precedents. In this respect, as in others, the situation is abnormal.

Of course it may be said that all this does not and should not prevent a judge from holding his own theory of punishment and acting upon it. The observation is only partly justified. It overlooks the fact that a judge, no less than a general or a tailor, labours in a practical calling. He works in a material which he is powerless

to alter with tools which are none of his choosing. And his object is not to illustrate a theory or a wilderness of theories, but to abate crime in a particular community which will be different in many important respects from any and every other community. In his study he may aspire to share with the philosopher the freedom of the pure reason: it is otherwise in the court-room. Here he must take the crime and the criminal, the law and the public, as he finds them: and in the problem of adapting means to ends the determining elements are just those over which he has no control.

These are some of the difficulties which meet me and, I suppose, every other practitioner in the round of daily work. I mention them not for the sake of tilting at theories which wiser heads have thought out, but to justify or at least excuse the confession of faith which I shall shortly make. And here I leave the subject to return to it from a slightly changed point of vantage after glancing for a moment at the preamble of the circular [1].

It seems there to be suggested that judicial aberration is more common in England than elsewhere, because a wider discretion is allowed to English judges than to those of other nations. It is incontestable that, if penalties were fixed and judges had no discretion at all, the anomalies observed upon would disappear and others take their place. But having made this concession I must state my conviction that judicial aberrations have little to do with the greater or less degree of liberty which particular systems of law allow to the Courts. I believe, on the contrary, that the cause of them may almost always be traced to the men who administer the law and not to the law which is administered. Here are some of the penalties of the French and Egyptian Codes with the degrees of latitude conceded to the courts.

FRENCH PENAL CODE.

	Maximum.	Minimum.
Art. 19. 'Travaux forcés à temps' .	20 years	5 years
Art. 21. 'Réclusion'	10 years	5 years
Art. 40. 'Emprisonnement' . .	5 years	6 days.

Art. 463 gives the rules by which penalties may be reduced

[1] The preamble referred to was in these words:—'In certain countries, for instance in England, the law prescribes a maximum punishment for each offence, but no minimum. The sentence is, in such cases, left almost wholly to the discretion of the judge, and this leads to striking anomalies. Similar anomalies exist, in a minor degree, in those countries where both a minimum and a maximum punishment are prescribed.'

when extenuating circumstances are 'found.' Taking it in connexion with those given above we arrive at these results:

(1) 'Travaux forcés à temps' may be reduced
  (α) to 'réclusion,'
  (β) to imprisonment with a minimum of 2 years.

Latitude permitted
  From 20 years' 'travaux forcés' to 2 years' imprisonment.

(2) 'Réclusion' may be reduced
  to imprisonment with a minimum of 1 year.

Latitude allowed
  From 10 years' 'réclusion' to 1 year's imprisonment.

(3) Imprisonment may be reduced to 'police punishment,' i.e. to
  (i) imprisonment of 1 to 5 days,
  (ii) fine from 1 to 15 francs.

Latitude admitted
  From 5 years' imprisonment to a fine of 10*d.*

EGYPTIAN PENAL CODE.

	Maximum.	Minimum.
'Travaux forcés à temps' .	15 years	3 years
'Détention à temps' . .	15 years	3 years
Imprisonment . . .	3 years	8 days

Article 352 gives the scale of diminution in the case of extenuating circumstances. The results are:

(1) 'Travaux forcés à temps' may be reduced to
  (α) 'détention à temps,'
  (β) imprisonment with a minimum of 2 years.

Latitude
  From 15 years' 'travaux forcés' to 2 years' imprisonment.

(2) 'Détention à temps' may be reduced to
  imprisonment with a minimum of 6 months.

Latitude
  From 15 years' 'détention' to 6 months' imprisonment.

(3) Imprisonment may be reduced to
  a fine with a minimum of 5 piastres (1*s.*).

Latitude
  From 3 years' imprisonment to a fine of one shilling.

It therefore appears that even under systems of fixed minima the discretion allowed to the courts is moderately wide. Speaking only of Egypt, I am convinced that generous as it appears it is

insufficient. But be that as it may, it will, I think, be found that the sentences which invite criticism do not in general approach either the maximum or the minimum penalty, and that *ex converso* the sentences which do approach those limits are for the most part thoroughly justified. When an English judge sentences a man to a day's imprisonment for bigamy, or when a French Court inflicts two years' imprisonment for an offence which carries a maximum of twenty years' 'travaux forcés'—in these and similar cases the judgment is usually a sound one. The principle is clear enough. It ought to be indifferent to the offender whether he comes before A. or B.: and if two offenders should be found whose cases are in all respects identical they ought to be certain of receiving exactly the same punishment. If this be so, there appear to be but two classes of anomalies sufficiently important to attract criticism. One is the case in which a judge (or tribunal) habitually takes a view of the proper quantum of punishment so different from the normal view that his sentences are either markedly higher or markedly lower than the average. In my younger days there were on the English bench two judges, one of whom was severe to the bounds of savagery, and the other lenient almost to weakness. This difference was observable over so long a series of years as to exclude the explanation that all the worse cases came before the one and all the less aggravated before the other. The other case was exemplified in the sentence passed some two years ago by a Scottish judge on the directors of Pattisons'. It was, I think, of three years' penal servitude, and was generally criticized as unreasonably light and as showing, not so much that the judge had given undue weight to circumstances favourable to the accused, as that he had formed no adequate idea of the gravity of the offence which he was called upon to deal with [1]. Now I submit that in all such cases (for I rule out casual blunders and extravagances of temper as evils beyond the reach of science) the presence or absence of a minimum is of no effect whatever. The sentence is always heavier than any minimum which is admitted by civilized systems of law—for in speaking of extenuating circumstances it must be remembered that the tribunal has unfettered discretion to find them or not as it pleases: they are part of the facts of the case and as such withdrawn from the consideration of the Court of Cassation. Sometimes they are 'found' on insufficient grounds. Nevertheless, the anomalous sentence occurs not in the extremes but almost always in the middle distance.

If this be so, the cause of England's 'bad pre-eminence' must be sought elsewhere than in the freedom permitted to her judges. It would be easy to assign several reasons: I mention one which is

[1] Of course the error may also be in the opposite direction.

frequently brought home to me. In England the criminal judge usually sits alone: in other countries he does not. It has been my fate to sit for a year with a colleague who has a peculiar horror of physical violence. He may of course be quite right: but I can safely affirm that if he had been sitting alone his sentences would have been very different from those actually pronounced. This experience and many like it have brought me to the conclusion that the cause of the anomalies referred to lies not so much in the law as in the magistrate who administers it: and further that it has its roots in instinct and temperament rather than in conviction and theory. Two men with the same prisoner before them and the same speculative views of the object of punishment will often propose widely divergent sentences. This is with me an almost daily experience. Furthermore it sometimes happens that the very nature of the punishment is left to the discretion of the judge. In England flogging can be inflicted in a certain class of cases. In those cases, if my memory serves, it is almost always left to the judge to order it or not as he sees fit. Now one man regards the lash as a valuable arm against certain kinds of evil doing: his colleague considers it degrading, alike to the sufferer and the public. Here is a cause of variation, but it has little to do with the existence of a minimum. I incline to the view that punishments which involve great physical discomfort should be reserved for crimes of violence and lust: and I shrink from sending to the quarries the village tax-gatherer who has embezzled a few pounds of the police cess. For anything I can tell, this disposition of mind may constitute an anomaly: but I can indulge the frailty, and yet keep far from the minimum laid down by the law.

These reflections bring me back to the point from which I digressed. Taken with what went before, they lead me to ask whether it be possible to frame any set of rules for the guidance of judges. I raise the question in all humility as becomes one who is so deep in the trees that his view of the wood is, of necessity, limited. Yet, to my thinking, there are insuperable obstacles to anything which goes beyond a statement of general principles and general cautions—illustrated and perhaps illuminated by typical examples drawn from the practice of eminent magistrates. Even with this restriction the field of labour is wide. Doctors are not agreed even upon first principles in such matters as the treatment of the professional criminal, or of the 'casual' who lapses from time to time (and all too often) into crime. Even in the hurry of continual practice one is stopped again and again by a doubt as to the efficacy of the weapons which are put into the hands of justice. And that such a doubt affects the sentence

which follows, no one, I think, who has felt it will be disposed to deny. Again, I find, not only among my colleagues but among the magistrates of other countries, the most striking divergence of practice and feeling (for very often it is no more) with regard to the effects of severity as such. A luminous and general treatment of these and kindred topics would be an immense help to a clearer and more consistent practice. But at the same time I can hardly as yet accept the view entertained by some persons that the infliction of punishment is an art which can be reduced to rules and taught. The stronger analogies, I submit, are with such activities as statesmanship or business or conduct in general. No system of casuistry has stood the test of practice; and although the fundamental rule of business—to buy and sell the right things at the right times and prices—can be put into a few words, there are no rules for making a fortune. At this point, however, I am touching upon the philosophy of the subject and invading the province of the Commission. I will therefore confine myself to suggesting a difficulty of a purely practical nature.

Baldly stated, the question to which the practising judge must give an answer is this: How much shall I give him? In the first place, every term of this question is individual and particular. In the second, one may ask: How much of what? Clearly of the punishment which the legislature awards to this particular case. Now I often ask myself whether any consistent principle can be traced in the enactments of the legislature: and reflection and practice have not laid this doubt as completely as I could wish. I do not labour the point: it would be absurd to deny that the main purpose of punishment as at present organized is to deter. But it is equally evident that it is not the only purpose. Here and there and in varying degrees other objects enter upon the field and claim recognition. Furthermore, it is very possible (as was hinted before) to accept the deterrent theory, and yet to doubt whether the law you administer is well designed to effect its end. I visit with the same imprisonment, and with almost the same amount of it, the man who has stolen a turkey and the man who has defamed the German Emperor: I consign to the same quarries the armed burglar and the clerk who has forged a public document. Yet, if I may judge of those whom I deter by those whom I sentence (and no other criterion is open to me), I should say that these classes are affected in very different measures by the same dose of punishment. Modern legislation admits without doubt of punishments that differ in kind: and the Courts are not slow to avail themselves of the choice offered. Still we rely to a remarkable extent on purely quantitative differences. My belief is that we

do so too much—that our penalties have not enough variety. Herein we have perhaps one of the many indirect consequences of the general use of money. So large a portion of human motive and conduct is measurable with fair accuracy by a quantitative rule that we are apt to suppose that a common measure must be found everywhere. Of course it is not so. The judge who inflicts upon *A. B.*, accused for the third time of stealing a hen, a heavier sentence than on *C. D.*, charged, but for the first time, with stealing a watch, does so for reasons which cannot be reduced to exact calculation and which to his equally able and experienced colleague may appear inadequate. Some of the punishments of an earlier time aimed at appropriateness of another kind. The thief had his hand cut off—an effectual way of preventing him from repeating the offence, and an obvious, if not always sufficient, warning to persons similarly tempted. Or it was an eye for an eye and a tooth for a tooth: or the slayer paid a sum of money to the family of the slain. If revolting in practice, these provisions were at least easily understood. Doubtless we are more merciful than our forebears: but our vision is sometimes less direct. Indeed one is sometimes tempted to suspect that the discretion enjoyed by the tribunals is a covert invitation to turn machinery, primarily designed for one use, to ends which the legislature recognizes but provides no direct way of compassing.

In the second place it is clear that whatever theory the judge may adopt he should award the lightest punishment which will effect his object. If that be reformation and six months' imprisonment will turn the thief into an honest man, he is wrong in sentencing him to seven months. If three years' hard labour will render a district law-abiding (I do not discuss the abstract justice of beating Paul to keep Peter good), four years is unjustified and wasteful. This is a question about which, as I submit, it is impossible to lay down rules: yet it is the heart and kernel of the matter. In deciding it all sorts of factors enter into account—some legitimately enough, others in ways less easy to justify. The demeanour of the prisoner, his line of defence, his previous record, the state of crime in his neighbourhood, (sometimes) the relation of social or religious feeling to his offence—these are only a few of the elements which have to be considered. So far as I am aware no two people are affected by them in precisely the same manner or degree: probably no one looks upon them twice in precisely the same light. Yes; but this is just what the Commission proposes to remedy: it is to reduce this element of arbitrariness that its efforts are bent. Be it so: I ask what, beyond a statement of general principles, can be said except this: 'Give its due weight to every legitimate con-

sideration: exclude from your mind every unjustifiable influence.' I confess that when I come to this bed-rock of judicial work I despair of receiving help, except of the most general kind, from the experience of any foreign magistrate. I have before me a man guilty of forging a will for the purpose of excluding his sisters from their share in their father's real estate. He comes from Upper Egypt, and acted under the influence of a prejudice centuries old against women becoming holders of land. He is unable to read or write, and, it may be, reverences a neighbouring snake. I give him the punishment which I think right. Very possibly I am disgustingly wide of the mark: but I fail to see how the experience of a brother who lives and works in Minnesota or Buda-Pest will prove a lantern to my feet.

To sum up, I think that in the aspects of it to which the Commission invites attention the infliction of punishment presents analogies rather with conduct than with science or art. Understood thus sentences may and should be *ὡρισμέναι λόγῳ*; but the *λόγος* is that of practical life, not of science: *ὡς ἂν ὁ φρόνιμος ὁρίσειεν.* To those to whom the penal law is a subject rather of scientific study than of daily application this may seem the negation of all principle—a casting forth into the outer darkness of the relative and contradictory. I hope and believe that it is not so. Be that as it may, I can as yet see no further than this—*ἡ κρίσις ἐν τοῖς καθ' ἕκαστα.*

II.

I now pass on to the specific questions.

Q. 1.—Does the judge, in fact, when awarding a sentence, act on any theory as to the object of punishment, such as retribution, expiation, example to others, reformation of the offender, or the like? Is it desirable that he should do so?

What happens when you have a great number of cases and little variety is, I believe, this. A standard rapidly forms itself in the mind. This I may call the normal offence: and it is visited with what I shall term the normal punishment. For example: Art. 300 of the Egyptian Penal Code punishes simple larceny with an imprisonment which ranges from one month to one year. I find that two extremely frequent sentences are three months and six months. The one corresponds to the normal petty larceny, the other to the normal larceny of somewhat greater seriousness. In inflicting (or more strictly proposing to inflict, for I do not sit alone) these punishments I make no conscious reference to any theory whatever. When the facts approach the normal types the

sentences follow almost mechanically. I notice however that when I return to work after the Long Vacation, I do not feel the same certainty of touch: I pass through a short period of hesitancy and tentativeness. But what I try to do during that period is not to re-think for myself and from first principles the considerations which should govern punishment. I try to feel my way back to a sense of the normal offence: and I find myself asking my colleagues, 'What do we generally give in this sort of case?' So far as I can judge others do pretty much as I do: indeed I do not see how judges could deal with a large mass of work unless they had some such method of abridgment. Upon reflection I incline to think that the results thus obtained are no worse than those which would flow from a theoretical examination of each case. The method (if it deserves the name) has at least this advantage, that it tends to uniformity. The standard may be, doubtless is, too high in one case and too low in another: we may, and no doubt do, often overlook features which ought to secure for particular cases a special consideration. But still a standard of reference does exist which was originally fixed with some care, and which we are able to criticize in the light of subsequent experience. Of course opportunities for testing it are not so numerous, and means for correcting it are not so adequate as might be desired: we work a good deal in the dark, knowing little of the previous or subsequent careers of those who come before us. Nevertheless means and opportunities are not wholly wanting. In the second place the standard *tends* to become the common rule of the whole Court: and this by reason of the fact that the composition of the chambers is altered every year. I say 'tends,' for it would be too much to claim that the process is complete. The standard is of necessity somewhat vague: and it happens from time to time that a strong judge with a personal bias in some particular direction is joined to two weak colleagues. But having made these deductions I think it is still true to say that this way of work makes for uniformity. So much for the normal offence. When circumstances special either to the offence or to the offender are remarked, they are taken specially into account as will appear in the answers which follow.

It is perhaps not fanciful to believe that in practice a good judge is guided by a sense of proportion and fitness which it is difficult to refer to any theory—a kind of tact which experience and temperament combine to produce. Possibly in the last analysis it is an unconscious balancing of all considerations. At any rate I have often been struck with the happy knack (if I may so term it) displayed by some of my abler colleagues—an appropriateness and adequacy difficult to attain, but when seen not to be mistaken.

I know of no analogue unless it be the peculiar sense which some men have in the management of a boat—a power almost instinctive and wholly denied to others of equal experience and theoretical attainments. The sentences thus fixed might, I think, be defended in nearly all cases on grounds of strict theory: but the faculty operates without conscious reference to principle.

I am unable to say whether the judge in sentencing ought to have some theory in his mind. If he has much to do he will be glad to leave some part of it to 'unconscious cerebration.' And if he is a sensible man, knowing his people, I believe he may safely do so. More than this I cannot say.

Q. 2.—Does the judge, in fact, keep the same end in view in the case of all offences, or does he make a distinction between one offence and another? Is it desirable that he should do so?

I never met a judge who approached all cases from the same standpoint: just as I have never met a person who observed the same demeanour in all societies. I should as soon expect to meet the second as the first. I have already given at considerable length the reasons for this opinion. They come to this—that the judge has a practical end in view and that circumstances determine his choice of means. Sometimes he is obliged to make an example, at others to mark his sense of the enormity of the crime, at others he is free to attempt the reformation of the criminal. But whichever of these intermediate objects he may choose his ultimate purpose is to diminish crime. When I send a boy to a reformatory instead of to a prison, I do so (in the main) because I am afraid that he will come out of prison a hardened little sinner with nothing to hope or fear, whereas I hope the reformatory will turn out a good citizen and a master of a trade. I am not, of course, indifferent to the future of the wretched child; but I select this means because I think the reformation of the particular delinquent a shorter cut to my chief object than any terror which imprisonment might inspire in other bad little boys. Were I of the opposite opinion I should send the lad to prison.

Perhaps I may illustrate by a contrast. For reasons already adduced our judgments (to our great loss) are little, if at all, canvassed by public opinion. But the Executive watches them with narrow scrutiny: and in the comparatively small community in which we live the opinion of each is generally known to all. Now I have never heard but two criticisms on a sentence: 'Extraordinarily weak; what is the good of all our work if the Court of Appeal cannot be relied on' and 'Capital: it will have an excellent effect in the districts.' These appreciations give the measure

of the preoccupations of the Executive. For it this point of view is natural and inevitable: perhaps entirely justifiable. But it is difficult to conceive a judge sticking to it with the persistence of a limpet.

Q. 3.—When he makes a distinction between one offence and another, on what is the distinction based? On the character of the punishable act looked at from a moral standpoint? On the greater or less frequency of the crime in the district? On the greater or less risk to which it exposes the community, or on any, and what, other circumstances?

All the elements mentioned in this question are taken into account: but in very different degrees by different people. Of nothing is this more true than of offences in which the members of different sexes are involved. Offences against morality, in the narrow sense, are not the only ones to which I allude, though here there is a considerable divergence in the point of view of Europeans and Easterns. But take such a case as an assault by a husband on his wife: it is not unfrequent, though in general the harm done is slight. Now I observe that some of my colleagues are disposed to regard such acts as regrettable excesses in the exercise of a legitimate *patria potestas*: others look upon them as enormities to be marked by the full sense of the Court's displeasure. Oddly enough this difference does not entirely follow the line of cleavage of race. In fixing the actual penalty other considerations of a more humble character often overlay the moral appreciation. It is sometimes evident that if you give the husband what you feel he deserves you will leave his family, if not to starve (which is rare in the East), at least dependent upon the bounty of relatives. Again, there is a certain callousness—moral impudence if I may so name it—which almost always brings upon itself a punishment greater than would be visited upon an offence in all other respects similar. I have noticed that particularly in cases of theft. Speaking more generally, I think it true to say that the moral quality of the act, when sufficiently characterized to distinguish the offence from the normal type, almost always receives attention. I can remember larcenies which without constituting what is known as *abus de confiance* did in fact violate a trust, and cruelties practised in circumstances which invited to pity. In such cases the punishment has been of unusual severity.

We are not in general sufficiently informed of the 'local character' of the offence. In this respect the courts of first instance with their limited local jurisdiction have an advantage over the Court of Appeal. Some districts are unfavourably known for particular crimes: but, so far as I am aware, no very clear line of action is

followed with regard to them. One province is notorious for forgeries: but severity is tempered by the consideration that its inhabitants are particularly ignorant and the limits of their small holdings (these forgeries are mostly concerned with disputes about land) very doubtful. In Upper Egypt, while the sugar-cane is standing, robbery with violence and other like crimes are lamentably common. The tendency is towards severity; partly because of the frequency of the crime, partly because of the difficulty of tracing a criminal, who has a secure refuge in the sugar-canes. I am not clear how far this rather gambling reason approves itself to theory. It is the custom of the country to fire off guns at weddings: and people suffer not seldom in life and limb through the negligence of the shooters. The Courts have set themselves to put down this dangerous practice: but here again there is a difficulty in the way of being stern. The culprit meant no harm, and, which is more important, he almost always behaves most excellently after the mischief is done. There is a singular and not unfrequent class of cases in which the men of a woman's family (not her husband) put her to death for unchastity. Curiously enough I have only once been called upon to deal with this offence: and I then considered very carefully the state of public feeling upon the matter. I know that my colleagues do the same: and I believe that I am founded in saying that the tendency (due perhaps to the European element in the court) is to a severity which deliberately rules popular prejudice out of court. I have not sufficient experience to judge of the wisdom of this policy, though the character and attainments of those who are chiefly responsible for it dispose me in its favour. I cite it as a good illustration of a difficulty which often meets us—that of deciding how far the penal law can usefully venture ahead of general sentiment in matters which engage men's passions because they touch religion or the social organization.

Q. 4.—When he makes a distinction between one individual and another, does the distinction turn on the offender's antecedents as shown by his judicial record, or on his degree of intelligence and education, or on any other, and what, circumstance? Is the age or sex of the offender taken into account, and if so, to what extent? Is it desirable that any, and which, of the distinctions mentioned above should be made?

All the considerations set out in this question are taken into account. Some are provided for by the law itself: and though judges are not tied down to the exact text (by reason of the article which provides for extenuating circumstances and others) the provisions of law ensure in general that these elements should

be kept in view. Previous convictions are almost always remembered against a man—sometimes perhaps with insufficient vividness. But this is a question of great difficulty. We have not as yet a class of professional criminals such as appears to exist in more civilized countries. At the same time our information, imperfect as it is, suffices to show that the term 'recidivist' covers very different categories of offenders. As soon as this is recognized, the problem of giving its due weight and no more to the judicial record becomes singularly complicated. My own conviction is that a special machinery is necessary for dealing adequately with habitual criminals.

Real ignorance always operates as a plea in abatement. Sometimes it goes to astonishing lengths. I remember a case in which a boy was beaten to death by his father and brothers. He suffered from fits, and the family had consulted a wise man, who told them that the child was possessed of a devil which could only be expelled by fustigation. After solemn prayer, and with tears streaming down their faces, they proceeded to the cure, exorcising by the same means the evil spirit and the breath. When in the dock, they appeared to be overwhelmed with amazement that they should be arraigned for doing their duty by their child. This (and some other elements mentioned) is of even greater importance when the question is that of guilt or innocence.

Women almost invariably receive lighter punishments than men, even when proved to have taken part in a common offence. The reasons are various—some legitimate enough, others, to my thinking, of very doubtful validity. There can be no question of women's greater ignorance, nor of the fact that in the great majority of cases they act under the influence if not the compulsion of their men kind. But the comparative immunity which here rests on solid ground is extended to cases where it is altogether unjustifiable. The reasons of this are not very clear. I think that the (until lately) very unsatisfactory state of the prisons has had considerable weight. Again, the fecundity of the race is great, and an immense proportion of the women prisoners appear in the dock with a child at the breast. One thing has often struck me. So far as my recollection goes there is no instance in my experience of a native judge showing a disposition to be unduly severe to women. On the contrary, they err (if at all) on the side of leniency. This may be due to a livelier sense and deeper knowledge of the true position of the women of their race: I believe also that in the depths of their nature exists the feeling (though education has modified their intellectual convictions) that for a woman to appear publicly at the seat of justice is in itself an outrage to her sex and to the honour of her men, as well as a removing of her from the

natural forum of the family. Be that as it may, women on the whole get off lightly.

A prisoner's youth is taken into consideration by the law itself when his age does not exceed fourteen years. When that limit has been passed the age of the culprit fades from view, largely for the reason that we cannot effectively take it into account. The Reformatory institutions are of very limited accommodation and only recently set upon a rational basis. We sometimes forget that so new a thing exists at all; and the prosecuting authorities are not always quick to remind us of it. In this connexion I may mention again sexual crimes. There is a tendency among my native colleagues to deal lightly with offenders who are just passing or have just passed from boyhood to manhood—unless of course there be circumstances of unusual atrocity. Europeans find it difficult to detect an extenuating circumstance in the fact of being a young man in the vigour of health and strength. At the same time I have repeatedly heard this urged in mitigation by two of my ablest native colleagues—men remarkable for high-mindedness and refinement.

I observe a tendency to be indulgent towards crimes of acquisitiveness when committed on relations. The wisdom of the provision which makes a certain degree of relationship an absolute bar to prosecution for theft may very well be doubted. It colours the treatment of cases which do not come within the exception—often to a disastrous extent. On the other hand, the 'undivided family' is so much the rule (land, for example, is often held in common during three generations) that it is easy to exceed the just measure of severity. In general it may be said, both in regard to this question and the last, that social customs and social organization have to be borne constantly in mind.

I think it will appear from the above that I think it not only desirable but essential that these and other distinctions should be made. For me the question here as elsewhere is, How much?

E. W. Coghlan,
Judge of the Native Court of Appeal, Egypt.

II.

(By two Danish Judges.)

Before proceeding to answer specifically the questions proposed to us, we think it expedient to make some introductory observations.

First, we may briefly advert to the organization and the methods of procedure of the Danish criminal courts. Both offer certain peculiarities which, if we are not mistaken, go a long way to explain the tendency which, as we shall point out below, appears to us in the main to control criminal sentences in this country.

In Copenhagen, all criminal jurisdiction is vested in the Criminal and Police Court of Copenhagen—a court consisting of fourteen members, the quorum being five except in the case of certain classes of trifling offences which may be dealt with summarily by a single judge. The rest of the kingdom is, for the purpose of the administration of justice, divided into some 130 districts, in each of which criminal jurisdiction—as to any offences, grave or trifling—is exercised by a single judge (who, in all districts but one, also exercises jurisdiction in every description of civil proceedings). From the district judge there is an appeal to a 'Superior Court,' the quorum in which is invariably five. From the Superior Court—there are two such courts, one for Sealand and the other islands, and one for Jutland—as also from the Criminal Court of Copenhagen, an appeal lies to the Supreme Court (the ultimate appeal court both in civil and criminal cases), which consists of thirteen members, nine of whom form a quorum.

There are no juries. The question of conviction or acquittal, no less than the awarding of punishment, is the business of the court; and in both respects its decision is subject to appeal. For the present purpose the right of appeal—to the Supreme Court as well as to the Superior Court—may, without material inaccuracy, be said to be unlimited. It is open to the prosecuting authority, no less than to the accused, to appeal. Thus, the object of an appeal may be to obtain a conviction, where there has been an acquittal in the court below, or to have a heavier sentence imposed. On the accused person declaring his wish to have his case submitted to the appeal court, the necessary steps for so submitting it are taken by the prosecuting authority. It is always in the discretion of the appeal court to alter the sentence, as it seems to it just; thus an appeal brought solely at the request of the accused may result in a heavier sentence being imposed.

The number of criminal appeals in the Supreme Court has during recent years averaged about 170 a year. Every judgment

of the Supreme Court is reported, along with the judgment appealed against; the latter invariably contains a more or less detailed statement of the facts of the case.

The evidence on which the court—i. e. the trial court (if the word 'trial' be capable of such an extended meaning), or the appeal court—has to act, is entirely in writing. It always includes the examination of the accused person—whose confession, in the majority of criminal cases, forms the mainstay of the evidence. The evidence is regularly taken on the preliminary inquiry, which is conducted by the district judge, or, in the Criminal Court of Copenhagen, by one of the members of that court acting as 'inquiring judge' (and who, as a rule, will be one of the five judges by whom the case is afterwards tried); but the evidence taken at that stage may be supplemented, at any subsequent stage, by further evidence being taken, in the same manner, by the 'inquiring judge.' Both in the courts of first instance (except in the case of such minor offences as are dealt with summarily) and (invariably) in the appeal courts, counsel are assigned to prosecute and defend. Counsel address the court by means of written arguments, except in the Supreme Court, where counsel are heard orally.

Since 1866, Denmark has had a Penal Code. With very few exceptions (the most important of which is premeditated homicide, the punishment for which is death), each provision of the Code relating to a particular offence fixes a maximum and a minimum punishment. In a few of such provisions one or more circumstances are mentioned which, if present, shall be held either to aggravate or to extenuate the offence. Besides this, some general principles which should guide the courts in awarding punishment within the statutory limits, are laid down in the Code. In its section 57 it is provided that 'in awarding punishment within the limits provided in this Act, the court shall take into consideration the more or less dangerous nature of the offence (regard being had to the time and place at which it was committed, the means by which it has been accomplished, the importance of its object, and the extent of the damage caused by it), the greater or less firmness of purpose exhibited by the offender, the motives which actuated him, his education, age, and previous conduct, the relation in which he stood to the person against whom the offence has been committed, and his subsequent conduct.' As subsequent conduct which should weigh in mitigation of punishment, one of the following sections instances the offender's having actively endeavoured to obviate, lessen or repair the injurious effects of his act, or having voluntarily surrendered, making a full confession. Indirectly at least, another section of the Code appears to have an important

bearing in this connexion. Where a person is convicted of two or more offences, the Code provides (see section 62) that both or all of such offences should be made to weigh in settling the punishment, such punishment not to exceed the maximum punishment provided in the section under which such offences are punishable, or, if they be punishable under two or more sections respectively, the highest maximum provided in any one of such sections (or, in special circumstances, such maximum increased by one half).

The theory of the framers of the Code appears to have been that it is the duty of the court to so graduate its sentence, within the statutory limits provided in the case of each particular crime as to make the punishment, in each individual case, proportionate to the gravity of the case—including under this term the greater or less number of separate offences proved against the prisoner[1]—*the maximum punishment being reserved for cases of extreme aggravation.* Carried to an extreme, this view would, as it seems, prevent the court from ever applying the maximum punishment provided in respect of any given crime, as an imaginary case may always be put in which some aggravating circumstance is added, or in which a greater number of offences are proved against the accused.

The theory here stated—mitigated, it is true, to some extent by common sense—may be said to be the theory on which our courts act. Indeed, the maximum punishment provided in the case of any particular crime is rarely, if ever, applied, even where the court, were it to form its own independent estimate, would consider such punishment as no more—or, perhaps, as less—than adequate in the particular circumstances of the case. And, in the absence of special circumstances, the sentence will, as a rule, rather approach to the statutory minimum. Practically, the paramount consideration with a Danish court, in awarding sentence, and which ordinarily controls any other, is that the punishment should be as nearly as possible similar to the punishment which has been awarded on former occasions by the court, or by a superior tribunal, for the same offence committed under similar circumstances, or proportionate to it, regard being had to any difference in the circumstances. It will be easily seen how well our paper system of procedure lends itself to this tendency of adhering to fixed standards—a tendency which may, perhaps, even be thought but the natural outcome of that system. Moreover, the fact that, in the Supreme and Superior

[1] It may be proper to observe that it is usual to take evidence as to each of any number of crimes which can be raked up against the prisoner. Such a thing seems practicable only under a system of criminal procedure like ours.

Courts, and in the Criminal Court of Copenhagen, sentence is passed by a board of (at least) nine or five judges respectively is, in itself, a circumstance which makes for uniformity. And, it need hardly be said that, with our system of appealing, any subordinate court will acquire a habit of regulating its own action, in this as in other respects, by that of the appeal court, as it naturally will not like to have its sentences constantly varied on appeal.

Each of the three theories of punishment referred to in the circular—the expiatory, the deterrent, and the reformatory—has left its mark on the Code, and—as a matter of history—has had its share in shaping the system of penalties embodied in it. And, it could hardly be asserted that any single one of them, to the exclusion of the two others, is at the bottom of any of the above-mentioned provisions of the Code by which it professes to guide the courts in the meting out of punishments. In one provision, however, which we may yet mention, the reformatory theory appears more conspicuously. Where (as is very often the case), by the terms of any section, there is an option between imprisonment with hard labour (the minimum and maximum terms of which are eight months and six years respectively) and penal servitude (which may be inflicted for not less than two and not more than sixteen years, or for life)—the most obvious difference between which two modes of punishment, if awarded for the same length of time, is that in the case of the former, but not in that of the latter, the convict, as a rule, is kept in solitary confinement, his term being, in this case, reduced according to a fixed scale—this, by section 14 of the Code, is subject to a general proviso that penal servitude should, in such cases, only be awarded to older and more hardened offenders. On this rule the courts act—as, no doubt they would, if there were no enacted rule to that effect; and so, in other cases where there is an option between two modes of punishment the one of which may, and the other may not, in the opinion of the court, offer some chance of reformation (the accused not being beyond hope of reclamation), the court, as hardly needs saying, will give the preference to the former. Again, a manifest increase in any given class of crimes—such as, for instance, offences against the person—may dispose the courts to greater severity in the case of such crimes; they will, so far, be acting on the deterrent theory. And, as far as the controlling principle of uniformity (or proportionality) will admit of this, the court also, when occasion arises, will give effect to the object of ridding society for the longest possible time of a dangerous criminal. But, beyond the narrow limits thus indicated, that principle or theory leaves the courts little or no scope for directly

giving effect to either the reformatory, or the deterrent, or any other specific theory. Thus, on the whole, we think that, whatever importance may, under Danish law, be attributed to any of the three theories, the aim which such theory singles out as the object of punishment is apt, as far as the courts are concerned, to merge, to a very great extent at least, in the general aim of uniformity. It may be that—though the expiatory theory may not appear to most people to appeal in such a way to a modern mind as to be likely to make a judge (even if free to do so) consciously adopt it as his guide—the idea of expiation or retribution, rather than any other conception, is really at the bottom of that very theory of proportionality on which our courts act.

It now remains for us to state our answers to the specific questions proposed in the circular.

Q. 1.—As will appear from our above statements, there is, under the system at present in force in this country, but little occasion for a judge to act on any specific theory as to the object of punishment. But within the narrow scope thus left him, a Danish judge will, in awarding sentence, keep in view any of the objects of punishment which is not excluded by the circumstances of the case—including among such objects: the affording an example to others, or (what may be but another mode of expressing the same thing) maintaining the comminatory effect of the penal statute and giving support to the sentiment of detestation which prevails in the community in regard to crime, and also, as the case may be, the reformation of the offender, or his being prevented from doing harm.

We consider it as desirable that the court should have a somewhat freer hand in awarding sentence and should be able, more than it is at present, to give effect to the view that punishment is a means for attaining certain ends—not excluding from the latter any of the objects just specified. At the same time we consider it as important that there should be a reasonable uniformity or proportionateness between the sentences awarded in different cases for similar offences. But we think that, in our present practice, the aiming at proportionateness has been carried to excess. In particular, we think it unreasonable that the court, where the maximum punishment provided in the case of any given crime appears to it to be (no more than) an adequate punishment in the case under adjudication, should feel prevented from awarding such maximum punishment by the consideration that some other case has occurred, or may be imagined, offering some additional aggravating feature, and in which, yet, no heavier punishment was, or would be, available.

Q. 2.—While, for instance, the object of deterring would-be offenders would appear to exist in the case of any class of offences, it seems obvious, on the other hand, that reformation of the offender, as an object of punishment, necessarily presupposes some moral defect or depravation in the offender for which punishment is believed to be a likely cure. This element may, as it seems, be absent in the case of offences to which the opinion of a more or less important section of the nation attaches no moral blame, such as may happen in the case of certain offences of a political character; it may, likewise, be absent in the case of offences of a trifling character, and is, generally, excluded, wherever the offender is believed to be incurable.

Q. 3.—In answer to this question we may refer to the 57th section of the Danish Penal Code, the effect of which we have stated above, and which may be taken as a summary statement of the facts which a Danish court will take into consideration in awarding sentence (as, no doubt, it would, if the Code were silent on this point).

Q. 4.—In regard to this question, also, we may refer to section 57 of the Code.

Previous conduct which will weigh against the prisoner is, of course, practically synonymous with one or more previous convictions. It should be added that it is not, in the case of all crimes, left to the discretion of the court, what weight should be attributed, in awarding sentence, to such convictions. In the case of some crimes—among which larceny holds the most conspicuous place—our Code provides a heavier minimum and maximum punishment in the case of a second (or later) conviction; in the case of larceny it even further increases both the minimum and the maximum punishment in the case of a third and fourth (or later) conviction respectively.

So, again, the age of the offender is not solely a matter for the discretion of the court. In the case of young offenders (between the ages of fifteen and eighteen) the Code, by a general provision, reduces by one half the minimum punishment provided in any section, and directs that a lighter punishment should be inflicted than would have been awarded if the accused had been a person above the age of eighteen; it also fixes eight years' penal servitude as an absolute maximum in the case of such offenders. In the case of offences committed by persons under the age of fifteen—where such offenders are at all prosecuted—the Code provides a further reduction, dispensing with any minimum and making two years' imprisonment with hard labour an absolute maximum in their case. In the case of any offenders under the age of eighteen the Code,

within certain limits, enables the court to substitute corporal punishment for imprisonment.

We may add, in conclusion, that we have submitted the foregoing observations to two of our colleagues who, both of them, possess great experience in criminal cases, and that they both concur, in substance, in all we have said.

C. THOMSEN,
Member of the Superior Court of Copenhagen.

C. USSING,
Member of the Criminal Court of Copenhagen.

THE LIMITS OF THE RULE IN *WANT* v. *STALLIBRASS.*

I.

WHERE the vendor has only an absolutely bad title, can the purchaser out of time with his objection recover the deposit? In other words, what are the limits of *Want* v. *Stallibrass*, L. R. 8 Ex. 175, and is that case law?

In that case the vendors sold expressly as trustees for sale, the abstract showed that the trust for sale did not arise till the death of a living person, the contract provided that objections should be taken within a limited time and in default should be waived. The purchaser took the objection out of time, but sued for and recovered his deposit on the ground that the title was absolutely bad.

Kelly C. B. said in reference to the claim of the vendors to retain the deposit because the objection was out of time:—

'This might have been so if the title disclosed had been merely a defective title, where, upon objection made, defects could have been supplied; but where the abstract, which ought to set forth a primâ facie good title, shows in express terms that the vendor has no power to make a title at all, it is not a case for objection and answer, but the abstract at once enables the purchaser to say that the vendor has broken, or has no means of performing his contract, and that he is entitled to the return of his deposit.'

The Chief Baron thus as it were struck the whole of the time condition out of the contract, the other members of the Court gave it a forced construction. Pollock B. delivering his own opinion and that of Martin B., after observing that if the vendor's construction of the condition was correct, i. e. that the purchaser had waived all objections, then the purchaser must not merely forfeit his deposit 'but accept and pay for the estate,' went on:—

'Now the right of a vendee to a good title is a right not merely growing out of the agreement . . . , but is given by the law. This is affirmed by Lord St. Leonards in his work on Vendors and Purchasers, ch. 9, s. 1 (14th ed., p. 337), and is supported by the case of *Hall* v. *Betty*, 4 M. & G. 410, and it would be putting a most unreasonable construction upon the conditions of sale to hold that the vendee, by failing to object to the abstract within the stipulated time, not merely waived any requirement as to further information or further security, which he might have properly enforced against a vendor who had a valid title or one capable of being made valid,

but that he became liable to *accept* a title wholly bad, when the very basis of the contract, apart from the conditions of sale, was that the vendor was bound to give a good title.'

Now the usual form of condition not only compels the purchaser to waive objections made out of time, but goes on to compel him to *accept* the title subject only to objections made in time. Far from *Want* v. *Stallibrass*, so far as the construction of the condition is concerned, being an authority against, it seems to be some authority in support of the efficacy of such a condition, a point not noticed in the next two cases cited.

In *In re Tanqueray-Willaume and Landau*, 20 Ch. D. 465, a testator directed his executors, his wife and son, to pay his debts, and devised his real estate to his executors upon trust for his wife for life, and after her death to raise certain legacies and subject thereto for his son. He died in 1871, and his executors sold in 1881, requiring objections to be delivered within a certain time, in default the purchaser 'to be deemed to have accepted the title.' An objection was taken out of time that there was no charge of debts on the real estate and consequently no power to sell. The vendors said that there was a charge, and if not the objection was taken too late.

It is to be noted that the purchaser's summons raised no question as to return of the deposit, but asked merely (so far as is necessary for this statement) for a declaration that there was no charge.

Kay J. held first that there was no charge, secondly that the objection could still be taken:—

'I think the condition in these conditions of sale does not prevent the purchaser from raising an objection of that kind because it goes to the root of the whole matter. If it should be the case, as I am at present inclined to think, that there is no implied charge of debts or implied power of sale at all, then the executors, who are professing to sell under that implied power, have no power to sell whatever, and that it appears to me is an objection which the purchaser is at liberty to raise. In my opinion this is a title too doubtful for the Court *to compel the purchaser to accept*. The costs of the application must be paid by the vendors.'

On appeal it was held that there was a charge, and so it became unnecessary to pronounce on Kay J.'s opinion, but on the argument that the objection was out of time. Jessel M. R. said, 'The objection goes to the root of title' or 'the whole of the title'; 46 L.T. 544—this part of the *dictum* is omitted, 51 L. J. Ch. 434, 436. 'Moreover it is raised by the summons *and the agreed statement of facts*. The question is open.'

Now it seems perfectly consistent with the summons and Kay J.'s

opinion, that he was not considering the matter at all in relation to the return of the deposit, but only in relation to the declaration asked for, and if he had refused to entertain the question on the ground of time specific performance would have been matter of course.

In *Saxby* v. *Thomas*, 63 L.T. N.S. 695, 64 L.T. N.S. 65, the authority of *Want* v. *Stallibrass* was not impugned; and Romer J. held that a purchaser out of time with his objection could recover the deposit where the vendor showed, as he held, an absolutely bad title, though the condition required the purchaser both to waive objections and to *accept* the title. On appeal it was held that the vendor had shown a good title and the decision below was reversed. Lindley L. J. remarked:—

'This instrument'—on which the objection arose—'was set out on the abstract, and therefore it was urged by Mr. Cozens Hardy, and very forcibly, that if there is any thing in this objection the fifth condition meets it, and the purchaser having been told by the abstract of this document and not having made any requisition within the time limited by this condition he is precluded by his bargain from raising it afterwards.'

He then remarked that the cases at first sight looked hard to reconcile, but it was unnecessary to go into them as the title was good.

Having regard to Kay J. and Romer J.'s opinions, though the point does not seem to have been brought to their attention, it might for the present be unsafe to assume that the words 'and shall accept the title' have any greater operative force than 'shall waive objections' even though both sets of words occur in the condition.

In *Boyd* v. *Dickson*, I.R. 10 Eq. 239, the vendor was suing for specific performance; a deposit had been paid, but it does not appear whether it was ordered to be returned: probably not, see pp. 241, 253, 256. The decision went on the fact that taking the eighth and ninth conditions together the eighth condition was misleading, and the M.R. held that as the title was radically bad, and as the objection was to a matter sought to be covered by the misleading eighth condition, it did not lie in the vendor's mouth to say that the time clause was protective against that objection; he also relied to some extent on the short period of time allowed for objections.

Whatever may be thought of the decision[1], it in no sense supports

[1] In *Boyd* v. *Dickson* the condition applied only to objections 'in respect of title or matter appearing on the abstract': it did not go on to cover objections to 'these conditions,' and went on, 'otherwise it shall be considered that all *such* requisitions and objections are waived . . . and that the purchaser has accepted the title.'

the general theory sometimes supposed to be laid down by *Want* v. *Stallibrass*, viz. that whatever the form of the time condition the purchaser can recover his deposit when the title is absolutely bad, even if in fact the M. R. ordered return of the deposit in that case.

In *Pryce Jones* v. *Williams* [1902] 2 Ch. 517, where the purchaser got a good equitable term and the legal term was outstanding, the vendor asked that the purchaser should pay the balance of his money into court; the purchaser sued for his deposit. Joyce J. observed that the objection was not to the root of the title but to its subsequent devolution, allowed the vendors and dismissed the purchaser's summons. The case was not of course the case of an absolutely bad title.

It is submitted however on the preceding cases that the question is not merely whether the root of title but whether the title itself is bad.

In *Robinson* v. *Musgrove*, 2 M. & R. 92, a part of the property sold was non-existent or could not be found, and that was part of the *ratio decidendi*.

In *Soper* v. *Arnold*, 37 Ch. Div. at p. 101, Cotton L. J. seemed to treat *Want* v. *Stallibrass* as deciding no general principle, but as an authority only on the meaning of the condition in that case; and in the same case, 14 App. Cas. 103, there are expressions of Lord Herschell that may be read as antagonistic to the supposed general principle of *Want* v. *Stallibrass*.

The writer has now cited and endeavoured to explain his view of all the cases known to him that can be claimed as supporting the view that the time condition does not mean what in plain English it says.

In *Blackburn* v. *Smith*, 2 Ex. 783, the vendor had contracted to deliver a full and sufficient abstract, objections to be taken within a month, otherwise title to be 'accepted.' An abstract short of sixty years and showing that the legal estate was outstanding was delivered, but the abstract showed all the documents in the vendor's possession or power. The purchaser without taking objections within time assigned for breach that a full abstract was not delivered and sued for and was refused return of the deposit.

Parke B. said: 'The terms "full and sufficient abstract of title" cannot mean "a full and sufficient marketable title," otherwise there would be no reason for the stipulation requiring all objections to be taken within the month.'

Platt B. said: 'The parties provide that if no objection is made within the month the vendors are to be deemed to have accepted the title that must mean objectionable title.'

Rolfe B. said: 'Suppose a title is traced down to *A. B.* and

then it is shown that *A. B.* died intestate and unmarried and that the vendor took possession as his illegitimate son, that would be a bad title but a perfectly good abstract. If a vendor fairly abstracts the whole title on which he relies, what more can he do?'

In *Rosenberg* v. *Cook*, 8 Q. B. D. 162, there is however the authority of Lindley J. and Brett L. J. to show that if the vendor sells freehold and has not even possession, or if he has only a revocable licence the purchaser, though out of time, could recover his deposit.

In that case the vendor sold as freehold the land over a railway arch, stating that it had been conveyed to him by the Railway Company, offering inspection of the conveyance, requiring requisitions within seven days; in default the title to be 'accepted.' The purchaser out of time objected that the sale to the vendor was *ultra vires* the Railway Company, and sued for his deposit. It was held that the purchaser could not recover, as the vendor had a possession which he could pass to the purchaser. There are, however, expressions of Cotton L. J. tending to show that the Court proceeded on the fact that the purchaser in the circumstances learning that his vendor had bought from the Railway and being precluded from objection to his conveyance or the earlier title in fact bought only the possession. If this was the true *ratio decidendi* the remarks of the other members of the Court as to the purchaser being out of time were superfluous.

In *Life Interests &c. Corporation* v. *Hand in Hand Ins. Society* [1898] 2 Ch. 230, the purchaser out of time required evidence that the vendors who were mortgagees had given the requisite notices enabling them to exercise their power of sale. Accordingly in court he asked the vendor's witness if notice had been given. The question was objected to on two grounds: first, that under the statutory powers the purchaser being protected on conveyance could not ask the question; second, that if he could have otherwise asked the question, his objection was out of time. Stirling J. held, first, that but for the time condition the question could be asked; second, 'the conditions of sale, however, contain the usual provision limiting the time for making requisitions, and it is said that it is now too late to make such a requisition. The answer of the purchasers to that is, "that may be so; but we take upon ourselves the burden of proving the allegation in the defence, that at the date fixed for completion the vendors were not in a position to sell. If that be so, *though we may not be able to recover the deposit* we can resist specific performance." I think that that view is correct, and that the question is admissible and relevant and ought to be answered.'

Whether *Want* v. *Stallibrass* is to be considered as laying down

a rule of general principle, or as merely deciding the construction of the decision in that case, this decision of Stirling J. is in direct antagonism to *Want* v. *Stallibrass*, for in both cases the condition only compelled waiver of objections, and did not go on to compel acceptance of title.

In *Oakden* v. *Pike*, 34 L. J. Ch. 620, estates were limited to *R. O.* the elder for life, remainder 'unto the sons of the said *R. O.* (if he should leave any), to the eldest son, and if he should die without issue,' &c. *R. O.* the elder and his eldest son contracted to sell. After the time limited for objections in default whereof the title was to be accepted, the purchaser objected that the son took only an estate tail contingent on his surviving his father; the vendors then offered to disentail. Kindersley V.-C. decreed specific performance on the ground that the objection was out of time, declining to go into the question of title at all though he thought the title good. This finishes the cases dealing directly with the time condition.

Now it is to be noticed that the decision in *Want* v. *Stallibrass* is largely founded on the fallacy that unless the Court had refused the vendor's construction of the condition, the purchaser would have been compelled to accept and pay for an absolutely bad title.

The Court has always had a discretion as to giving or refusing the remedy of specific performance, and it is clear that though the purchaser cannot recover his deposit where the objection is covered by a condition general, fair, and not misleading, yet the Court will not compel him to pay for an absolutely bad title. This is made clear by *Scott* v. *Alvarez* [1895]. 1 Ch. 596, 2 Ch. 603. In that case the vendor sold expressly as mortgagee, and so even apart from stipulation would have had to covenant only against encumbrances. The property sold was a lease granted in 1867. The condition stated that the title would begin with the lease, and omitting intermediate title as to which objection should not be made continue with an assignment of 1891, and that the purchaser should assume that assignment to have vested a good title in the assignee.

The purchaser was able to show doubt and suspicion as to the intermediate title; on his summons the Court below allowed the purchaser to recover the deposit. On appeal, the Court reversed that order on the ground that the objection was covered by the condition, declared that a good title was shown, and ordered the purchaser to repay the deposit.

After that decree the purchaser discovered facts which enabled him to show that by reason of gross frauds in relation to the

intermediate title the title was absolutely bad, not doubtful or suspicious, and he obtained leave to review the order of the C. A.

On the vendor's consequent specific performance action, the Court below, holding the title absolutely bad, refused specific performance and ordered a return of the deposit. On appeal the Court held

(1) That the title was absolutely bad, not a good holding title.

(2) That the purchaser could not recover the deposit as the objection was covered by the condition, and he could show *no breach of contract on the vendor's part.*

(3) But the title being absolutely bad, specific performance would not be decreed.

'But there are bad titles and bad titles; bad titles which are good holding ones, although they may be open to objections which are not serious, are bad titles in a conveyancer's point of view, but good in a business man's point of view; and I do not know of any case in which a Court of equity has decreed specific performance of and compelled a purchaser to pay his purchase money for nothing at all when he shows the Court that the title he is asked to have forced upon him is bad in that sense, that he can be turned out of possession to-morrow.' Per Lindley L. J., who left it open whether a condition could be framed with such a consequence; Kekewich J. and Lopes L. J. thought such a condition could be framed; Rigby L. J. appears to have thought the contrary.

The basis of the decision in *Want* v. *Stallibrass* being thus removed, is there any reason why the time condition should not receive its plain English construction?

The writer submits:

(1) That *Want* v. *Stallibrass* never did lay down a general proposition that whatever the terms of the condition a purchaser out of time could recover his deposit where the vendor had only an absolutely bad title. That if it did so decide it is contrary to the express decisions in *Life Interests &c. Corporation* v. *Hand in Hand Ins. Society* and *Oakden* v. *Pike*, that it is opposed to the *dicta* in *Blackburn* v. *Smith* and *Saxby* v. *Thomas* in appeal, and limited by the decision in *Rosenberg* v. *Cook*, and opposed to proper canons of construction, *Scott* v. *Alvarez* and cases there cited, that its authority not being impugned in *Saxby* v. *Thomas* before Romer J. in the Court below, it derives no authority from his decision, that *Tanqueray-Willaume's* case on the ground above suggested does not support it, and that it is not law.

(2) That if it lays down no general principle, nevertheless the construction placed by the Court on the condition was wrong as

shown by *Life Interests &c. Corporation* v. *Hand in Hand Ins. Society*; and that construction, if right, cannot be extended to cases in which the condition either compels the purchaser to 'accept' title simply, or to both 'accept' title and waive requisitions.

FREDERICK EDWARD FARRER.

II.

I HAVE read Mr. Farrer's interesting argument upon the question whether a purchaser of land can recover his deposit where the vendor has an absolutely bad title and the purchaser does not make objection to the title within the time limited by the contract. I agree with him that the *dicta*, if not the decisions, upon this point appear to be conflicting; but I submit, contrary to his view, that the case of *Want* v. *Stallibrass*[1] is good law and has never been overruled. I further suggest that it is the authority of the case of *Oakden* v. *Pike*[2] rather than that of *Want* v. *Stallibrass*[1] which is impugned by the decision in *Scott* v. *Alvarez*[3].

I think it will be well to examine the cases on which Mr. Farrer relies in order of the time of their decision. In the first place, however, I venture to remind the learned reader that the question of the recovery of the deposit on a contract for the sale of land is a question of purely common law, and has nothing to do with any of the equitable rules or doctrines applied by the High Court in exercising its equitable jurisdiction to order the specific performance of such contracts[4]. Also, that in every contract for the sale of land there is implied a stipulation that the vendor shall show a good title, that is to say, that he shall prove that he has the right to convey what he has contracted to sell. And further, that this promise by the vendor to show a good title is an essential part of the contract; it is vital to the contract, that is to say, its performance is a condition of the purchaser's liability under the contract, so that a breach of this stipulation discharges the purchaser from all duty to perform his part of the contract, entitles him to treat the contract as rescinded, and allowed him (under the old practice) to sue for the deposit in *indebitatus assumpsit*[5]. In the absence of special

[1] L. R. 8 Ex. 175. [2] 34 L. J. Ch. 620. [3] [1895] 2 Ch. 613.

[4] This is nowhere more pointedly displayed than in *Scott* v. *Alvarez*, ubi sup.

[5] *Duke of St. Alban's* v. *Shore*, 1 H. Bl. 270, 278; *Seaward* v. *Willock*, 5 East 198, 202; *Souter* v. *Drake*, 5 B. & Ad. 992, 39 R. R. 715; *Flight* v. *Booth*, 1 Bing. N. C. 370, 375, 376, 41 R. R. 599; *Ellis* v. *Rogers*, 29 Ch. D. 661; and see Anson on Contract, 294, 295, 304, 305, 9th ed. It is submitted that the suggestion made by Cotton L. J. in the last-mentioned case, that the right to a good title may be, not an implied term

stipulation the vendor is bound to show a good title to the fee simple in possession, free from encumbrances, of all the land which he has contracted to sell [1]. Another part of the vendor's general obligation to prove that he has the right to convey what he has contracted to sell is his obligation to show that he has in his possession or can procure to be handed over to the purchaser the whole physical property sold as described in the contract; for example, if the vendor has contracted to sell the Blackacre estate, comprising the substantial stone-built mansion house called Blackacre Hall with 6,000 acres of land adjoining, he must not only show a documentary title in fee simple to the whole of this property, but he must prove that there is such an estate physically existent and that he can convey the same to the purchaser. I mention this aspect of the contract for the sale of land because it seems to me that the construction placed by the Courts of common law upon special stipulations purporting to limit this part of the vendor's obligation has an important bearing upon the construction to be placed by these Courts on the usual special stipulation limiting the time for making objections to the title. Ever since the case of *Flight* v. *Booth* [2] it has been established law (that is, common law) that where land has been sold by a particular description but with a special stipulation that any error, misstatement or omission in the particulars shall not annul the sale but proportionate compensation shall be paid instead, the purchaser shall not be bound by this special stipulation if there is a misdescription which, 'although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all [3].' In such a case, it is held, there is, notwithstanding the special stipulation (which if read literally would apply), such a breach of the vendor's

in the contract, but a collateral right given by the law, is unsound. Cotton L. J. cited a *dictum* of Grant M. R. in *Ogilvie* v. *Foljambe*, 3 Mer. 53, 64, 17 R. R. 13, in support of this view: but on examining this *dictum* it appears that Grant M. R. meant to say nothing more than that in the particular case before him the purchaser's right to have a good title was not expressly provided for by the written agreement between the parties. If the obligation to prove title were strictly collateral to the contract of sale, a breach thereof would not discharge the purchaser from performing his part of the contract. Breach by the vendor of a *strictly collateral* warranty upon a sale does not discharge the purchaser from the main contract, as in the case of a warranty of quality on the sale of specific goods, where the buyer has had the opportunity of inspecting them; *Street* v. *Blay*, 2 B. & Ad. 456, 36 R. R. 626; *Heyworth* v. *Hutchinson*, L. R. 2 Q. B. 447; Benjamin on Sale, 448, 741, 748, 749, 2nd ed.; Pollock on Contract, 484, 528, 7th ed.

[1] *Hughes* v. *Parker*, 8 M. & W. 244; *Bower* v. *Cooper*, 2 Hare 408; *Phillips* v. *Caldcleugh*, L. R. 4 Q. B. 159.

[2] (1834) 1 Bing. N. C. 370, 41 R. R. 599.

[3] *Flight* v. *Booth*, 1 Bing. N. C. 370, 377; approved in *Re Fawcett & Holmes*, 42 Ch. D. 150, and *Jacobs* v. *Revell* [1900] 2 Ch. 858, 864.

obligation as discharges the purchaser from performing his part of the contract, and enables him to sue for the recovery of the deposit as money had and received to his use. The like construction has lately been applied where land was sold under a condition that if any error, misstatement or omission in the particulars be discovered, the same shall not annul the sale, nor shall any compensation be allowed by the vendor to the purchaser in respect thereof, and there was a material misdescription falling within the rule in *Flight* v. *Booth*. In this case the purchaser was held to be entitled to rescind the contract and recover his deposit; the point adjudged being therefore a point of common law [1].

I mention these authorities on account of Mr. Farrer's statement that the case of *Want* v. *Stallibrass* [2] is opposed to proper canons of construction; as I think they show that Courts of common law, in construing special stipulations in a contract, will have regard to the intention with which it is to be presumed that such stipulations were made, and will not enforce strict adherence to the letter of such stipulations if this would lead to a manifest violation of such intention. I will now proceed to examine the authorities which Mr. Farrer cites.

In *Robinson* v. *Musgrove* [3] land was sold under conditions that errors of description should not annul the sale but compensation should be made therefor, and that all objections to the title not made within ten days from delivery of the abstract should be considered as waived. The purchaser took an objection to the *title* within that time, and claimed to rescind on that account. But on the trial of the action to recover the deposit, the purchaser's counsel for the first time raised the objection that there was a material misdescription, that part of the property contracted to be sold was not to be found anywhere, and another part did not answer the description. Tindal C.J. directed the jury, 'If any substantial part of the property purporting to be sold turns out to have no existence, or cannot anywhere be found, that circumstance in my opinion entitled the plaintiff to rescind the contract *in toto*. Deficiency in the value may be fit matter for compensation, but not the total absence of one of the things sold.' This of course is an application of the rule laid down by the same learned judge in *Flight* v. *Booth* [4]. It is another instance of the doctrine that breach of the vendor's obligation to prove that he can convey what he sold altogether discharges the purchaser from observing his part of the contract. It may be suggested that the vendor's failure to fulfil this positive

[1] *Jacobs* v. *Revell* [1900] 2 Ch. 858.
[2] L. R. 8 Ex. 175.
[3] (1838) 2 M. & R. 92.
[4] See above, p. 169.

obligation on his part discharges the purchaser from the stipulation as to time.

In *Blackburn* v. *Smith*[1] land was sold under express stipulations that the vendor should furnish a full and sufficient abstract, and that all objections to the title not made within one month from the delivery of the abstract should be waived, and that non-delivery of any objections within that time should be an acceptance of the title. The land sold was originally copyhold, but had been enfranchised twenty-nine years before the contract. The vendor delivered an abstract showing fifty years' previous title to the copyhold, but no title to the freehold earlier than the enfranchisement, and showing an apparent equitable title in the vendor. The purchaser made no objection to the title within the month. Afterwards he claimed to rescind the contract, and sued in *assumpsit* for his deposit. The particular breach of the contract which he assigned was, however, not a breach of the vendor's obligation to show a good title, but a breach of his promise to furnish a full and sufficient abstract. The vendor's contention was that a full and sufficient abstract must mean an abstract showing a sixty years' title to the freehold, and this was the whole point in issue. It is to this contention that the remarks of the judges cited by Mr. Farrer[2] were directed, and their judgment was thus:—

'We think that the abstract was sufficient within the meaning of this issue, as it must be taken to have been a full and fair abstract of all the muniments which the defendant had in his possession, power, or knowledge, though it did not go back for sixty years. Whether an abstract containing less than what this did would have been sufficient under this contract it is unnecessary to say.'

It is submitted that this case is really of no authority on the point decided in *Want* v. *Stallibrass*[3]. The question put in issue was, not whether the purchaser was barred by the condition as to time from making an objection which would otherwise have been good, but whether the vendor had discharged his obligation to deliver a full and sufficient abstract. The Court decided that he had. Nothing turned on the condition as to time. Besides which, it is established that an abstract may be perfect within the meaning of the rule, that time specially limited for making objections to title runs only from the delivery of a perfect abstract, although it disclose a defective title[4].

In *Oakden* v. *Pike*[5], the facts were as stated by Mr. Farrer[6], but

[1] (1848) 2 Ex. 783. [2] See above, p. 164. [3] L. R. 8 Ex. 175.
[4] 1 Dart, V. & P. 142, 6th ed., approved *Gray* v. *Fowler*, L. R. 8 Ex. 249, 279.
[5] (1865) 34 L. J. Ch. 620. [6] See above, p. 166.

it should be mentioned that *R. O.* the son had prior to the contract executed a disentailing deed with his father's consent. The title therefore stood thus: the father was entitled for life, and after his death the son was entitled in fee, either for a vested remainder, or contingently on his surviving his father, according to the true construction of the will by which their estates were conferred. The vendors therefore certainly had shown some title to what they sold. In these circumstances Kindersley V.-C. decreed specific performance by the purchaser; and his judgment no doubt proceeded on the ground that the purchaser, having entered into the contract to accept the title shown, if no objection should be made within the time limited, was bound thereby and must take the consequences.

The next case in order of time is *Want* v. *Stallibrass*[1] itself. Mr. Farrer has stated the facts and the grounds of the judgment[2]. It is worth while noting how the case was put in the argument of the purchaser's counsel: If the vendors have no power of sale at all, the condition as to time 'does not apply, for the condition only has reference to imperfections in the title as deduced in the abstract, not to cases where the abstract shows affirmatively that the vendor has no title to sell or convey. Such an abstract is merely illusory, and it is as if *A* purported to sell property, and furnished an abstract which showed a title in *X*; it would not enable the purchaser to prepare and tender a conveyance[3].' Kelly C. B. obviously adopted this argument in the passage cited from his judgment[4]. As to that quoted[4] from the judgment of Pollock and Martin BB., I suggest that its true meaning is this: the stipulation that the vendor shall show a good title is vital to the contract, its observance is a condition of the purchaser's liability; where on the vendor's own showing, on the face of his own abstract, he has no right to convey what he sold, the purchaser is altogether discharged from the contract, and is therefore no longer bound by the stipulation as to time. I suggest that there is an intimate connexion between the law laid down in *Want* v. *Stallibrass*[1] and the rule in *Flight* v. *Booth*[5]. *A* sells Blackacre to *B*. *A* delivers an abstract showing a title to Blackacre in *X*, or showing a title in himself to Whiteacre. In either case that is no performance of his obligation to prove title, and the purchaser is *ipso facto* immediately discharged from the contract. And according to *Flight* v. *Booth*[5], if *A* delivered an abstract showing title in himself to (say) half the acreage of Whiteacre, *B* would be discharged from the contract, even though he had agreed that any error of description should not annul the sale, but compensation

[1] (1873) L. R. 8 Ex. 175.
[2] Above, p. 161.
[3] L. R. 8 Ex. 178.
[4] Above, p. 161.
[5] 1 Bing. N. C. 370, 41 R. R. 599.

should be allowed therefor. And it is worthy of note that the actual decision in *Flight* v. *Booth*[1] was upon a deficiency in a matter of right and not of physical content; as the misdescription in that case was of the nature of the restrictive covenants subject to which the property was sold. This is surely very near akin to a misdescription of the title, or quantity of estate sold; as where a vendor, who has contracted to sell the freehold in fee, shows title to a short term only or to a copyhold estate.

The decision and judgments in *Want* v. *Stallibrass*[2] do not however profess to extend further than the case of a failure by the vendor to show that he has any title at all to convey what he has contracted to sell. And I submit that in such a case the vendor's position would not be improved, if the condition as to time had expressly provided, not only that objections not taken within the time specified shall be considered to be waived, but also that in default of any objections so made the purchaser shall be deemed to have accepted the title. If the purchaser is no longer at liberty to make any objection to the title shown, he is impliedly bound to accept the title, as is pointed out by Pollock B. in *Want* v. *Stallibrass*[3]. Surely it can make no difference if this obligation, instead of being left to the implication of law, is expressed in the contract.

As to *Boyd* v. *Dickson*[4] I agree with Mr. Farrer that it is no real authority for or against the rule in *Want* v. *Stallibrass*[2]. It was a vendor's suit for specific performance, and the bill seems to have been dismissed on the like ground of misrepresentation in the conditions of sale as afterwards formed the basis of decision in the leading case of *Re Banister*, *Broad* v. *Munton*[5].

In *Rosenberg* v. *Cook*[6] it is remarkable that *Want* v. *Stallibrass*[2] does not appear to have been cited by the purchaser's counsel. Lindley J. and Brett L. J. appear to have distinctly recognized that if the vendor had only a revocable licence, he would be producing to answer the contract something distinctly different from what he had contracted to sell, and in that case the purchaser would have been discharged from the contract, notwithstanding the time stipulation[7]. But the decision of the whole Court of Appeal proceeded on the ground that the vendor had in effect contracted only to give a possessory or disseisor's title—an estate by wrong, which, the learned reader will remember, is an estate in fee simple—and that he had shown such title as he contracted to give. It may be

[1] 1 Bing. N.C. 370, 41 R. R. 599. [2] L. R. 8 Ex. 175; see above, pp. 161, 162.
[3] L. R. 8 Ex. 185. [4] (1876) 10 Ir. Eq. 239. [5] (1879) 12 Ch. D. 131.
[6] (1881) 8 Q. B. D. 162; see above, p. 165.
[7] I submit that this opinion shows the intimate connexion between the rule in *Flight* v. *Booth* and that in *Want* v. *Stallibrass*.

observed, in answer to Mr. Farrer's remark, that this decision rendered the remarks of Lindley J. and Brett L. J. superfluous, for if the Court of Appeal had thought that the purchaser was barred by the time stipulation, no matter what title or want of title the vendor showed, it would have been quite unnecessary for them to consider what title he had promised to give, and whether he had performed that promise.

In *Re Tanqueray-Willaume* and *Landau*[1] the decision of Kay J. and the *dictum* of Jessel M. R. are of course founded on an acceptance of the rule in *Want* v. *Stallibrass*[2] as good law: but, as Mr. Farrer points out, the return of the deposit does not appear to have been asked for in that case, so the proceedings would seem to have been analogous to an equitable action for specific performance rather than a common law action to recover the deposit. But accepting Mr. Farrer's view in this respect the point is that this decision and this *dictum* apply the principle acted on in *Want* v. *Stallibrass*[2] to proceedings to obtain the specific performance of the contract, and therefore cast doubt on the correctness of the decision in *Oakden* v. *Pike*[3].

The case of *Soper* v. *Arnold*[4] was this: The conditions in a contract of sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions the deposit should be forfeited, and the vendors should be at liberty to resell. The purchaser paid the deposit and accepted the title, but when the time for completion arrived he could not provide the residue of the purchase-money. The vendors thereupon gave the purchaser notice that the contract was rescinded and the deposit forfeited. Three years afterwards the vendors having contracted to sell to another purchaser, it was decided that their title was bad, owing to a defect which had appeared upon the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake and failure of consideration. It was held by Kekewich J., the Court of Appeal, and the House of Lords that, the title having been accepted, and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit. The case was distinguished from that of *Want* v. *Stallibrass*[2] on the ground of the purchaser's express acceptance of the title, followed by his own default in completing the contract, the vendor's consequent rescission and the purchaser's acquiescence therein. I submit that there is nothing more in the case than this. No attempt

[1] (1882) 20 Ch. D. 465; above, p. 162
[2] 34 L. J. Ch. 620; above, pp. 166, 171.
[3] L. R. 8 Ex. 175.
[4] (1887) 35 Ch. D. 384, 37 Ch. D. 96, 14 App. Cas. 429.

seems to have been made in argument to upset the authority of the rule in *Want* v. *Stallibrass*[1]. Both Kekewich J.[2] and Cotton L. J.[3] considered that case to have been correctly decided; and it is submitted that in Lord Herschell's judgment there is really nothing antagonistic to the principle there laid down.

In re Scott and Alvarez's Contract[4] land held by underlease was sold under a condition that the purchaser should make no objection or requisition in respect of the intermediate title between the underlease and an assignment thereof in 1891, but should assume that such assignment vested in the assignees a good title for the residue of the term. The purchaser's solicitor nevertheless asked questions as to this intermediate title of the vendor's solicitor, who gave him certain information tending to cast suspicion on such title. The vendor's solicitor asserted that this was done without prejudice to the special condition. The purchaser maintained that, as the vendor had given information as to the intermediate title, he could not oblige the purchaser to accept the title shown without clearing up the suspicions raised. The purchaser took out a vendor and purchaser summons in support of this contention, which prevailed with Kekewich J., but was disallowed in the Court of Appeal. The Lords Justices held that, to enable the purchaser to escape from the stringent condition into which he had entered, it was not enough to show that the title was suspicious, but he must prove it to be bad; and as it was made to appear to them that the purchaser's main objection was removed by the Statute of Limitations, they held that he had failed in such proof. After this, the purchaser discovered that gross frauds had been committed with respect to the intermediate title, and that several documents, on which the vendor's title depended, were forgeries; and he declined to complete the purchase. The vendor, who was not in any way implicated in the frauds, then brought an action for specific performance, to which the purchaser by leave counterclaimed to review the order of the Court of Appeal made in the summons, on the ground of the subsequent discovery of fresh material facts. Kekewich J. not only dismissed the vendor's action for specific performance but ordered him to return the deposit. But, on the case being again taken to the Court of Appeal, it was considered that at law the purchaser was strictly bound by the contract into which he had chosen to enter, and could not therefore recover his deposit, as there had been no breach of contract by the vendor. But it was declared that the specific performance of the contract in equity depended on different considerations; and on this point

[1] L. R. 8 Ex. 175. [2] 35 Ch. D. 387, 388. [3] 37 Ch. D. 101.
[4] [1895] 1 Ch. 596, 2 Ch. 603.

the judgment was affirmed for the reason that, as the vendor had no holding title at all, but was liable to instant ejectment, his title was not such as the Court would oblige an unwilling purchaser to take. As regards the common law aspect of this case, it is submitted that it is entirely different from *Want* v. *Stallibrass*[1]. There the vendor was under an absolute and unqualified obligation to show a good title, and he failed to discharge this obligation. In *Re Scott and Alvarez* the vendor had limited his obligation to show a good title by very stringent conditions, and it was considered that at law he had discharged the obligation which he had undertaken. He was not therefore in default as regards the performance of his part of the contract. The purchaser, however, was in default, for he had broken one of the special conditions of sale in calling in question the title during a period of time for which he had contracted to assume that it was good. And as regards the equitable rule laid down in *Re Scott and Alvarez*, namely that the Court will not order a purchaser to perform his contract specifically where he will not obtain a good holding title, even though the title offered be such as he had expressly contracted to accept, surely this is an express negation, so far as the doctrine of specific performance is concerned, of the principles as to the sanctity of contracts and the importance of holding people to their bargains enunciated in the judgment delivered in *Oakden* v. *Pike*[2].

In *Saxby* v. *Thomas*[3] the purchaser bought from a mortgagee selling under his power of sale. There was a question whether the mortgagor had power to create the mortgage. The purchaser did not take this objection until after the time limited for making requisitions had expired. The purchaser's counsel contended that *Want* v. *Stallibrass*[1] established that a purchaser out of time with his requisitions can nevertheless recover his deposit where the vendor shows no title at all. The vendor's counsel maintained that the rule in *Want* v. *Stallibrass*[1] does not apply where the vendor has shown a good holding title. Romer J. held[4] that *Want* v. *Stallibrass* is an authority that the condition limiting the time for making requisitions cannot be used for the purpose of forcing a bad title upon a purchaser because he has not taken objection to the title within the time limited; and assuming the law to be that the rule in *Want* v. *Stallibrass* does not apply so as to preclude the vendor from retaining the deposit where he has shown a good holding title, the vendor was too late in raising this contention after the purchaser had claimed to rescind. In the Court of Appeal Romer J.'s decision was reversed entirely on the

[1] L. R. 8 Ex. 175.
[2] 34 L. J. Ch. 620; see above, p. 171.
[3] (1890) 63 L. T. N. S. 695, 64 id. 65.
[4] 63 L. T. 698.

ground that the mortgagor had power to create the mortgage, so that the title was good. But Lindley L. J. said: 'If it were necessary to decide that point, I should like to have a little further time to compare such cases as *Want* v. *Stallibrass* on the one hand and *Oakden* v. *Pike* on the other, and *Rosenberg* v. *Cook* and the other cases which have been referred to by counsel for the vendor. I do not feel clear that all these cases are quite consistent. I do not say they are not; but off-hand I feel a difficulty in reconciling them all.' Lopes L.J. desired to express no opinion on the point as to time, it being unnecessary and there being decisions which it was difficult to reconcile. It is submitted that these *dicta* cannot fairly be represented as being opposed to the rule in *Want* v. *Stallibrass*[1]; surely the intention of both these learned judges was to guard against their judgments being taken as an expression of opinion on that point.

In *Life Interests &c. Corporation* v. *Hand in Hand &c. Society*[2], the decision of Stirling J. was no doubt as stated by Mr. Farrer. But that action was a vendor's action for specific performance, and the defendants' counsel put their case no higher than this—that in resisting an action for specific performance, a purchaser is not precluded by conditions of sale in the form in this case from proving by any means in his power that the vendor's title is defective, though he *may be* precluded from obtaining a return of the deposit[3]. *Want* v. *Stallibrass*[1] was not cited. It appears from this that Stirling J. simply adopted the contention of the purchaser's counsel with respect to the question of the defendants' right to resist specific performance. This was the only question he was concerned to decide; and the mere repetition by him of the qualification put by the defendants' counsel in argument, that the purchaser *might not* be able to recover the deposit, cannot fairly be regarded even as an *obiter dictum* to that effect. It is submitted, therefore, that this case is not, as Mr. Farrer asserts, in direct antagonism to *Want* v. *Stallibrass*[1]. It appears, however, to be in direct conflict with the case of *Oakden* v. *Pike*[4], and to be a concrete application to facts like those in *Oakden* v. *Pike*[4] of the principle established in *Re Scott and Alvarez*[5]. But it should be mentioned that *Oakden* v. *Pike*[4] was not cited in argument.

In *Pryce Jones* v. *Williams*[6] leaseholds were sold by the Court under the usual stipulations limiting a time for making objection to the title. The vendor showed a good equitable title to the property

[1] L. R. 8 Ex. 175; see above, p. 161.
[2] [1898] 2 Ch. 233.
[3] [1895] 2 Ch. 603.
[4] 34 L. J. Ch. 620; see above, pp. 166, 172.
[5] [1898] 2 Ch. 230; see above, p. 165.
[6] [1902] 2 Ch. 517.

sold. After the time had expired, the purchaser took the objection that the legal estate was outstanding. The vendor took out a summons claiming in effect specific performance; the purchaser claimed rescission of the contract and a return of the deposit. The purchaser's counsel relied on the rule in *Want* v. *Stallibrass*[1] and the *dicta* as to objections going to the root of the title in *Re Tanqueray-Willaume and Landau*[2]. Joyce J., after holding that the legal estate was outstanding in the Crown, made an order on the vendor's summons and dismissed the purchaser's claim. He said:—

'Now, the requisitions that were made with reference to the legal estate in those two leases were not as to the root of title, but as to the subsequent devolution[3]. I come to the conclusion that those requisitions cannot be insisted upon, the vendors standing, as they do, upon condition 6, which stipulates that the requisitions must be made within a limited time. On consideration I see no reason why, in this case, the purchaser is not bound by the fact that his requisitions were not sent in in time. The purchaser will obtain possession of the property, and he will get a perfectly good equitable title, and he cannot be disturbed; and he will, no doubt, obtain the legal estate upon application to the proper quarter and upon payment of certain recognized fees, although I admit that the Crown could not be compelled to assign the legal estate.'

The learned judge did not question the propriety of the decision in *Want* v. *Stallibrass*[1], but declined to apply the rule there laid down to the case before him. He seems to have decided the point raised before Romer J. in *Saxby* v. *Thomas*[4], namely, that the rule in *Want* v. *Stallibrass*[1] does not apply where the vendor has shown a good holding title. It will be remembered that the decision in *Want* v. *Stallibrass*[1] did not profess to go beyond the case where the vendor had shown no title at all. Between showing no title at all and showing a good holding title there are many degrees of security or insecurity of title; and it may be asked, If *Want* v. *Stallibrass*[1] and *Pryce Jones* v. *Williams*[5] were both well decided, at what point ought the line to be drawn between them? It is submitted that the answer to this question should be found in the principle established in *Flight* v. *Booth*[6], and that if the vendor, on the face of his own abstract, shows a title so materially different from the description of title which he had contracted to give 'that it may reasonably

[1] L. R. 8 Ex. 175. [2] 20 Ch. D. 465; see above, pp. 162, 174.

[3] It is submitted, with great respect to Joyce J., that the expressions used by Kay J. and Jessel M.R. as to objections going to the root of the title do not bear this sense. They were alluding, not to objections to the instrument with which the title commenced, but to objections founded on a total failure by the vendor to discharge his obligation to show a good title.

[4] 63 L. T. 695; see above, p. 176. [5] [1902] 2 Ch. 517.

[6] 1 Bing. N. C. 370, 377; see above, p. 169.

be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all,' then the vendor has on his own showing failed to discharge his obligation to show a good title, with the result that the purchaser is altogether discharged by this breach of contract from performing his part of the agreement, notwithstanding that he may not have objected to the title within the time limited for making the requisitions. This of course is no more than suggestion; and it is hazardous to proceed to an example. But if a vendor have expressly or impliedly undertaken to show title to the freehold in fee, free from encumbrances, in land sold, does he discharge that obligation by showing on the face of his own abstract the right to convey no more than an estate for a short term of years or even for his own life? And is not the title which he does show something so different from that which he contracted to give that it may reasonably be supposed that the purchaser would not have entered into the contract but for the representation that he should have the fee?

Finally, with regard to Mr. Farrer's contention [1] that the decision in *Want* v. *Stallibrass* [2] is largely founded on the fallacy that, unless the Court had refused the vendor's construction of the condition, the purchaser would have been compelled to accept and pay for an absolutely bad title, but that it is clear from *Re Scott and Alvarez* [3] that the Court will not compel a purchaser to pay for an absolutely bad title. The last-mentioned case certainly decided that the Court will not enforce specific performance where the vendor can only give a title, which would subject the purchaser to instant ejectment; but in its common law aspect this case is directly opposed to any doctrine that where the title is such as a court of equity will not oblige the purchaser to accept, the vendor cannot recover damages for breach of contract. It was distinctly laid down in *Best* v. *Hamand* [4] that where the vendor has shown such title as he contracted to give and the purchaser contracted to take, then the vendor is entitled to recover damages at law from the purchaser declining to fulfil the contract, notwithstanding that the specific performance of the contract is impossible. *Best* v. *Hamand* [4] was the first of the decisions [5] evolving the rule of common law laid down in *Re Scott and Alvarez* [3]; and these cases establish that at law a vendor, who has strictly complied with the letter of the obligation which he undertook with respect to showing title, is entitled to reap the fruits of the contract if the purchaser refuses to perform

[1] See above, p. 166.
[2] L. R. 8 Ex. 175.
[3] [1895] 2 Ch. 603.
[4] (1879) 12 Ch. D. 1, 12.
[5] *Nottingham &c. Co.* v. *Butler*, 16 Q. B. D. 778; *Re Davis to Carey*, 40 Ch. D. 401; *Re National Prov. Bank of England & Marsh* [1895] 1 Ch. 190.

it. The measure of the damages which he can recover depends on the question whether he has executed a conveyance to the purchaser. If not, he can only recover the damages he has actually sustained; not the whole purchase-money; but he is entitled to substantial compensation for his loss[1]. It seems that if the vendor in *Re Scott and Alvarez*[2], instead of suing for specific performance, had tendered a conveyance to the purchaser, and on his refusal to accept it had sued at law for damages for breach of contract, he could have recovered substantial damages.

T. CYPRIAN WILLIAMS.

III.

[We thought it proper to give Mr. Farrer the opportunity of making the following short reply to Mr. Cyprian Williams's observations.—ED.]

WHEN in a contract there is inserted the usual condition as to the purchaser's right to an abstract, compelling him in default of objection within a time limited to accept the title, what in words does the vendor say and the purchaser agree to, but that if objections shall not be taken within the time they shall be deemed non-existent?

Any other construction of the condition must be a forced construction; is there any reason for applying a forced construction?

As regards the time condition and that alone the purchaser is given the opportunity after contract of exercising his own judgment. Why should the sloth or want of skill of his advisers be a reason for saying that the condition shall not mean what in plain English it says?

It is true that the ordinary conditions giving or excluding compensation or making the purchaser take subject to easements &c. in general form, do not cover objections for an essential defect undisclosed.

There is reason in these cases for saying that the purchaser is not to be bound by the express words of his contract and in giving to the condition a conventional meaning, for unless this was done the purchaser from the moment of his signing the contract would be absolutely bound by the condition without having

[1] *Laird* v. *Pim*, 7 M. & W. 474; Sug. V. & P. 238, 14th ed.
[2] [1895] 2 Ch. 603.

had opportunity to exercise his judgment on the specific defect objected to. The reason fails in application to the time condition; the purchaser is given an absolute right to exercise his judgment on the abstract though the contract has already been signed.

For the reasons given in my preceding article and in this short reply, I venture to disagree with the conclusions drawn in Mr. Cyprian Williams's learned article.

FREDERICK EDWARD FARRER.

[But is it a question of construction at all? Can parties stipulate that a total failure of consideration shall have no effect?—ED.]

LABOUR COMPETITION AND THE LAW.

Part II.

BEFORE proceeding to discuss some of the recent cases bearing on the subject of conspiracy, it will be convenient to restate the circumstances under which agreements to work the hurt of another may be unlawful, although the means used to carry out the agreement be not unlawful apart from agreement. In order to attain a greater degree of particularity and perhaps of accuracy, we shall consider them with reference to the invasion of a right; and in particular, agreements which are directed to the mental disturbance of the subject must be distinguished from those which are not. Thus

(1) A combination may conceivably be unlawful because it directly contemplates an invasion of the general abstract right of the individual to the preservation of his interests consistently with the welfare of the community of which he is a member. If however the agreement contemplate no more than an infringement of this general right, it is only unlawful, if at all, when it is solely attributable to the fraudulent or injurious designs of several minds. Simultaneity of action without intent is nothing[1]. Or (2) a combination may be unlawful if it directly contemplates, as in the case of a strike by workmen, a disturbance of the abstract right of the individual to peace of mind. It is the intention of the law to protect individuals from being wantonly and unjustifiably exposed to that sensation of alarm which ordinarily arises from a knowledge that two or more persons are agreed to do, or in concert have actually done, something by the use of numbers which he does not like, provided there be in fact a common and direct intention to cause him mental unrest. This is the class of conspiracy which specially affects combinations of masters, combinations of men, and last but not least, trading combinations.

The sole difficulty, therefore, to be met with in dealing with cases of this kind is that where there is no intent to disturb by utilizing numbers the equanimity of an individual, the position lacks sure authority[2]. A possible factor of what Lord Macnaghten termed in *Quinn* v. *Leathem* a 'malicious conspiracy to injure' may

[1] And vice versa, at least where the means are *per se* lawful.

[2] Is it this common and direct intention to prejudice the peace of mind which forms a component part of the criminality and of the *injuria* of a harmful conspiracy, or is a knowledge of individual disadvantage enough? Under ordinary circumstances an intention to alarm would be presumed (by *presumptio juris et de jure*) from an intention to do that which is calculated to alarm. Consider on this point *Barber* v. *Lesiter*, 7 C. B. N. S. 175, where there was neither simultaneity nor intent.

be the purpose, not of Coercion but of Intimidation. By Intimidation we mean the act of making a person afraid or mentally uneasy, whereas Coercion is the employment of intimidation for a specific purpose, namely in order to compel that person to pursue a course of conduct which he would not otherwise have pursued. The charge of conspiracy in *Gregory* v. *Brunswick*, a case referred to with approval by Lord Macnaghten, was in substance a charge of unlawful and desired intimidation. Thus the declaration states that the 'defendants contriving and maliciously intending to injure and *aggrieve* the plaintiff, and to bring him into public scandal, shame, and disgrace, and to injure the plaintiff in his profession or occupation of an actor . . . and to *oppress*, *vex*, impoverish and ruin the plaintiff . . . wickedly and maliciously did amongst themselves conspire &c.' The writer is unable to agree with the suggestion that the legal materiality of the element of numerical strength lies wholly or necessarily within the realm of Nuisance. Speaking of the proposition that two persons may not lawfully do that which one may lawfully do, Mr. Haldane has recently said [1] that 'the test seemed to him to be, were a large number of people combining together to do what one might legally do, so as to create a nuisance.' This would be, it is submitted, to confine the real issues within a compass far narrower than the authorities admit of. It is hardly necessary to remind the reader that *Quinn* v. *Leathem* and the *Mogul* case are leading cases, not on the law of nuisance or picketing, but upon the law of molestation in trading rights by means of and in pursuance of an unlawful agreement. A private nuisance (and acts of boycotting, at any rate, must be private nuisances or not properly nuisances at all) has always been understood to signify a disturbance of a right enjoyed in connexion with the ownership or occupation of specific property [2]. It is not accurate to say that a man has a proprietary or quasi-proprietary interest in his trading expectations, at any rate where those expectations are not based upon any existing contract (*Allen* v. *Flood* [1898] A. C. 1). Hence the action for a conspiracy to injure a man in his trade, which as we have suggested probably finds its origin in the qualified right of the subject to peace of mind, is not a form of nuisance, although a form of trespass on the case. The true position, I suggest, is

[1] See *Times*, January 21, and *Contemporary Review*, March, 1903 [and cp. L.Q.R. xiv. 131.—Ed.].

[2] Private nuisance is defined in Blackstone's Commentaries, Book iii. p. 216, as 'anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another'; [sc. not amounting to a trespass]. Bracton, it is true, describes the establishment of a rival windmill, whereby the owner of an existing mill loses his custom, as an instance of *justum nocumentum*, but there is no reason to suppose that the damage referred to is not treated as suffered in respect of the ownership or occupation of the mill. For *common* nuisance see Bac. Abr. N.

this. The law may be supposed to say to bodies of persons allied together for a common object—'If you use simultaneity against another for the purpose of gratifying ill-will, you will be liable to an indictment, and to pay compensation for any damage you occasion; while if you intend to bring about in this way discomfort with a lawful object in view, that intention must be founded in reason having regard to the nature of such lawful object, and not only such intention itself, but all and every of the acts by which that intention is sought to be consummated. If you do by concert any unreasonable act of damage, it is presumed, at least with reference to such act, that your motives were those of hatred and ill-will, and you will be liable to an action at law, and unless covered by some Act of Parliament you may be indicted.' There must be a reasonable necessity to justify. This involves a reasonable efficacy underlying what is done, and also (for conduct may be efficacious without being necessary) a reasonable occasion. There must also be a lawful necessity or occasion. By 'lawful' occasion I mean this. The whole principle of successful justification appears to depend upon a disclosure by the facts of the hypothetical existence of an antinomy or antagonism of lawful interests. And a proposition further deducible, I think, from the authorities is this, that a lawful interest cannot be successfully set up as justification for the concerted interruption of a lawful interest of a different order, at any rate where the latter is that of pursuing a lawful calling. In other words, the opportunity to earn money in a lawful way is only to be legally disturbed by concerted intimidation, when that attack is made for the purpose of drawing money in some form or other into one's pocket, or securing the best return for one's outlay. The law does not forbid struggles of this character; nay rather, it encourages them. For competition for the sake of money, whatever form it take, tends to make a country rich, and withal promotes healthy effort and industry. Without the field of competition, concerted and intentional intimidation by intrinsically lawful means is criminal and illegal. The motive for toleration is gone. Abstract interests of morality or religion, unconnected with the right to acquire money or its equivalent in a lawful way, cannot be relied upon as excuse. So too, molestation of this kind cannot be resorted to, (as actually happened in a case to which I shall refer), as a convenient method of debt-collecting. Above all, anything in the nature of a blind and unreasoning attack even in the cause of competition is condemned. For an ulterior motive is imputed in every case, where sensible men would not have acted in the way complained of for the sake of their lawful advantage.

Now let us apply these principles to facts and cases. It follows

that every strike (and by strike we mean an agreement by workmen to throw up their employment simultaneously, or in such a manner as to affect prejudicially their employer's peace of mind) which is not calculated by reason of the circumstances to put money into the pockets of the *strikers* is unlawful, and apart from the Act of 1875 indictable. I lay aside cases of vicarious attack.

The same is equally true of lockouts by various masters or firms acting in combination so as to alarm or punish certain workmen, save that s. 3 of the Act of 1875 affords no protection to masters. The position of joint employers is of course a different one. The dismissal with proper notice of a particular servant by two or more persons possessing jointly the right to his services cannot ordinarily evidence an unlawful agreement; for inasmuch as the servant's position is the same whether the right to control him and the liability to pay him is vested in one or a hundred, he feels no annoyance or alarm on the score of the numerical strength of the persons responsible for his dismissal. Taken by itself, therefore, such an act cannot evidence an agreement to disturb his peace of mind. So too, where *A* says to his master, 'I shall leave you, if you do not dismiss *X*,' *X* will have no remedy if he is dismissed. But where *A* and *B* go to their master and say, 'We shall leave together, if you do not dismiss *X*,' this conduct needs justification not only as regards the master but as regards the servant as well, not necessarily, as regards the latter, because an agreement to alarm him is evidenced (though the circumstances may often justify that inference), but by reason of the character of the conduct pursued towards his master.

Having then established the agreement to molest by employing the arm of numbers, it then remains for the Court, I suggest, to inquire, not what evidence there be of the actual existence of a proper or even a laudable motive, but what evidence there is, if any, from which such a motive ought to be legally presumed.

In a case[1] of last year, the plaintiff, a joiner, had applied for membership of an union which resisted the practice of piecework; but subsequently, being short of money and having a wife and children to keep, worked for a short time in a non-union shop and accepted piecework. On his applying to the union for admission to full membership, not only was his application refused, but the union procured his then employer, who principally employed union men, to employ him no longer by a threat of a strike; and in the result prevented him from obtaining work anywhere. In an action brought by Thomas against the union to recover damages in con-

[1] *Thomas* v. *Amalgamated Society of Carpenters and Joiners*, tried at Manchester Assizes, cor. Wills J.; reported *Times*, Monday, April 28, 1902.

illustration of the broad principle that the law refuses to admit for the purpose of exoneration the existence of a proper motive for any act of folly or immoderation. The State can only treat the dangerous fool as it would the most accomplished emissary of Satan; and it flatters him egregiously when it sends him to prison or mulcts him in damages. It is true, no doubt, that an infinite possibility of consequence may attach to all kinds of conduct, but there must always be a degree to which harmful conduct may reach, where all reasonable men will be agreed as to its ineffectiveness or its excess, for the purpose of acquiring profit in a particular direction. And it is left to the judges, I maintain, to voice by their pronouncements on this branch of the law such consensus of reasonable opinion, which will thus become crystallized into precedent. Legal limits can be set to competition.

It seems strange that the above principle should never have definitely suggested itself as a complete and (as I venture to think) an altogether satisfactory answer to the Labour problem. Direct and unambiguous authority, no doubt, is wanting at present for its recognition in this country, but the general trend of actual decisions is not against it. No doubt the principle has been much obscured by some remarks made in the *Mogul* case (to be mentioned hereafter), which may have been, not unreasonably perhaps, misunderstood.

On the other hand, the following expressions of Lord Bowen with reference to the justification for the combination in the *Mogul* case (23 Q. B. D. p. 61) are compatible with such a rule. 'Such legal justification would not exist where the act was merely done with the intention of causing temporal harm *without reference* to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell.' And the following passages in the judgment of Fry L. J. in the same case seem to recognize the principle, at least as involving *strong evidence* of actual malevolence. 'The damage to be inflicted on the plaintiffs was to be strictly limited by the gain which the defendants desired to win for themselves' (23 Q. B. D. p. 622). This consideration of whether or no the damage be limited to the requirements of self-interest, as a test of justification, appears to have been adopted literally by Holmes L. J. in *Leathem* v. *Craig* ([1899] 2 I. R. 777). And the following passages, if we understand the expressions 'object of harm' and 'object to injure' therein to include not merely a primary object of inflicting harm for the sake of producing mental uneasiness, but a secondary object of gratifying ill-will, seem directly to support the present contention. 'There was *not only* no malice or indirect object *in fact*,

but the existence of the right to exercise a lawful employment, in the pursuance of which the respondents acted, negatives the *presumption* of malice which arises when the purposed infliction of loss and injury upon another cannot be attributed to any legitimate cause, and is therefore presumably due to nothing but its obvious object of harm ([1892] A. C. p. 59, per Lord Field). And Lord Hannen says (ib. at p. 59), 'If several persons agree not to deal with a particular individual, as this could not, under ordinary circumstances, benefit the persons so agreeing, it might well lead to the conclusion that their real object was to injure the individual.' It is evident, therefore, that both these judges thought that the element of malevolence is material in some sense in these cases. Lord Hannen speaks of a 'conclusion' of fact, it seems; but Lord Field clearly refers to a 'presumption' of law.

And the principle seems to have been in a manner present to the mind of Lord Esher in giving judgment in *Temperton* v. *Russell*[1]: 'These trade unions appear to have agreed together that certain rules, which they *thought* to be for their benefit, should be observed by the master-builders of Hull,' and 'The trade unions . . . seem to have come to the *conclusion* that a certain mode of carrying on building operations . . . was detrimental to their interests or those of their constituents.'

Mark too the language of Lord Campbell in *R.* v. *Hewitt* (to be presently referred to): 'No doubt the defendants may have been under a *delusion* that they were doing what they were entitled to do, but they must be instructed that the law must be obeyed, and that they cannot be permitted to injure their neighbours in carrying out that which they *may consider to be a protection to themselves.*'

The remote or illusory character of the advantage sought to be gained in *Temperton* v. *Russell* may be usefully *compared* with the characteristics of a strike against the refusal to pay a fine as in *R.* v. *Hewitt*[2]: to procure the reinstatement of a dismissed fellow-workman (the *Gas Stokers'* case[3]); to procure the dismissal of fellow-workmen merely because they were working under a general declaration not to strike (*Walsby* v. *Anley*[4]); the *useless* (in any reasonable sense) and unnecessary 'punishment' of persons anxious to join a union (*Quinn* v. *Leathem*); kinds of conduct all of which have been at various times held unlawful. And, on the other hand, the facts in *Temperton* v. *Russell* may be *contrasted* with a strike or threat of it in order to gain over a workman from a *rival* union (*Gibson* v. *Lawson*[5]); or to procure the dismissal of non-union men, and so acquire the monopoly of labour in a port for a particular

[1] [1893] 1 Q. B. 715. [2] (1851) 5 Cox, 162. [3] (1872) 12 Cox, 316.
[4] (1861) 30 L. J. M. C. 126. [5] [1891] 2 Q. B. 545.

union (*Curran* v. *Treleaven*[1]); conduct which has been held to be at least not criminal; and again with a shipowner's combination to influence shippers and others to deal only with the combine by a method of procedure necessary to secure the monopoly of the tea-carrying trade, and thus to compel a rival firm to leave the field (*Mogul* case). And with similar conduct on the part of a society trading in meat (*Glasgow Fleshers'* case[2]). And, lastly, with the threat of a strike in order to secure protection from encroachment by others on a particular class of labour in which the persons combining were directly and exclusively interested (*Allen* v. *Flood*[3]); conduct which was positively held lawful in each instance so far as the question of civil liability was concerned, except in the last case—where the legality of the strike was merely conceded by counsel as unquestionable. We shall have occasion later on to question the accuracy of the legal view upon which this admission appears to have been based.

It may be observed here that different considerations arise in such cases as these with reference to the damage threatened to or inflicted on third persons with the object of securing an end which is in itself lawful though injurious to the person ultimately aimed at; and here it becomes important to inquire whether the conduct towards such third persons was reasonably *necessary* in every way, and not merely effective, in order to attain the lawful object? Under those circumstances only will the lawfulness of the ultimate object operate in law to invest with legality the immediate object of injury[4]. When once a course of harmful conduct has been shown to involve an adequacy of result, it does not seem to be less 'necessary' because the harm it inflicts is out of all proportion to the advantage gained. But where the damage is excessive in the sense that certain harmful conduct would have recommended itself to a reasonable man as being clearly sufficient, any additional or misconceived damage will be inflicted unlawfully. Upon this principle it follows that where the injury of one person would suffice, the injury of another or others as well is unlawful. But we may notice that upon the present test, the accuracy of that part of the decision in *Lyons* v. *Wilkins*, where the boycotting of an outworker for a manufacturer by an union was held unlawful, may be doubted; seeing that (as one of the judges sitting in the Court of Appeal expressly stated or admitted in his judgment[5]) the

[1] [1891] 2 Q. B. 545. [2] 35 S. L. R. 645. [3] [1898] A. C. 1.

[4] Wherever a man commits an unlawful act intending a third person's harm or even knowing that it is calculated to injure a third person, such third person has a right of action (*Tarleton* v. *M'Gawley*, 1 Peake N. P. C. 270, 3 R. R. 689; *Garret* v. *Taylor*, Cro. Jac. 567; *Riding* v. *Smith*, 1 Ex. D. 91; *Levet's* case, Cro. Eliz. 289).

[5] Lord Lindley (then L. J.) [1896] 1 Ch. at p. 822.

conduct towards the outworker was *necessary* to make the strike 'effective.' In this case the defendants, who were officials of a trade union, procured to be boycotted not only the manufacturer, but also the outworker in order to prevent him supplying the former with materials for his trade. But their real and ultimate object was to force the manufacturer to grant a rise of wages. It was admitted by the judges that the boycotting of the manufacturers was legal, both as regards the strikers and the union. It seems in fact only possible to support the case, if at all, on the ground that the union, which the defendants represented, had not the adequacy of interest which the strikers possessed, and upon this question reference may be made to *R.* v. *Rowlands*[1], where members of a trade union were successfully prosecuted for conspiring to procure a strike of men who were not members of the union. Sheer altruism is certainly no excuse. But if *Lyons* v. *Wilkins* is to be supported on this ground, it would follow that all procurement of strikes by a trade union comprising amongst its members persons other than the strikers, would be absolutely illegal. But in truth it would seem more accurate, upon this question, to regard the trade union and its officials as agents for each and every of the members; appointed, that is to say, by each one (in effect), upon his admission to the union, to act in his behalf and to further his interests.

We may next make two observations upon some expressions employed in the *Mogul* case. First, although Fry L.J. said in the course of his judgment in that case, 'to draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the Courts,' and Lord Bowen and Lord Bramwell also made observations to a similar effect, those judges were merely dealing with the specific contention raised in the case that the offering of reduced rates by the defendants was 'unfair,' and perhaps also with the notion that the defendants might have stopped short of a complete annihilation of their rivals so far as a locally limited enterprise was concerned. They did not lay down, and one can hardly think they meant to lay down, that a judge has no 'power' to distinguish conduct which is within from conduct which is without the category of acts in the course of competition in trade or labour. Observe, at any rate, that the doctrine cannot be successfully impugned on the ground that it admits in the courts an arbitrary discretion capable of working hardship in the hands of a biased or prejudiced judge. Every case of this kind can be decided, under the test indicated, upon the

[1] (1851) 16 Q. B. 671.

adducement of reasons and upon logical deductions based thereon. No decision based on reason can be truly said to be arbitrary.

Secondly, while the *dicta* (previously referred to) of six judges in the same case as to the insufficiency of the element of restraint of trade for the purpose of constituting a ground of action in tort, are not only of binding authority, but historically speaking of unquestionable accuracy, and that, whether by restraint of trade be denoted an unreasonable restriction or a mere restriction placed upon trading capacities and possibilities, those statements do not touch the liability for inflicting a damage depending for its illegality upon the element of injury effected by combination with the object of inflicting harm or annoyance. In other words, though in the result the test of the illegality in question may incidentally depend upon the reasonableness of the agreement operating in restraint of trade, in respect of which and in furtherance of which the damage is inflicted, the gist of the illegality and the *injuria* is the harmful or alarming combination and not the unreasonable restraint of trade.

The main principles however, herein contended for, do not seem to have been followed by Walton J. in the recent case of *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland and others*[1]. The facts were these. The treasurer of an union became in arrear with his payments due to the union to the extent of some £38. He was sued in the County Court and judgment was given against him by consent, for two monthly payments of £5, and the remainder to be paid by monthly instalments of £1. He paid £4 and no more. A judgment summons was then issued claiming £11, which at the time was more than was due under the terms of the judgment, and the summons was consequently dismissed with costs. Thereupon Williams, the general secretary, and Toomey, a local secretary of the union, wherever the plaintiff obtained employment, compelled his employer for the time being to give him notice to leave, by threatening that their men would be made to strike; with the result that in the end the plaintiff was unable to find work and ceased to do any work at all. He brought an action against Williams, Toomey, and the union for damages, alleging a malicious conspiracy to injure him in his calling. Walton J. left the following questions to the jury:—

1. Did the defendants Williams and Toomey acting together or individually call out the union men or threaten to call them out unless the plaintiff was stopped?
2. If they or either of them did, did they or he do so to

[1] Tried at Cardiff Assizes, 1902 (*Times*, March 28, p. 10); 18 T. L. R. 500.

prevent or endeavour to prevent the plaintiff from getting employment or retaining his employment?

3. Was this done in order to compel the plaintiff to pay the arrears of his defalcations?
4. Was it done in order to punish the plaintiff for not paying such arrears?

Certain alternative questions were also submitted to the jury in the event of their answering the above questions in the affirmative.

5. Was what the defendants Williams and Toomey did only to warn the employers that union men would leave in consequence of union men being unwilling to work with the plaintiff?
6. Was this done in consequence of the union men objecting to work with plaintiff?
7. What damages, if any?

The jury answered the first three questions in the affirmative, and the fourth also as regarded Williams, but in the negative as regarded Toomey. Their replies to the alternative questions were in the negative, and they assessed the damages at £100.

The learned judge gave on these findings judgment for Toomey on the ground that his object was, as the jury found, merely to compel repayment of the defalcations, and for the union on the ground that Williams was not acting within the scope of his employment as general secretary. But he gave judgment against Williams for £100 with costs.

Putting aside that part of the decision regarding the liability of the union[1] as irrelevant to the present purpose, an application of the principle suggested would seem to demand a somewhat different result from that actually arrived at, as to Toomey's liability.

It was held that Toomey was not liable, because his object was

[1] This part of the decision is based apparently on the fact that the rules did not expressly authorize the general secretary or the executive council to order strikes other than those set on foot with the object of improving or regulating the conditions of labour. It was, however, admitted that the general secretary had powers identical with those of the executive committee; and by Rule III, 4, the executive committee 'is to take every means to further the objects of the union and to protect its funds from misappropriation.' By Rule I, 3, one of the objects of the union is declared to be 'to protect the interests of all classes of labourers of either sex.'

Under these circumstances one might have thought that in view of the finding of the jury that Williams had partly, and Toomey wholly, acted in order to compel payment of defalcations, i. e. 'to protect the interests' of the union, the defendants had been placed by the union 'to do a class of acts in their absence' within the meaning of the *dictum* of Willes J. in *Bayley* v. *Manchester Railway Co.* (L. R. 7 C. P. 415); and were (also in view of the finding of the jury) acting in their master's (*scil.* the union's) interests, within the principle of *Limpus* v. *London General Omnibus Co.* (1 H. & C. 526; 32 L. J. Ex. 34). In the latter case the act complained of, so far from being not expressly authorized, had been actually forbidden. But the master was nevertheless held liable.

not to punish but to compel repayment of the defalcations, and the learned judge said that Toomey's conduct was within the principle of the *Mogul* case, because his object was to obtain repayment of what was due to the union. It is humbly submitted that this was not of itself sufficient to exonerate Toomey from the legal liability for the conspiracy in which he took part.

It may be useful, in the first place, and not perhaps altogether hypercritical, to point out that this case is not exactly parallel with the facts in the *Mogul* case. The blow or series of blows struck in the *Mogul* case were in the course of the give and take of trade rivalry and antagonism. There the primary intention was to jostle the plaintiffs out of the market by destroying their trade and thus to enrich themselves at the expense of the plaintiffs. Here, too, the primary object was to prevent the plaintiff from working, but the secondary object was to recover what was lawfully due to the union, to obtain for the union their own. It may be conceded that if—besides the fact that Toomey's (secondary) object being what the jury found it solely to be, namely the recovery of the money due—the course of action which Toomey proceeded to put into execution would reasonably have been under all the circumstances calculated to effect that object, the correctness of the decision as regards Toomey could not be gainsaid, assuming a true analogy in other respects to the *Mogul* case. His case would have been analogous in this respect, at least, to that of the defendant shipowners; and if the analogy were complete in other respects, he would rightly have been held legally irresponsible.

But suppose that the defendants in the *Mogul* case had done something financially injurious to the plaintiffs and in pursuance of their preconcerted scheme to drive the plaintiffs out of the carrying trade, but which could not fairly or reasonably be said to have furthered or have been calculated to further their cause in the least, would the defendants have been held under those circumstances not liable for that damage?

Applying now this consideration to *Giblan's* case, how, it may be fairly asked, can preventing a man in Giblan's position in life earning his living and acquiring money be said to be reasonably calculated to ensure the satisfaction by him of his just liabilities? It is plain that if Giblan had been a man possessing sufficient means to pay, and for some reason or other refused to pay, such a course of aggression might prove highly efficacious for the purpose of extracting the money which he owed. But Giblan was presumably not a rich man or even a well-to-do person. He was the officer of a trade union. The matter for which he had been sued was one of some £38, payable in two instalments of £5, and

the remainder in monthly instalments. Is it conceivable that if he had had the means to pay, he would not have done so, at least when he found himself displaced from every employment he was able to obtain, and indeed face to face with ruin and starvation? May it not be fairly assumed that he would have paid what he owed if he could, and that he did not pay because he could not pay?

The case seems in fact a modern but apt illustration of the fable of the goose and the golden egg. In point of fact, the course which Williams and Toomey embarked upon was not only ineffectual for the purpose they had at heart, but was directly fatal to its successful accomplishment. It is therefore suggested that judgment, on this ground alone, might probably have gone against Toomey as well as against Williams.

But again, is the principle of the *Mogul* case applicable to any 'antinomy' other than the antagonism of lawful interests of the same kind? Does it touch cases other than those where the purpose of earning or producing money or its equivalent exists in two persons or sets of persons so as to constitute what is known as competition? Does it authorize persons to employ this form of molestation as a substitute for legal process? In *Gregory* v. *Brunswick*[1], where the defendants were alleged to have conspired to prevent the plaintiff from earning his living by hissing him off the stage, the plea that he was of immoral character and had edited a paper containing obscene and scurrilous libels was held no answer to the charge of conspiracy. The language of the judges in that case, when considered together with the objections formulated in the demurrer, favours the inference that the plea was held to be no answer to the conspiracy, because the damage complained of was not in itself (i.e. objectively speaking) connected with or referable to the lawful object alleged to have been ultimately contemplated by the agreement, viz., the promotion of morality and the suppression of papers such as the plaintiff had edited[2]. If the plaintiff had offended the law, the law could take care of itself, and had provided a remedy. There was, in short, no such antinomy or conflict of interest as the law could recognize.

It does not appear what evidence there was to justify the finding

[1] 6 M. & G. 205, 953; 6 Scott N. R. 809.

[2] There is much to be said for the supposition that if the case had been presented as one of defamation (as it was not), the plea would not even then have been held a good one; for laudable as may have been the actual motive, the privilege accorded by the law to theatre-goers of condemning a piece or actor on its or his merits, *qua* piece or actor, would seem to have been abused for the purpose of accomplishing an ulterior object. A plea alleging that the play or the actor's performance lacked merit would (*semble*), if the case had been presented as one of defamation, have been held a justification.

of the jury in *Giblan's* case that Williams was actuated by the additional desire to punish the plaintiff for not paying his debts to the union, or how his case was otherwise distinguishable from that of Toomey; and one may be inclined to assume, rightly or wrongly, that it was proved that he had some personal animosity against the plaintiff, or that at least he knew that the plaintiff could not pay and that therefore what he (Williams) was doing would under the circumstances be ineffectual and consequently oppressive.

The assumption of such a knowledge, however, would be scarcely consistent with the finding of the jury that Williams was actuated by (*inter alia*) a desire to make Giblan pay his debt.

If we assume, then, that evidence of this or a similar character was absent, the case could be said, by reason of the apparent *reductio ad absurdum*, to suggest the danger as well as the difficulty involved in leaving it to the jury to say on the whole case whether the intention of one defendant or more was to 'punish' another or to further lawful interests, or as was found in this case to do *both*. Or indeed of invoking the services of a jury at all in cases of this character except for the purpose

(*a*) of finding that the damage had been inflicted in pursuance of an agreement entered into with the primary and specific object of causing loss to the plaintiff.

(*b*) of finding facts, if any, from which the judge may properly infer privilege; and,

(*c*) where necessary, of showing that the defendants or defendant have or has abused a position to which privilege *prima facie* attaches.

It must be admitted that this distinction between legally presumed motive and actual motive, and the corresponding functions of judge and jury, has not hitherto been clearly recognized in any recent case. One can only say that it is a distinction likely to be definitely evolved from the present chaos, and if and when adopted, likely to find support and approval on the score of reason and justice. 'I think,' said Lord Herschell in *Allen* v. *Flood*, speaking of the motive of the ironworkers, 'the term punishment has proved misleading.' In that case the plaintiffs who were shipwrights had previously worked on iron, a practice which the defendants' union resisted as conflicting with the interests of ironworkers. Consequently, when the members of the defendants' union refused to work with the plaintiffs and threatened to strike if the latter were retained in the same employment with themselves, the ironworkers and Allen acting in their behalf as their spokesman, messenger, or agent, were, it was said, merely upholding the competitive rights of ironworkers as a class. And Lord Herschell

certainly appears to have thought that the actual motive underlying the conduct of Allen and the ironworkers was a proper one. One may at least say that there was no reason to suppose that the predominating motive underlying *Allen's* conduct was that of ill-will rather than the desire to protect the interests of ironworkers from the encroachment of shipwrights. But the propriety of the motive of the *ironworkers* themselves, to be inferred in law from considerations of the possible benefit to be derived from their striking, is a different question entirely; and it appears to the writer that the legal position of the ironworkers and of Allen respectively should be distinguished.

It seems, however, to have been admitted by the respondent's counsel that the ironworkers would have been doing a lawful and justifiable act in striking; and Lords Watson, Herschell and Macnaghten certainly dealt with the case on this assumption. It is believed that this admission was a false step on the part of the respondents, although for a reason which we shall notice later on, it does not in any way concern the correctness of the decision itself.

Was, then, the act of the ironworkers, which Allen truly said would result on a given contingency, reasonably calculated to advance their interests or benefit their pockets? Would the ultimate object of the strike, the dismissal of Flood and Taylor, operate in any reasonable sense to the advantage of the ironworkers? Herein lies the difficulty at first sight of recognizing the accuracy of the decision in *Allen* v. *Flood*. The shipwrights were not working at the time on iron, though they had done so previously in a different yard. If they had been doing so at the time, and it had appeared that there were certain of the ironworkers' union ready and anxious to fill the posts occupied by Flood and Taylor, and also that the Company's men had a general authority to act in the interests of such ironworkers, an antinomy capable of vicarious prosecution[1] might have arisen. But the antinomy, if antinomy there might once have been, had ceased with the altered conditions. The shipwrights had not only ceased to offend, but had left the scene of their offending. The chapter was closed, and there had been no fighting. The occasion for attack was gone. For the Company's men it had never existed. All that the dismissal of Flood and

[1] I assume that what *I* and *X* may lawfully do by the weapon of combination, but which by reason of the circumstances we are unable to do, we may depute to *Y* and *Z* to do for us; and *Y* and *Z* may shelter themselves under our privilege. The very life of trade unionism seems to hang on this principle. It is defensible on two grounds, (1) that the law encourages competition as far as it can, and (2) the *bona fide* exercise of an authority to conduct a vicarious attack rebuts the presumption of malevolence as against *Y* and *Z*.

Taylor could achieve would be a warning to any shipwright who might hear of the matter, not to act with reference to any ironworker, as certain shipwrights had acted towards certain ironworkers in the past; ironworkers who had actually made no objection at the time either for themselves or for other people. Was this an adequate interest as regards the Company's men?

Fortunately, however, we are saved from the inference that *Allen* v. *Flood* is a conclusive authority for the proposition that persons may combine to alarm another person by the use of numbers, in order to injure a third person, merely because that third person has done something in the past which not only he has specifically ceased to do, but which by reason of altered conditions [1] no longer concerns, save on a forced basis, the persons combining, either personally or as authorized representatives of kindred interests. For in the first place, the judges in the House of Lords expressly refused to consider (see per Lord Watson [1898] A. C. p. 99) whether a case of unlawful intimidation and coercion had been made out, as that question had been raised too late. For this purpose it is suggested that the question whether the threatened combination of the ironworkers would have been justifiable or no, would have been a material element for consideration; but here again it is to be observed that the judges throughout expressly left out of consideration any question of conspiracy either as a main or even, it seems, an incidental feature of the case. This is no doubt to be largely accounted for by the fact that Kennedy J. directed the jury that there was no evidence of intimidation, coercion, or conspiracy. But this seems properly applicable only to Allen's conduct and not that of the ironworkers. It is true that Lord Watson said that in his opinion the employers had not been coerced in any proper sense, but had merely followed their own interests in the course which they took; but it is difficult to support the reasoning contained in this statement, and literal importance ought not to be attached to the language of Lord Watson, which he had himself relegated to the category of *obiter dicta*, and whereof he had disarmed criticism by declaring that the question was raised too late, and that he did not intend to deliver any decision thereon one way or the other. Similarly, although Lords Watson, Herschell, and Macnaghten certainly expressed opinions to the effect that the ironworkers were at liberty to strike against Flood and Taylor, this had been admitted by the respondents' counsel; a contrary view of the law had not been presented to the noble and learned judges for their considera-

[1] I conceive every competitive antinomy to be potentially limited both as regards time and space according to the circumstances, not only in labour, but in trade.

tion; and it does not appear that the question of conspiracy was even present to their Lordships' minds. Thus at p. 99 Lord Watson says that the ironworkers were '*not under any continuing engagement to their employers*, and if they had left their work and gone out on strike, they would have been acting within their right, whatever might be thought of the propriety of the proceeding,' thus rendering it certain that his Lordship had in mind merely the ironworkers' rights as against their employers under the terms of their employment, without adverting to the fact that such a strike might be unlawful as a conspiracy to harm the employer, set on foot in order ultimately to reach Flood and Taylor.

Consequently, if a similar case were to come up for discussion, it would still seem open to a court of first instance to decide, and especially so since *Quinn* v. *Leathem*, that conduct like that of the *ironworkers* as distinguished from that of Allen, would amount to an unlawful threat. Moreover, if the threat instead of remaining outstanding were actually carried out, it still seems open to the Courts to decide that the employer or the servant, alternatively, would have a cause of action, according as the employer stood firm or yielded to the pressure. The truth indeed seems to be that the Glengall Iron Company, though in a sense coerced by the conduct of the ironworkers and Allen alike, were illegally coerced by the ironworkers, *scilicet* through the legally innocent agency of Allen. Flood and Taylor, on this view, could have alleged against the ironworkers an obstruction by unlawful conduct towards an intermediary, i.e. the employers, and in addition they might have charged an unjustifiable agreement to alarm them, but as regards the latter averment, the jury would have to find (*semble*) a specific desire to alarm Flood and Taylor, upon the principle laid down at the commencement of this Part.

And we get some distinct and important expressions of opinion in *Quinn* v. *Leathem* that the conveyance by one person to the mind of another of an impression or belief that an unlawful act would be done by third persons upon a certain contingency to that other, does not necessarily amount to unlawful intimidation. 'Truly,' said Lord Lindley, speaking of *Allen* v. *Flood*, 'to inform a person that others, not under the control of the informant, will annoy or injure him unless he acts in a particular way cannot of itself be actionable whatever the motive or the intention of the informant may have been.' And this rule seems founded on reason and general expedience.

If, however, Allen had been one of the ironworkers themselves, or if the ironworkers had been making a mere idle threat, and Allen knew that they did not intend to carry out what they

threatened, the position of Allen would in either case become *identified* with that of the malcontents, and the case no doubt would have been different.

We are therefore led to the conclusion that the respondents were rightly held to have no cause of action against Allen; but that if they had sued the ironworkers, in person or by means of a representative suit, they would (in view of *Quinn* v. *Leathem*) probably have succeeded [1].

Under these circumstances it became a serious question in *Quinn* v. *Leathem* as to the precise extent to which *Allen* v. *Flood* was a binding authority.

True, it had been conceded in the earlier case that a strike on the ironworkers' part would have been perfectly legal. But, as we have seen, this was never actually decided, and reasons have already been adduced for thinking that that concession was based on insufficient grounds. And it certainly does not follow that, because a person merely acting as an independent agent or mouthpiece for a body of men, and not acting as one of their number, and not otherwise identifying his legal position with that of the body, was held in one case to have acted lawfully in communicating the intentions of the body, that case must be considered a binding authority for holding such body of persons in similar circumstances justified in agreeing upon and actually committing that injury, as was the case in *Quinn* v. *Leathem*. The legality of the communication rests under those circumstances independent of the legality of the contemplated act whereof communication is made. The act of the agent and the intended act of the principals are obviously diverse in character. Allen had no doubt the interests of the ironworkers at heart, but to make him liable, it was necessary to show not only (1) that the ironworkers were threatening an illegality, but (2) that Allen had actually encouraged them in that course. He would have to be not the mere medium of the wrong but an actual party thereto.

Both these conditions were held by the Lord Chancellor to be fulfilled in *Allen* v. *Flood* [2]; the first in point of law and the second on the evidence. The first of these contentions is, it is submitted, confirmed by the decision in *Quinn* v. *Leathem*; on the second point, the Chancellor's view was outweighed by that of the majority.

Viewed in the light of these considerations, the following passage in the Chancellor's judgment seems particularly apt. 'A case is only an authority for what it actually decides. I entirely deny

[1] It is clear that the ironworkers' union could not have been made responsible in any case, since the ironworkers were acting wholly independently of their union.

[2] See his judgment in *Quinn* v. *Leathem*.

that it can be quoted for a proposition that may seem to logically follow from it. Such a mode of reasoning assumes that the law is necessarily a logical code; whereas every lawyer must acknowledge that the law is not always logical at all.' This passage seems to have been understood by some critics as tending to detract from the value of precedent as a guide to the decision of analogous cases, and also to have created consternation on the score that it does not tally with the statement of Sir Edward Coke that 'reason is the life of the law, nay the common law itself is nothing else but reason.' But (taking each point in order) the law indeed cannot always be logical. Its hands are tied by historical considerations and the express or tacit authority of precedents. It is however logical in this, that while it consistently follows authority deciding that conduct presenting certain essential characteristics is actionable, it as consistently refuses to be wholly fettered by considerations of morality or justice, where those considerations directly conflict with positive or negative inferences of an obvious character, derived from the language of judges or from the trend of actual decisions.

The cases of *Allen* v. *Flood* and *Quinn* v. *Leathem*, if we consider them as they were actually presented, are in no true sense analogous except that the character of the damage in each case was similar. A judicial decision as to the legality of conduct apart from agreement can have no bearing on a decision as to the legality of entering into an agreement. Taken as presented to the Lords, these cases were as analogous to one another as the injury caused by a murderous assault is analogous to that caused by the negligent swinging of a stick.

The true suggestion rather would seem to be that to distinguish between these remarkable cases is to emphasize, if anything, the value of precedent as furnishing grounds for drawing legal inferences. An inference from precedent, be it observed, may be none the less direct because[1] that inference is not positive in character but negative. The second ground of criticism may be met in the reflection that human thought and speech are apt to be coloured by the occasion of which they are begotten. The language of Coke indeed in the passage cited (Co. Lit. 97 b) contrasts strangely with his answer to James I, on the question of the king's right to sit in person and try causes. This is the remark which the king hazarded: 'My Lords, I have always thought, and by my saul, I have often heard the boast, that your English law was founded upon reason. If that be so, why have

[1] As was the case in *Allen* v. *Flood* with reference to the procurement by a single individual not to make contracts.

not I and others reason as well as you, the Judges?' And this is what Coke C. J. replied: '. . . I crave leave to remind your Majesty that causes which concern the life or inheritance, or goods or fortunes, of your subjects are not to be decided by natural reason, but by the artificial reason and judgment of law[1].' It was Lord Bowen[2] who wittily observed upon another utterance of Coke, 'Does not Lord Coke in one respect resemble the enemy of mankind, in that he can always quote Scripture when it suits his purpose?'

So much for the doctrine of legally presumed motive. Lastly, as to the actual state of mind necessary to supplant the presumption of a proper motive. In the case of defamation, the ulterior motive must, it appears, govern the conduct in question of the defendant or dominate his mind to such an extent that he may be said to have abused his privileged position, and to have acted not for the purpose of exercising his lawful rights, but for the sake of a purpose foreign to that with which the law would otherwise credit him[3]. It may be so with conspiracy also; but a plaintiff will always find some difficulty in persuading a jury that a man has not acted chiefly with a view to his own temporal advantage, when there is a presumption in his favour that he has so acted.

D. R. CHALMERS-HUNT.

[1] Campbell's Lives of the Chief Justices of England, vol. i. 272; 12 Coke, 64.
[2] The *Mogul* case, in arg.
[3] See [1898] A. C. p. 19, per Lord Brampton (then Hawkins J.).

SPECIALLY ADMISSIBLE EVIDENCE — *RES GESTAE.*

WORDS, acts, or writings which are admitted as part of the *res gestae* are circumstantial evidence of an original and proximate nature. Such evidence is necessarily circumstantial, because its function is to vary, qualify, or explain the main fact. It is even more obvious in the case of *res gestae* than in the case of other circumstantial evidence, that there must be an open and visible connexion between the principal fact and the evidentiary fact. Evidence which is admitted as part of the *res gestae* must be fact, not narration; must be original and not second-hand evidence. '*Res gestae* is in truth original evidence, though treated under the head of hearsay[1].' Best also considers *res gestae* to be 'the original proof of what has taken place[2].' Best points out that the least reflection will show that it consists of words as well as acts. On an indictment for treason in leading on a violent mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be[3]. Perhaps the best definition of *res gestae* is that the expression includes 'every thing that may be fairly considered an incident of the event under consideration[4].' The *res gestae* are 'the whole of the evidentiary facts, that is the details of fact which compose the facts directly in issue, which are evidence as part of the history of the case[5].' In Campbell's Ruling Cases, the doctrine of *res gestae* is thus stated: 'Words and declarations are admissible when they accompany, or immediately—and so that there is no time for reflection—follow (and tend to set a character upon) some act or event the nature of which is the subject of the inquiry[6].' It is, however, clear from Taylor and Best that many cases have decided that the doctrine of *res gestae* extends to acts and writings as well as declarations. An unpublished writing, even on an abstract subject, is admitted in evidence when it is in furtherance of a design of conspiracy[7]. It is also considered that it is as *res gestae* that old leases are admissible as acts of ownership against parties in no way privy to them[8]. The doctrine of *res gestae* extends to acts as well as declarations and writings.

[1] Taylor on Evidence, vol. i. p. 391.
[2] Evidence, p. 411.
[3] Case of *Damaree and Purchase*, Foster, Cr. Law, 213; 15 How. St. Tr. 522; *R.* v. *Lord George Gordon*, 21 How. St. Tr. 514.
[4] Taylor, vol. i. p. 376.
[5] Encycl. Laws of England, Art. Evidence.
[6] Ruling Cases, vol. xi. p. 281.
[7] *R.* v. *Watson* (1817) 32 How. St. Tr. 82.
[8] *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, 653, 668.

On an indictment for treason, when the evidence showed that the prisoner was a member of the directing body of a conspiracy, and, after his arrest, an insurrectionary movement, the result of the commands of the directing body, broke out in several places in Ireland, it was held that those acts of war were receivable in evidence against the prisoner[1]. This case is cited in the elaborate discussion on the admissibility of evidence as part of the *res gestae* that is found in Taylor on Evidence[2]. It would follow from Campbell's definition of the rule that words are admitted as part of the *res gestae*, when they 'immediately follow' the subject of the inquiry. At a trial for murder, a minute or two after the prisoner was seen going into a house, the victim of the crime came suddenly out with her throat cut so severely that she died within a quarter of an hour. On coming out the victim said something, pointing to the house. The words so uttered, immediately after the event, were excluded by Cockburn C. J. at the trial on the ground that they did not form part of the *res gestae*[3]. This case, and the correspondence between Lord Chief Justice Cockburn and His Honour Judge Pitt-Taylor that ensued on the admissibility of evidence, will be referred to later. But as the whole event transpired within a few minutes, it seems impossible to conceive a case where it could more aptly be said that the words 'immediately followed' the act which was the subject of the inquiry; and, if the rule as thus stated in Campbell's Ruling Cases was correct, the evidence would have been admitted in *R.* v. *Bedingfield*. In Best on Evidence, it is considered that the Chief Justice had the best of it in the correspondence that took place on his rejecting the evidence. According to the reasoning with which Lord Chief Justice Cockburn supported his ruling, where the act has been fully consummated, words that 'immediately follow' do not form part of the *res gestae*. In that case the action was fully consummated, because the prisoner had made a determined attempt at suicide immediately after the attack on the woman, so that she could have nothing further to apprehend from him. In Russell on Crimes, evidence which is admitted as part of the *res gestae* is considered under the head of hearsay evidence, and seems confined to evidence of declarations and complaints[4]. It is observed in Roscoe's Nisi Prius Evidence: 'The *res gestae* in each case is original evidence; and the accompanying declaration, being part of it, is also original evidence[5].' Archbold states: 'When hearsay is introduced,

[1] *R.* v. *M'Cafferty* (1866–7) Ir. Rep. 1 C. L. 363.
[2] Taylor on Evidence, vol. i. at p. 385 (9th ed.).
[3] *R.* v. *Bedingfield* (1879) 14 Cox, C. C. p. 342.
[4] Russell on Crimes, vol. iii. pp. 384–6.
[5] Roscoe's Evidence at Nisi Prius, vol. i. p. 53.

not as a medium of proof to establish a distinct fact, but as being part of the transaction in question, it is admissible . . . This kind of evidence is usually described as *res gestae*; and it does not seem quite accurate to describe it as hearsay [1].' A declaration made by an agent, acting at the time within the scope of his authority, is part of the *res gestae*, and the hearsay evidence given of such a declaration is not regarded as second-hand or derivative evidence [2].

But that the subject is one of great difficulty may be inferred from the statement in Taylor on Evidence, that it is not easy to explain of what the *res gestae* consists. Lord Blackburn is credited with having observed that if one tenders inadmissible evidence, he should, if it is in chief, say that it is 'part of the *res gestae*,' and if it is in re-examination, 'that it arises out of the cross-examination.' In *R.* v. *Kershaw*, at the Liverpool Winter Assize, 1902, Bucknill J. alluded to 'the mysterious doctrine of the *res gestae*.' It must be remembered that the propriety of excluding evidence was more demonstrable formerly when parties to neither criminal nor civil proceedings could give evidence on oath. When, therefore, it was sought to tender hearsay evidence of the declarations of a defendant in equity, or of a prisoner, such evidence was open to the objection that attaches to all second-hand evidence, that there was no opportunity for cross-examination. But now by the Evidence Act, 1851 (14 & 15 Vict. c. 99), s. 1, a party to a suit is a competent witness in civil proceedings; and by the Evidence in Criminal Cases Act, 1898, a prisoner is allowed to give evidence on his own behalf. Substantive law is said always to arrive at its perfection before adjective law. The rejection of the evidence of the declarations of a defendant in equity was justifiable before 1851 on the general principle that derivative or second-hand proofs are not receivable as evidence *in causa*. But the objection to receiving such evidence disappeared after that date, when a defendant in equity could offer responsible testimony. The same applies to criminal proceedings after 1898. In the correspondence that ensued on *R.* v. *Bedingfield*, Lord Chief Justice Cockburn indicated that even the all but inflexible rule, that no statements are admissible against a party charged which were made in his absence, might be relaxed if a prisoner was allowed to give evidence on his own behalf, and even said that it would be advantageous and in the interests of justice that it should be removed in that event [3].

Best observes that the technical rules regulating the burden of proof cannot be followed out in all their niceties when they press against accused persons. As an instance of the generalization, there

[1] Archbold's Criminal Practice, Pleadings and Evidence, p. 392.
[2] *R.* v. *Hall*, 8 C. & P. 358.
[3] Law Journal, 1880, p. 16.

can be cited a case in criminal proceedings where evidence of intention has been rejected, while in civil cases, on questions of domicil, declarations as to the intention with which a person goes to a place are admissible. Where on a trial for murder it was proposed by the prosecution to ask a witness what the deceased said on leaving her lodgings, that being the last occasion on which she was seen alive, Cockburn C.J. refused to allow the question to be put, saying, 'it was no part of the act of leaving, but only an incidental remark. It was only a statement of intention which might or might not have been carried out[1].' But upon an action to establish a French domicil, where a testator had made a will in the English form, so that if his domicil was not English the will could not have taken effect, the testimony of witnesses was admitted who had heard 'some declarations (of the testator) in casual conversations,' that he had intended to return to France (*Doucet* v. *Geoghegan* (1875) 9 Ch. D. at p. 455). In another case, which also involved the question of domicil, the Court stated that, though hearsay evidence of verbal declarations of the intentions of a testator about his domicil 'have been considered by many authorities the lowest species of evidence,' especially when encountered by conflicting declarations, yet 'there was no doubt that such declarations are admissible evidence in these questions of domicil[2].'

Sir James Stephen says, 'the term *res gestae* seems to have come into use on account of its convenient obscurity[3].' Lord Chief Justice Cockburn seemed to have thought the meaning of the term obvious, when he alluded to 'the much abused term *res gestae* which lawyers persist in using as though there were no English equivalent capable of expressing its meaning[4].' In the correspondence referred to, Lord Chief Justice Cockburn expressed the opinion that the term was not found in the reports till long after Lord Holt's time. It is submitted with some confidence that the first occurrence of the term *res gestae* in the reports is where it is used by Lord Ellenborough, in *Aveson* v. *Lord Kinnaird* (1805) 6 East, at p. 193. In that case, evidence was admitted of the declarations of a wife as to her state of health, made shortly before effecting a policy of life insurance, with a view to show the policy had been obtained by fraud. In a subsequent decision it was observed that the declarations in *Aveson* v. *Lord Kinnaird* were received on the principle of the *res gestae*[5]. But Lord Chief Justice Cockburn observed of Mr. Pitt-Taylor's citing *Aveson* v. *Lord Kinnaird*, that

[1] *R.* v. *Wainwright* (1875) 13 Cox, at p. 172.
[2] *Hodgson* v. *De Beauchesne* (1858) 12 Moo. P. C. 325.
[3] Sir James Stephen's Digest of the Law of Evidence, p. 161.
[4] Law Journal, 1880, p. 15.
[5] Per Bayley J. in *Doe* d. *Ridgeway* (1820) 4 B. & Ald. at p. 55.

that case had about as much to do with the doctrine of *res gestae* as 'an Ode of Horace or one of Æsop's Fables.' In Taylor on Evidence the case is cited among those where hearsay evidence can be tendered of expressions of bodily and mental feeling, and is not expressly alluded to among the cases where evidence was admitted as part of the *res gestae*. But the cases where hearsay evidence is received of a person's mental or bodily feelings are explicitly declared to fall under the principle of *res gestae* in Taylor on Evidence[1]. Mr. Pitt-Taylor could, therefore, with complete consistency cite *Aveson* v. *Kinnaird* when discussing the admission of evidence as part of the *res gestae*, without incurring the reproaches that Lord Chief Justice Cockburn addressed to him, as Junius addressed Blackstone, for the inconsistencies between his deliverances as an author and as a controversialist. And the observations of Bayley J. in 1820 constitute an additional vindication of Mr. Pitt-Taylor's contention that *Aveson* v. *Lord Kinnaird* was a case where the declarations were admitted as part of the *res gestae*. It is difficult to understand how Lord Chief Justice Cockburn could, after this, have contended that *Aveson* v. *Kinnaird* bears about as much on the doctrine of *res gestae* as an Ode of Horace or one of Æsop's Fables. But the case is clearly to be distinguished from *R.* v. *Bedingfield* as one where the declaration admitted as part of the *res gestae* was made before, and not after, as in the latter case, the subject of the inquiry. But as this difference between the times of the declarations is essential, it is at least as difficult to understand how Mr. Pitt-Taylor could have thought *Aveson* v. *Lord Kinnaird*, though it clearly appears to be a case where evidence was admitted as part of the *res gestae*, supported his protest against the rejection of an *ex post facto* declaration as not forming part of the *res gestae*.

The presumed derivation of the term *res gestae* from the Civil Law does not appear to have been insisted on in any reported case, and was not alluded to in the correspondence between Lord Chief Justice Cockburn and Mr. Pitt-Taylor. The Roman Law of Evidence is not one of the most valuable portions of the Civil Law. A distinction was pointed out in *Mason* v. *Mason* (1816) 1 Mer. at p. 312, between the value of adducing, in an English Court of Justice, legal principles and mere presumptions of fact derived from the Civil Law. It was said in that case by Sir W. Grant that the English Courts have never adopted presumptions of fact from the Civil Law, such as the presumption that a person lives for a hundred years after he is last heard of alive. But presumptions of this kind constitute an integral portion of the law of evidence.

[1] P. 391.

Again the phrase *res gestae* as applied to the subject of judicial inquiry is not, correctly speaking, derived from the Civil Law. A transcript from Pomponius in the Digest shows that the Romans designated the subject of judicial inquiry as *res gestae.* Cf. Dig. 22, 5, 11. Even a person who has not been summoned as a witness is expected to observe good faith as regards the *res gestae.* Dirksen gives *gestum* as equivalent to *factum,* and *gesta* as equivalent to public monuments and records.

While the first occurrence of the term *res gestae* seems to be the use made of it by Lord Ellenborough in *Aveson* v. *Lord Kinnaird*—where it occurs in a remark Lord Ellenborough addressed to counsel, and not in the judgment—the principle can be traced to Lord Holt's time. In an action for assault brought by the husband and wife at Nisi Prius, Lord Holt allowed the declarations of the wife, made immediately upon the hurt received, and before she had any time to devise anything to her advantage, to be received in evidence [1]. Lord Chief Justice Cockburn pointed out that the meagre report in Skinner prima facie refutes Lord Ellenborough's explicit statement in *Aveson* v. *Lord Kinnaird,* that Lord Holt admitted the evidence as part of the *res gestae.* It is curious to note that the notion that Lord Holt used the term *res gestae* may have been induced by the reporter's note to *R.* v. *Foster* (1834) 6 C. & P. at p. 325, where the *obiter dictum* of Lord Ellenborough about *Thompson* v. *Trevannion* is given *totidem verbis,* but without the implicit acknowledgment of inverted commas. This footnote therefore seems to induce the notion that Lord Holt must have used the term *res gestae.* In *Doe* d. *Ridgeway* (1820) 4 B. & Ald. at p. 54, in the proof of a pedigree, the dying declarations of the servant of the person last seised, as to the relationship of the lessor of the plaintiff to such person, were held not receivable in evidence. The doctrine of *res gestae* was pronounced not to apply to this evidence. But in the argument, counsel cited cases where second-hand evidence had been received [2]. Abbott C.J. said, 'The cases cited are, I believe, the only exceptions to the general rule of not receiving evidence, unless upon oath, and with the opportunity for cross-examination. I am not aware of any other [3].' Bayley J. said, 'In *Aveson* v. *Kinnaird,* the declarations were received upon a very different principle. There they were part of the *res gestae* [4].' It therefore seems that, according to the King's Bench in 1820, *Aveson* v. *Lord Kinnaird* was the first case of the admission of specially admissible evidence as part of the *res gestae.* The other two cases cited in the argument in *Doe*

[1] *Thompson* v. *Trevannion* (1694) Sk. 402.

[2] *Wright* dem. *Clymer* v. *Little* (1761) 3 Burr. 1244; *Drummond's* case, 1 Leach, Cr. Cas. 378; *Tinkler's* case, 1 East, Pl. Cr.

[3] 4 B. & Ald. at p. 54.

[4] 4 B. & Ald. at p. 55.

d. *Ridgeway* (1820) have no more to do with the doctrine of *res gestae*, to employ the language of Lord Chief Justice Cockburn, 'than an Ode of Horace or one of Æsop's Fables.' *Tinkler's* case (1781) was a case of a dying declaration—wrongly referred to by Bayley J. in *Doe* d. *Ridgeway*, as a confession 'by a party who had taken the poison.' *Drummond's* case decided that the declaration of a convict at the moment of execution cannot be given in evidence as the declaration of a dying man; for, being attainted, his testimony could not have been received on oath. This case is of purely historical interest.

But in another case cited in the argument in *Doe* d. *Ridgeway*, that of *Wright* dem. *Clymer* v. *Littlе* (1761) 3 Burr. 1244, Lord Mansfield allowed the dying declarations of a subscribing witness to a forged instrument to be given in evidence impeaching it. Nothing was said as to the declaration forming part of the *res gestae*; Lord Mansfield merely saying that the evidence was proper to be left to the jury, as the declaration in question was 'a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience [1].' This case is of no importance at the present day, when it would certainly not be followed. Dying declarations are now confined to the single case of homicide, 'where the death of the deceased is the subject of the charge, and the circumstances of the death the subject of the dying declaration [2].' It was, however, approved as late as 1820 by Bayley J. in *Doe* d. *Ridgeway* [3].

It is as *res gestae* that old leases are admissible as acts of ownership, although they are *res inter alios acta*. This rule is directly traceable to Lord Mansfield, according to Lord Blackburn in *Bristow* v. *Cormican* (1878) 3 App. Cas. at p. 668. Lord Mansfield said, and the whole Court agreed with him, 'that these old leases were proper evidence to show that at that time the lord of the manor did in fact demise the ground [4].' It is thus possible, and seems a vindication of historical consistency, to regard Lord Mansfield as the founder of the admissibility of evidence as part of the *res gestae*. But he can only be regarded as having implicitly done so, because he does not employ the term itself. In order that *res gestae* should be admissible in evidence, it must be shown that they are relevant to, and connected with, the event under consideration. 'The acts by whomsoever done are *res gestae*, if relevant to the matter in issue. But the question remains, what are relevant? [5]' This question, it is

[1] 3 Burr. at p. 1255.
[2] *R.* v. *Mead* (1824) 2 B. & C. at p. 608; 26 R. R. 486.
[3] 4 B. & Ald. at p. 55.
[4] *Clarkson* v. *Woodhouse* (1782) 3 Doug. at p. 191; and 5 T. R. 412 n.
[5] Per Parke B. in *Wright* v. *Doe* d. *Tatham*, 7 A. & E. 355.

observed by Sir James Stephen, goes to the root of the whole subject[1]. If the acts are irrelevant, both the acts themselves and the declaration qualifying or explaining them will be rejected[2]. For instance, in an action against a town for injuries sustained through a defect in a highway, the declaration of a surgeon, since deceased, made at the time of his examining the plaintiff's wounds, have been rejected as evidence of the nature and extent of the inquiries, since the fact of the surgical examination would itself have been immaterial, and the declaration were no more than the mere hearsay expression of a professional opinion; *Lund* v. *Tyngsborough* (1851)[3]. In *Wright* v. *Doe* d. *Tatham* (1837) (7 A. & E. 313) the question was whether a testator had been of sound mind. Three letters were sought to be tendered in evidence, addressed to the testator as if he were an intelligent man. These letters were held not admissible, as not being relevant to the inquiry whether the testator was of sound mind. The letters would have been admissible if they had been connected with any act of the testator; if, for instance, he had acted on them by answering them. Taylor, commenting on this case, says:—

'For such a letter, if admissible at all, must be so, either because the act done in writing and sending it is evidence in itself, or because the opinion which is inferentially expressed by it being done is evidence. But the act done (that of writing and sending the letter) is . . . obviously immaterial to the strict issue (that of sanity or insanity); and where the declaration *per se* cannot be received, no case has yet established that the union of the two things (the irrelevant act and the accompanying declaration) will render them admissible[4].'

In an action for the infringement of a patent, what a third party relates of an isolated conversation he held with a deceased person, who sold him some of the product subsequently to the date of the patent, is not admissible in evidence as part of the *res gestae*[5]. The act and declaration need not concur in point of time with the event under consideration, but must not be subsequent. Thus entries in books made in furtherance of a conspiracy are admissible, but memoranda of payments made after the fraud by one conspirator to another are not[6]. If on a charge of conspiracy to annoy a broker who distrained for church rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants

[1] Law of Evidence, p. 161.
[2] Taylor on Evidence, p. 379.
[3] 9 Cush. 37 (an American case).
[4] Evidence, pp. 379, 380.
[5] *Hyde* v. *Palmer* (1863) 3 B. & S. 657.
[6] *R.* v. *Blake* (1844) 6 Q. B. 126; 13 L. J. M. C. 131; 8 Jur. 666.

went with them; but evidence of what a person who was at the meeting said some days after, when he was himself distrained upon for church rates, is not so[1]. In this last consideration, the words spoken were sought to be as tendered in evidence as a narrative of an event that transpired subsequently to the event under consideration. Neither is evidence of a conversation admissible as part of the *res gestae* which was overheard between men apparently returning from a meeting, held within an hour before, about half a mile off, though it be offered as evidence, not only of the general nature of the meeting, but of the effect that was likely to be produced by the language there employed[2]. In *Rawson* v. *Haigh* (1824) 2 Bing. 99, letters written one or two days after a man departed the realm, but before the date of his commission of bankruptcy, were held admissible in evidence and sufficient to establish an act of bankruptcy by showing with what intention he departed the realm. In this case Parke J. said:—

'It is impossible to tie down to time the rule as to declarations: we must judge from all the circumstances of the case: we need not go the length of saying that a declaration made a month after the fact would of itself be admissible; but if, as in the present case, there are connecting circumstances, it may even at that time form part of the whole *res gestae*[3].'

The connexion between the leaving the realm and the dispatch of the letters was that the absence from the realm continued after the dispatch of the letters. In a similar case, Denman C. J. said, 'the absenting himself from home by the bankrupt was a continuing act, and the letter was written during its continuance[4].' But in *Ridley* v. *Gyde*, declarations made by a trader a month after the giving a security were admitted; 9 Bing. p. 349. The conduct of the party was considered to have constituted the connexion in this last case. In the *Aylesford Peerage* case, letters written in 1876 were admitted, as part of the *res gestae*, to prove the legitimacy of a child born in 1881[5]. In certain cases the declaration will not be admitted, unless it was made contemporaneously with the event under consideration. The statements of a servant, employed by a horse-dealer or livery-stable keeper to sell a horse, will only be admitted respecting the horse when made at the time of sale[6]. The declarations of a wife at the time of her elopement that she fled from terror of personal violence from her husband seem to be

[1] *R.* v. *Murphy* (1837) 8 C. & P. at p. 305.
[2] *R.* v. *O'Connell* (1843-4) Arm. & T. 163.
[3] *Rawson* v. *Haigh*, 2 Bing. at p. 104.
[4] *Rouch* v. *Great Western Railway Company* (1841) 1 Q. B. at p. 61, 55 R. R. 206.
[5] 11 App. Cas. p. 9, per Lord Selborne.
[6] *Howard* v. *Sheward* (1866) 36 L. J. C. P. 42.

evidence against him[1]. It has always been considered that when a woman leaves her husband's house, whether she is turned out or goes voluntarily, her own declarations at the time are part of the *res gestae* and admissible, not as conclusive proof but as evidence of adultery[2].

In cases of conspiracy, 'a prisoner cannot be responsible for acts or writings of his fellow conspirators which possibly may not have existed until after the common enterprise was, so far as he was concerned, at an end; but if their previous existence be established, either by direct proof or by strong presumptive evidence, no objection to their admissibility can prevail[3].' The authority that is there given for the first part of this proposition is *R.* v. *Hardy* (1794) 24 How. St. Tr. at p. 704. It must be remembered that the trial of Thomas Hardy for High Treason occupies more than five hundred closely printed pages. But the *locus* given in Taylor does not support the text. A witness was there being examined as to conversations that seem to have occurred before Hardy's arrest, which was on the 12th of May, 1794. Eyre C. J. refused to admit these conversations on the ground that they were hearsay evidence, saying, 'We ought to be always very correct when collecting what people said. I think you had better not press it[4].' The passage in Taylor seems founded on a dictum of Eyre L. C. J., at a different stage of the trial, where he said, 'The only ground upon which any paper is objected to as evidence, found after the apprehension of the party, is that by possibility the paper might not have existed, or might not have been in the hands of the person till after his apprehension[5].' But these very papers were admitted, as sufficiently appears in the summing-up, because it was proved, the Court considered, that they existed before Hardy's arrest, on the 12th of May, though they were not both found till the close of the month. Eyre C. J. said, 'The next witness, Schaw, produces a paper, found upon Thelwall, and Nost produces a paper, found upon Martin; these two papers are proved to have been in Martin's handwriting; they were found after Hardy's apprehension; but they become evidence even in this case, against Hardy, from the circumstance of their having been proved, by two witnesses, to have been in Martin's possession before Hardy was apprehended; they were therefore papers that existed before that time[6].' Lord Chief Justice Eyre went on to say that these papers were of a more direct and violent cast than some others, because they pointed

[1] Per Lord Ellenborough C. J. in *Areson* v. *Lord Kinnaird* (1805) 6 East, at p. 193.
[2] Cf. observations of Lord Blackburn in the *Aylesford Peerage* case (1885) 11 App. Cas. at p. 3.
[3] Taylor on Evidence, pp. 384–5.
[4] 24 How. St. Tr. 704.
[5] 24 How. St. Tr. pp. 865–6.
[6] *Hardy's* case (1794) 24 How. St. Tr. at p. 1347.

immediately to the person of the king, and directed them to be read to the jury. The case of Thomas Hardy ought clearly to be cited in support, not of the rejection, but of the admission of papers, found after the arrest of a conspirator. The case would clearly support the last part of the above-quoted passage in Taylor. But in the text it is cited in support of the second. It seems suggested that it was established by presumptive evidence in *R.* v. *Watson* that certain papers existed before the arrest of the prisoner. But in that case the prisoner had taken away five-and-twenty copies of a placard; and the only question was whether he could be presumed to know its contents. There could have been no possible question that the paper had existed before the prisoner's arrest; *R.* v. *Watson* (1817) 32 How. St. Tr. at p. 82. *Hardy's* case is also cited by Taylor as an authority for the proposition that mere narrative cannot be tendered as forming part of the *res gestae*[1]. Here again the reference to the page does not support the statement in the text. But a letter of Thelwall was rejected in that case by Eyre C. J., on the ground that it was 'a correspondence of a private nature, a mere relation of what had been done'—'a very different thing from a correspondence in furtherance of the plot[2].' This letter was referred to by Lord Denman C. J. in *R.* v. *Blake* (1844), where the entry on a counterfoil of a cheque was rejected on the similar ground that the conspiracy was fully effected before that was done[3]. In *R.* v. *M'Cafferty* supra, the Irish Law Officers of the Crown quoted the passage in Taylor cited above. This may possibly account for the fact that in delivering judgment in the Court for Crown Cases Reserved, George J. said that *Hardy's* case and *Watson's* case 'proceeded upon the ground that the papers and other matters offered in evidence were not proved to be in existence prior to the arrest[4].' But in the summing up of Eyre C. J. in *Hardy's* case, it was explicitly stated that the letters were 'proved by two witnesses to have been in Martin's possession before Hardy was apprehended; they were, therefore, papers that existed before that time[5].' Again, Deasy B., in *R.* v. *M'Cafferty* (1867), said, 'But what is the rule in *Hardy's* case, and has it any bearing on the admissibility of the evidence in the present case? There a paper found in the possession of a conspirator after the arrest of Hardy was excluded, because there was no evidence that it existed before his arrest[6].' The report of Eyre's C. J. summing up in *Hardy's* case is paged to the evidence, and makes no doubt possible that the letters in that case were

[1] Evidence, p. 383.
[2] *Hardy's* case (1794) 24 How. St. Tr. at pp. 453–75.
[3] 6 Q. B. at p. 137.
[4] *R.* v. *M'Cafferty* (1867) Ir. Rep. 1 C. L. at p. 384.
[5] *Hardy's* case (1794) 24 How. St. Tr. p. 1347.
[6] Ibid. at p. 392.

proved to have existed before the prisoner's arrest, and were therefore admitted. The conclusion of law is not affected by the mistake of fact. But it is submitted that Taylor on Evidence contains as implicit a misstatement of fact as Lord Chief Justice Cockburn pointed out existed in Mr. Pitt-Taylor's version of the facts in *R.* v. *Bedingfield.*

Lord Chief Justice Cockburn complained at the commencement of the correspondence that Mr. Pitt-Taylor misapprehended the facts as given in evidence in *R.* v. *Bedingfield*, and this 'in a particular eminently material to the question.' Mr. Pitt-Taylor represented the deceased woman as 'running away from an assailant.' But Lord Chief Justice Cockburn was satisfied that the woman was engaged in obtaining assistance with reference to her wound; and that the occurrence was at an end, as far as the prisoner was concerned, and that the woman knew this. It is impossible to impugn the account given of the evidence by the Chief Justice. If the facts only were in issue between the two distinguished controversialists, there could be little doubt that most persons, whether lawyers or not, would accept without reserve the account of the evidence which was given by the judge who tried the case. The argument of the Chief Justice seemed directed to proving that there was only an issue of fact between Mr. Pitt-Taylor and himself. Both, in fact, agreed that the words uttered by the woman could not be accepted as a dying declaration, though, in view of the severity of the wound, arguments that were certainly plausible were adduced by a 'Barrister who was present in Court,' to show that the woman must have believed herself to be dying. But the words the woman uttered were rejected by the Chief Justice as a dying declaration because she gave no intimation that she was conscious of approaching dissolution. It appeared that the Chief Justice considered that the marginal note to *R.* v. *Cleary* (2 Foster and Finlason, p. 851), declaring the law to be that consciousness of death was a question of inference from the nature of the wound, was incorrect in view of Erle's C. J. language. This must be considered a question of some doubt, after the letter written to the Law Times by the learned reporter of *R.* v. *Cleary*[1].

Another literary opponent of the Chief Justice, who, as Horne observed of Junius, 'existed only in the newspapers,' under the *nom de guerre* of 'Long Robe,' criticized the ruling of the Chief Justice by quoting him as showing that the evidence ought to have been admitted. But 'Long Robe' lacked the directness, though he employed an artifice of Junius. 'Long Robe' overlooked the essential point that the passage he quoted from the letter of the

[1] Law Times (1880), p. 304.

Chief Justice was expressly limited to the case of 'a continuing action' on the part of the accused. But this deprived 'Long Robe's' criticism of any aptness, as the Chief Justice laboured the point that his ruling in *R.* v. *Bedingfield* proceeded on the ground that when the woman uttered the words he rejected the transaction was at an end as far as the accused was concerned[1].

But the cases quoted by Mr. Pitt-Taylor show that there was an issue of law, as well as of fact, between him and the Chief Justice. In Taylor on Evidence it is laid down that a narrative of past events is inadmissible as part of the *res gestae*[2]. But Mr. Pitt-Taylor quoted cases in his controversy with the Chief Justice where a declaration was admitted as part of the *res gestae*, though it was made *ex post facto* and was only a relation of a past event.

The rejection of the evidence in *R.* v. *Bedingfield* was explicitly founded by Lord Chief Justice Cockburn on the case of *R.* v. *Osborne*[3], where the particulars of a complaint in a charge of rape were excluded because 'the violence was over and the prisoner had departed.' The particulars of the complaint in such cases, according to Stephen, are excluded on the ground of irrelevancy. But 'the present rule as laid down by the Court of Criminal Appeal in 1896 in *R.* v. *Lillyman*, 2 Q. B. 167, is that upon the trial of an indictment for rape or other kindred offences against women, the particulars of a complaint made shortly after the alleged occurrence may be given in evidence, not of the facts complained of, but of the consistency of the story told by the woman in the witness-box, and as negativing consent on her part[4].' 'After very careful consideration,' Lord Brampton (then Hawkins J.) observed, 'We have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the fact that a complaint was made, and that reason and good sense are against our doing so[5].' This rule is, at all events, the rule which is generally observed[6]. But the fact that Lord Chief Justice Cockburn based his decision in *R.* v. *Bedingfield* on the law as it then stood as regards the rejection of the particulars of a complaint, explains why in summing up he pressed upon the jury that the deceased woman ran out to make complaint or outcry[7]. According to the principle contained in the case he relied on, the fact of a complaint is admissible while the particulars of that complaint are inadmissible. In Campbell's Ruling Cases it is considered 'curious' that the Lord Chief Justice should have pressed upon the jury the fact that

[1] Cf. 'Long Robe's' letter, Law Times, 1880, p. 177.
[2] Vol. i. p. 381.
[3] 1 C. & M. 622.
[4] Best on Evidence, p. 412.
[5] *R.* v. *Lillyman*, 2 Q. B. at p. 177.
[6] Cp. Steph. Dig. Ev., 5th ed., 1899, note v.
[7] 14 Cox, C. C. at p. 345.

the woman came out to make a complaint, while he formally rejected her evidence[1]. But it is clear that in admitting the fact, but rejecting the particulars of the complaint, Cockburn C.J. was essentially consistent with the law as it then stood, and with the authority on which he relied.

The research of Mr. Pitt-Taylor provided him with an Irish circuit case, in which it was held by Monahan C.J. that statements made by the deceased to the first person who comes up after he has been wounded are admissible as part of the *res gestae*[2]. It was observed of this case in the Law Times that 'it would be difficult to find a more parallel case to the one under discussion than that we have just cited, and the conclusion to be derived from the two is that if Chief Justice Monahan was right in the one case, the Lord Chief Justice is wrong in this, and vice versa[3]. But Lord Chief Justice Cockburn pointed out that the learned editor of the last edition of Russell on Crimes, in citing *R.* v. *Lunny*, appended to the statement of the case the remark, that 'this case requires consideration.' This adverse comment on *R.* v. *Lunny* survives in the (now) last edition of Russell on Crimes that was issued in 1896. Mr. Pitt-Taylor quoted another case, *R.* v. *Foster* (1834) 6 C. & P. 325, where the Court, on a charge of manslaughter, admitted an *ex post facto* statement as part of the *res gestae*. The prisoner was charged with manslaughter in killing a man by driving a cabriolet over him. A waggoner saw the cabriolet drive by, but did not see the accident, and immediately afterwards, on hearing the man groan, went up to him, when the latter made a statement as to how the accident happened. It was held that this statement was receivable in evidence. Park J. considered the case of *Aveson* v. *Lord Kinnaird* bore strongly on the point. This would clearly warrant Mr. Pitt-Taylor's citing it. But Roscoe considers that this case 'is difficult to reconcile with established principles[4].' Lord Chief Justice Cockburn was not slow to avail himself of Roscoe's disapproval. But under the circumstances he gained little advantage by appealing to it. The Law Times observed:—

'Mr. Pitt-Taylor has by his pamphlet made more than one decided hit. Perhaps the most amusing is his retort upon the Chief Justice, who relied upon Roscoe's rule as having questioned the two cases, quoted by Mr. Taylor, of *R.* v. *Foster* and *Thompson* v. *Trevannion*, and spoke of Roscoe as being as distinguished as Mr. Taylor. It so happens that the disapproval of those cases was not the disapproval of Roscoe but of his editor, Mr. William Markby, who at the time he wrote was a junior barrister of five years' standing. "Just one of those tyros," says Mr. Taylor, "whose

[1] Ruling Cases, vol. xi. p. 303.
[2] *R.* v. *Lunny* (1854) 6 Cox, C. C. at p. 477.
[3] Law Times, Nov. 22, 1879, at p. 59.
[4] Crim. Evidence, p. 23.

self-sufficiency and inexperience have elicited your Lordship's contemptuous disapproval [1]."'

This last innuendo requires to be explained in the light of a reference made to an anonymous critic of his rejection of the evidence in *R.* v. *Bedingfield*, as to whom Lord Chief Justice Cockburn expressed the opinion, that 'from the positive and self-sufficient manner in which he lays down the law, he must be sought for among the very youngest members of the profession—self-confidence being one of the happy attributes of youth and inexperience [2].' But Mr. Pitt-Taylor qualified any advantage he might have gained by this discovery by characterizing the style of his protagonist as 'slap-dash'—an expression that seems rather to want finish, if it does not altogether fall below the level of the controversy. The oratorical and literary honours of the contest clearly remained with Lord Chief Justice Cockburn, one of the most eloquent, probably, of all the Chief Justices.

It is submitted that the result of the decisions warrants the following general propositions on the subject of the *res gestae*:—

(1) Words, acts, and declarations form part of the *res gestae* when they occur before or during the continuance of the act under consideration which is the subject of the inquiry.

When the act is a continuing one, such as an act of bankruptcy arising from absence from home, it is of course consistent with this generalization that letters written during such an absence, explaining the motion of such absence, should be admissible as part of the *res gestae*. The declaration is in such cases made during the continuance of the act.

But the cases in which an *ex post facto* declaration has been admitted as part of the *res gestae*, when the act is not a continuing one, present great difficulty. In such a case the *ex post facto* declaration is connected with the previous main fact by the conduct of the party. It might be contended, perhaps, that such cases might be brought within the above proposition on the principle that 'omnis ratihabitio retrotrahitur et mandato priori aequiparatur.' But such cases seem more clearly to fall within the rule as laid down by Lord Brampton in *R.* v. *Lillyman*, where an *ex post facto* statement was admitted on the ground that it showed consistency of conduct, though it was conceded that the statement did not form part of the *res gestae* [3]. But it seems this cannot be insisted on, since the evidence of an *ex post facto* declaration was admitted in all the above cases on the ground that it formed part of the *res*

[1] Law Times, 1880, p. 181. [2] Law Journal, 1880, p. 6.

[3] *Ridley* v. *Gyde*, 9 Bing. 394; *R.* v. *Lunny*, *R.* v. *Foster*; cp. supra; *Aylesford Peerage* case (1885) 11 App. Cas. 1.

gestae. If it be assumed that these *ex post facto* declarations were rightly so admitted, of course the above generalization could not stand. But from the observations of Lord Brampton (then Hawkins J.) in *R.* v. *Lillyman* it seems clear that a statement made after the main fact which is the subject of the inquiry may be admitted as part of the history of the parties and the case, to show consistency of conduct, while it is conceded that the *ex post facto* declaration cannot be part of the *res gestae*. In *R.* v. *Lillyman* Lord Brampton said that he agreed with the ruling of Cresswell J., that in *R.* v. *Osborne* (1842) C. & M. 622, the statement of the prosecutrix—made, it will be remembered, after the alleged outrage, and as she was returning home—'did not form part of the *res gestae*[1].' But in the discussion on the rejection of the evidence in *R.* v. *Bedingfield* as not forming part of the *res gestae*, Lord Chief Justice Cockburn explicitly stated that the analogy as regards the admissibility of evidence between *R.* v. *Osborne* and the former case was complete, 'and that the ruling of Cresswell J. was directly in point.' It is clear, therefore, that the rejection of the evidence in *R.* v. *Bedingfield*, was implicitly approved by Lord Brampton and the Court of Criminal Appeal in 1896. But it seems equally necessary as a consequence of *R.* v. *Lillyman*, to introduce another class of cases where specially admissible evidence may be tendered to show the history of the case and the consistency of conduct. In view of the distinction clearly drawn by Lord Brampton between evidence of the former character, and evidence which is rendered as part of the *res gestae*, it seems difficult to concur in Archbold's statement that the declarations of a person robbed, made immediately afterwards, are evidence of the same principle as the *res gestae*[2]. Again, Archbold seems to treat *R.* v. *Lillyman* as the authority for admitting the fact of a complaint, but not the particulars of it, in evidence. But that case is the authority for admitting the particulars of the complaint made by a prosecutrix on a charge of rape[3].

Finally, words, acts, and declarations, in order (2) to form part of the *res gestae* must be relevant, that is, connected with the act or declaration of a person whose conduct, either active or passive, is one of the subjects of the inquiry; *Wright* v. *Doe* d. *Tatham* (1834) 1 A. & E. 313.

Lord Chief Justice Cockburn, in his correspondence with Mr. Pitt-Taylor, admitted that 'the American decisions have no doubt gone still further[4].' Mr. Chamberlayne is of opinion that the rule of

[1] *R.* v. *Lillyman*, 2 Q. B. at p. 175.
[2] Pleadings, Evidence, and Practice, at p. 292.
[3] 2 Q. B. at p. 175.
[4] Law Journal, 1880, p. 8.

res gestae 'has received extended development in this country beyond the limited English rule,' and that 'the principle recognized, more or less clearly, by the American authorities is this: Oral or written declarations, by whomsoever made, accompanying and assisting to constitute facts in issue or evidentiary thereto, are competent evidence, provided such declaration be contemporaneous with the fact which it assists to constitute, and so limit, explain or characterize such fact as in a just sense to be a part of it and necessary to its complete understanding[1].' Greenleaf says, 'If the declaration is connected with or grows out of the act, though not contemporaneous with it, but happening after some lapse of time, it is admissible as part of the *res gestae*[2].' In his comment on this passage, Lord Chief Justice Cockburn said:—

'To me, I must say with the greatest possible respect for American jurists, it seems that this extension of the doctrine of *res gestae* appears to involve a serious departure from principle, amounting in effect to a making or remodelling of the law, altogether beyond the authority of those whose province it is to administer the law and not to make it. I am certainly not prepared to act upon this view of the law till it shall have received the authoritative sanction of a Criminal Court of Appeal in this country[3].'

The writer of the American Notes to Campbell's Ruling Cases states that the rule given at p. 281 'correctly expresses the doctrine of *res gestae* held in this country[4].' It would seem equally clear that the rule so given does not correctly express the doctrine of *res gestae* by the law of England, either as it is to be inferred from the decision of Lord Chief Justice Cockburn in *R.* v. *Bedingfield*, or from the observations of Lord Brampton, delivering the judgment of the Court of Criminal Appeal, in *R.* v. *Lillyman*, in 1896. It is curious to note that while the whole current of authority is to the effect that the doctrine of *res gestae* has received a more extended development in America than in England, yet antecedent declarations have been rejected in America, even when only made just before the subject of the inquiry; *Alabama &c. R. Co.* v. *Hill*, 90 Alabama, 71. In the *Aylesford Peerage* case (1885) letters were admitted, as part of the *res gestae*, which were written in 1876, on a question of legitimacy, when a child was born in 1881[5]. Again, in this case letters were admitted, at the instance of the Earl of Selborne, that were written *ex post facto* in 1882, the ground of their admission being that they were part of the *res gestae*[6]. Lord Selborne explicitly suggested that the ground

[1] Notes on American Cases in Campbell's Ruling Cases, vol. xi. p. 291.
[2] Evidence, p. 131.
[3] Law Journal, 1880, p. 15.
[4] Campbell's Ruling Cases, vol. xi. p. 290.
[5] 11 App. Cas. at p. 3.
[6] 11 App. Cas. at p. 17.

of the admission of the letters written after the birth was that they formed part of the *res gestae*; but in the last edition of Pitt-Taylor on Evidence this case is not treated as one where the evidence was admitted as part of the *res gestae*, but as a case where hearsay evidence was received on a matter of pedigree. It is however impossible to avoid incurring the conviction, rendered necessary by Lord Selborne's words, that the evidence, in the *Aylesford Peerage*, of letters written long anterior and subsequent to the subject of inquiry, were admitted as part of the *res gestae*. But no case in America could have instanced a more extended development of the doctrine of *res gestae* than this.

In spite of the current of authority to the effect that the doctrine of *res gestae* has received a more extended application in America than in England, it is difficult to exclude the conviction that Mr. Pitt-Taylor may have had material grounds, for the purposes of his argument in the discussion on the rejection of the evidence in *R.* v. *Bedingfield*, in not referring to the American cases. This renders it necessary to question whether there is, in fact, any clear rule in America. Mr. Irving Browne, in his notes to Campbell's Ruling Cases (vol. xi), admits that the American cases are 'utterly irreconcilable' on the essential point whether it is necessary that a declaration, in order to be admissible as part of the *res gestae*, should be contemporaneous, that is, made during the continuance of the main fact which is the subject of the inquiry[1]. But this was substantially the whole issue between Lord Chief Justice Cockburn and Mr. Pitt-Taylor. Mr. Irving Browne quotes several cases where a declaration was rejected although made at brief intervals after the act. In one case a declaration was rejected when made only five minutes after the subject of the inquiry, which was a railway accident; *Durkee* v. *Cent. P. Ry. Co.*, 69 California, 533. It is hardly necessary to point out how such a ruling favours the arguments of Lord Chief Justice Cockburn in the discussion that ensued between him and Mr. Pitt-Taylor. In 1880 there were no American cases quoted in the then current edition of Taylor on Evidence. But in the last edition, the rule in America, as illustrated by the case of *Enos* v. *Tuttle* (1820), is stated to be that a declaration or a circumstance, in order to be admissible as part of the *res gestae*, must have been made 'at the time of the act done[2].' If this reference had appeared in the earlier editions, it would have proved very embarrassing to Mr. Pitt-Taylor, and an unexpected relief to Lord Chief Justice Cockburn. Assuming the ruling of Chief Justice Hosmer in *Enos* v. *Tuttle* to correctly define the

[1] Campbell's Ruling Cases, vol. xi. p. 291.
[2] Taylor on Evidence (9th ed.), p. 380.

doctrine of *res gestae* as it is recognized in America, it is essential to conclude that that doctrine is maintained there only in the limited and restricted sense for which Lord Chief Justice Cockburn contended in his discussion in 1879 with Mr. Pitt-Taylor. But enough has been said to show that the cases, alike in this country and America, are 'utterly irreconcilable' on the essential point whether a declaration or a circumstance is only admissible as part of the *res gestae* when it is made contemporaneously during the continuance of the act under consideration; or whether, even when made *ex post facto*, it may be admitted as part of the *res gestae*.

'Qui juris nodos et legum aenigmata solvat.'—*Juvenal*, viii. 50.

It seems extraordinary that none of the text-books should appeal to what must be considered the final authority, the ruling of the House of Lords in the *Aylesford Peerage* case (1885) 11 App. Cas. 1–19. In that case the subject of the inquiry was the legitimacy of a child born in 1881; and letters were admitted as part of the *res gestae* that were written in 1882[1]. The ground of the admission of the letters was expressly stated by the Earl of Selborne and by Lord Bramwell to be that they were part of the *res gestae*[2]. The rules of evidence are the same in civil as in criminal cases, and it should therefore seem that the *Aylesford Peerage* case has decided that an *ex post facto* declaration or circumstance may be part of the *res gestae*, overruling even the ruling of the Court of Criminal Appeal in *R.* v. *Lillyman* in 1896, so far as Lord Brampton (then Hawkins J.) held that an *ex post facto* declaration did not form part of the *res gestae*. But neither Best, Taylor, nor Campbell notice the important admission of the letters in the *Aylesford Peerage* case on the doctrine of the *res gestae*. Roscoe, who alludes to the case when discussing the subject, does not notice what seems the all-important point, that a subsequent circumstance or declaration may form part of the *res gestae*, since the House of Lords admitted the letters in that case. The effect of the admission of the letters clearly implies that according to a ruling of the House of Lords, a large construction of the doctrine of the *res gestae* prevails no less in this country than in America.

N. W. Sibley.

[1] 11 App. Cas. at p. 12.

[2] Ibid., at pp. 7, 11, 16.

THE CASE OF *SUTTON* v. *JOHNSTONE*.

CAN one member of the army or the navy bring an action against another member of the army or the navy for acts done in the ordinary course of professional duty, if such acts have been done maliciously and without reasonable and probable cause? The Dreyfus case in France, and the less notorious cases of Marten and Hickel in Germany, show that abroad this question possesses a practical importance[1]. It is perhaps of some interest to inquire what is the answer given to it by English law. It will be seen that the answer given partakes of the uncertainty which is characteristic of much of that part of the common law which is concerned with constitutional topics. The leading case on this subject is the case of *Sutton* v. *Johnstone*[2] decided in 1786. The facts of that case were as follows: In 1781 Sutton was the captain of His Majesty's ship *Isis*; and Johnstone was the commander of the squadron. In the April of that year there was an engagement between the French and English fleets, in which the *Isis* was damaged. The French sailed away; and Johnstone ordered the English ships to slip their cables and pursue. Sutton, owing to the condition of his ship, did not obey these orders. Johnstone in consequence put Sutton under arrest for disobedience to orders, and sent him to England for trial by a court-martial. In 1783 he was honourably acquitted by the court-martial. He then brought an action for malicious prosecution against Johnstone. The defendant pleaded the general issue. The jury found for the plaintiff. The defendant then moved in arrest of judgment in the Court of Exchequer on the ground that no action for a malicious prosecution would lie for a subordinate officer against the commander of a squadron for improper conduct while under his command. Eyre C. B. and the whole Court refused to arrest judgment. This decision was reversed in the Exchequer Chamber and the House of Lords, not upon the broad ground that no such action would lie, but upon the narrow ground that an action for malicious prosecution did not lie in the present case, because there was reasonable and probable cause for the prosecution. Lords Mansfield and Loughborough, however, expressed themselves very strongly in favour of the broad proposition contended for by the defendant. This proposition goes the length of saying that a member of the army

[1] The *Times*, May 2, 1902.

[2] 1 T. R. 493, 1 R. R. 257.

or navy 'forfeits or voluntarily surrenders all the civil rights belonging to other subjects, when the injury proceeds from a superior officer, under colour of discipline; even although the act done be admitted to have been done in opposition to discipline, in violation of moral duty, maliciously and without cause [1].' In expressing this opinion Lords Mansfield and Loughborough were careful to add that the case was one of first impression, that it was doubtful, and that it remained open for decision.

In tracing the subsequent development of the law upon this point we shall consider

(1) How far the question is concluded by authority:

(2) To what conclusion considerations based upon public policy, or the general principles of common law should lead us.

(1) At the outset we must distinguish cases which have been sometimes confused with the present case. It is quite clear that a court-martial acting within its jurisdiction can not be prohibited by a court of common law [2]; nor can a conviction obtained before such a court acting within its jurisdiction be brought up before a court of common law by writ of certiorari [3]. It is quite clear that judges, parties, and witnesses are absolutely privileged in respect of what is said in the course of legal proceedings, whether such legal proceedings take place before a court-martial or before any other court [4]. The present question, whether one member of the army or the navy has a right of action against another member of the army or the navy if he can prove malice and the absence of reasonable and probable cause, is quite distinct.

There are two cases in which the dicta in *Sutton* v. *Johnstone* are clearly followed. In the case of *Dawkins* v. *Lord Rokeby* [5] the plaintiff sued for damages for false imprisonment and malicious prosecution. Willes J. ruled that there was no cause of action even assuming the presence of malice and the absence of reasonable and probable cause. In the case of *Dawkins* v. *Lord Paulet* [6] the facts were as follows: The plaintiff was an officer in the Coldstream Guards. The defendant was his superior officer. The defendant wrote to the adjutant-general of the army a letter which reflected upon the character and capacity of the plaintiff. The plaintiff sued him for libel. He pleaded privilege. The plaintiff replied that the letter was written with express malice. The defendant demurred. The majority of the Court of Queen's Bench gave judgment for the defendant.

[1] *Sutton* v. *Johnstone* (argument for the respondent), 1 T. R. at p. 534.
[2] *Grant* v. *Gould* (1792) 2 H. Bl. 69, 3 R. R. 342.
[3] *Re Mansergh* (1861) 1 B. & S. 400.
[4] *Dawkins* v. *Lord Rokeby* (1873) L. R. 8 Q. B. 255; 7 H. L. 744.
[5] 4 F. & F. (1866) 806, 833. [6] (1869) L. R. 5 Q. B. 94.

In this case Mellor J. considered that the rule rested upon grounds of public policy similar to those upon which the rule giving absolute privilege to those engaged in legal proceedings is based[1]. The analogy between the two classes of cases is not close; and, in fact, in *Sutton* v. *Johnstone* Lords Mansfield and Loughborough had stated that 'there is no principle to be drawn from the analogy of other cases[2].' The argument to be drawn from the existence of this analogy (such as it is) is considerably weakened by the subsequent case of *Dawkins* v. *Lord Rokeby*. In that case the Court of Exchequer Chamber approved the decision in *Dawkins* v. *Lord Paulet*[3]; but the House of Lords carefully guarded itself from the supposition that it decided anything else except the absolute privilege of a witness giving evidence before a military court of inquiry. 'I feel sure,' said Lord Cairns, 'that your Lordships would not desire your decision upon the present occasion to go farther than the circumstances of this particular case would warrant[4].' What was said in the Exchequer Chamber upon the general question cannot therefore be regarded as anything else but strong dicta. These dicta may perhaps be said to be balanced by the dictum of Lord Penzance in the same case[5]. 'If,' he said, 'by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man.' It will be observed that the state of the pleadings in the case of *Dawkins* v. *Lord Paulet* was such that the conditions postulated by Lord Penzance were present.

So far as the majority of the Court of Queen's Bench can decide the question it is no doubt decided by the case of *Dawkins* v. *Lord Paulet*. But from that decision Cockburn C.J. dissented; and he relied upon a line of cases which if they do not in terms decide the question in the other way assume that the law is otherwise. We shall now examine these cases, most of which are cited by Cockburn C.J. in chronological order.

[1] 5 Q.B. at pp. 116, 117.

[2] 1 T. R. at p. 550.

[3] L. R. 8 Q. B. 255. The Court of Exchequer Chamber cited the following cases in favour of the proposition that no action would lie:—*Keighly* v. *Bell* (4 F. & F. 763), in which there was held to be no evidence of malice; *In re Mansergh* (1 B. & S. 400) and *Grant* v. *Gould* (2 H. Bl. 69), in which the question at issue was whether the court-martial had jurisdiction; *Barwis* v. *Keppel* (1766, 2 Wils. 314), in which the point was not fully argued: the Court said that if the plaintiff's counsel wished to speak more fully on the point they would hear them. In *Sutton* v. *Johnstone* the Court referred to *Barwis* v. *Keppel* on another point (1 T. R. at p. 548); but they clearly did not regard it as an authority on the general question, as they stated that 'there is no authority of any kind either way' (at p. 550). The Court of Exchequer Chamber however recognized that this general question did not arise for their decision in the case before them (at p. 272).

[4] L. R. 7 H. L. at p. 754.

[5] Ibid. at p. 755.

In the case of *Wall* v. *McNamara* (1779)[1] an action for false imprisonment was brought by the plaintiff, a captain in the African corps, against the defendant, the lieutenant-general of Senegambia. There was a verdict for the plaintiff, with £1,000 damages. The direction of Lord Mansfield to the jury was in striking contrast to his judgment in *Sutton* v. *Johnstone.* He told the jury that 'In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, such as Justices of the Peace, for acts done by them in the exercise of their civil duty. Then the principal inquiry to be made by a court of justice is how the heart stood. And if there appears to be nothing wrong there, great latitude will be allowed for misapprehension or mistake. But on the other hand, if the heart is wrong, if cruelty, malice, and oppression appear to have occasioned or aggravated the imprisonment or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape . . . from that punishment which it is your power and your duty to inflict on so scandalous an abuse of public trust.' It was admitted that the plaintiff was in fault for leaving his post. 'But supposing it to have been the defendant's duty to call him to a military account for his misconduct, what apology is there for denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison, when there was no possibility of bringing him to trial for several months . . . from these circumstances malignant motives may be presumed which would destroy any justification.' In the case of *Swinton* v. *Molloy* (1783)[2], the plaintiff, the purser of the *Trident* man of war, brought an action against the defendant, his captain. It was held that under the circumstances of the case the action would lie. In the case of *Warden* v. *Bailey*[3] (1811) a sergeant in the militia brought an action against his adjutant under the following circumstances: The colonel had given an order that sergeants and corporals should attend at school in order to learn reading and writing, and pay 8*d.* a week. This order was invalid. The plaintiff was put under arrest for using mutinous words about the order. He was ultimately acquitted by court-martial. It was held by the Court below that the order was invalid, that there was

[1] Cited 1 T. R. at p. 536; cp. the charge to the jury in *Wall's* case (1802) 28 S. T. at p. 176.
[2] Cited 1 T. R. at p. 537.
[3] 4 Taunt. 67; S. C. on appeal, 4 M. & S. 400, 13 R. R. 560.

no evidence of mutinous words, and that therefore the plaintiff had a good cause of action. On appeal it was held by Lord Ellenborough that there was no cause of action because there was sufficient evidence of mutinous words to justify the arrest and imprisonment. It would appear that the Court thought that an action would lie had there been no reasonable and probable cause for the imprisonment[1]. As Cockburn C.J. said[2], 'it can hardly be supposed that, had the Court been prepared to adopt the reasoning of Lord Mansfield in *Sutton* v. *Johnstone*, they would not have disposed of the case on the question of law instead of going into an elaborate investigation of the evidence.' In the case of *Dickson* v. *The Earl of Wilton* (1859)[3], the plaintiff sued his commanding officer for a libel contained in a letter to a superior officer, and obtained a verdict. The cases of *Dickson* v. *Viscount Combermere* (1863)[4]; *Freer* v. *Marshall* (1865)[5]; and *Keighly* v. *Bell* (1866)[6] were all actions of members of the army against their superior officers alleging express malice. In all of them the question of the existence of express malice was said to be a question for the jury; and this clearly assumes that if the jury had found that it existed the action would lie. The case of *Keighly* v. *Bell* is remarkable, because it was tried by Willes J. who, as we have seen, decided in *Dawkins* v. *Lord Rokeby*[7] that, even assuming the existence of express malice, no action would lie. In *Keighly* v. *Bell*[8], after consulting with the other judges of the court, he said: 'There remains to be considered the question arising upon the first count, as to false imprisonment, and also upon the second count for malicious prosecution, and upon the third count for libel. In my judgment the question upon all of them is whether the acts so done by the defendant were acts done not in the ordinary discharge of his military duty, but acts done without any reasonable or probable cause, and merely for the purpose of injuring the plaintiff. And in my opinion there is no evidence of the affirmative of that question. If it were a question merely on the weight or effect of the evidence I should have left it

[1] Lord Ellenborough said (4 M. & S. at p. 412) 'though it (the court-martial) terminated in the acquittal of Warden, it does not deprive the parties of the same justification which they would have had in another event of the trial, *if there was a reasonable and probable cause* for the original imprisonment of the plaintiff Warden, until trial could be had.'

[2] L. R. 5 Q. B. at p. 106. In *Dawkins* v. *Lord Rokeby* (L. R. 8 Q. B. at p. 272) the Court explained the case of *Warden* v. *Bailey* by saying that the order was simply illegal, 'as if an officer had ordered a soldier to be imprisoned in a debtor's prison for non-payment of an alleged debt.' But, if the order was given under colour of military authority, would the soldier even in such a case have a right of action against the officer in the ordinary courts? According to the dicta in *Sutton* v. *Johnstone* it would appear that the soldier's only remedy against his officer is by recourse to a military tribunal (1 T. R. at p. 549).

[3] 1 F. & F. 419.
[4] 3 F. & F. 527.
[5] 4 F. & F. 485.
[6] Ibid. 763.
[7] Above, p. 223.
[8] 4 F. & F. at pp. 799–801.

to the jury; but I think there is no evidence on which a conclusion could be drawn that there was such an absence of probable cause, or such sinister and indirect motive, and abuse of the office and power of the defendant, as could sustain the action.'

We may therefore perhaps say that though this question is concluded by the decision of the Court of Queen's Bench in *Dawkins* v. *Lord Paulet*, the effect of that decision is weakened by the dissenting judgment of Cockburn C. J., and by the line of cases pointing to the contrary conclusion. Though the general question could not be raised in a court of first instance it could still be raised in the Court of Appeal or the House of Lords.

(2) In their judgment in *Sutton* v. *Johnstone*, Lords Mansfield and Loughborough called this question a question of 'mixed law and policy.' The arguments based upon policy could not be more forcibly expressed than in their dicta on the one side, and in the dicta of Eyre C. B. and in the judgment of Cockburn C. J. on the other.

Lords Mansfield and Loughborough pointed out that until the present occasion it had never entered into any man's head that such an action could be brought. The code of military law provides for the regulation of the duties of the navy. Commanders necessarily have great discretionary powers to arrest or put seamen and officers on their trial before a court-martial. The rules of this code provide against the abuse of these powers. A commander who arrests or puts a man on his trial without reasonable and probable cause is guilty of an offence against these rules; but the same jurisdiction which tries the original charge must try the probable cause; which in effect is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction. Discipline is essential to the fleet. The first, second, and third part of a soldier's duty is obedience. Commanders in a day of battle must act upon delicate suspicions. They must give desperate commands. A military tribunal is capable of feeling all these circumstances. But what condition will a commander be in, if, upon the exercising of his authority, he is liable to be tried by a common law judicature? Upon an unsuccessful battle, there are mutual recriminations, mutual charges, and mutual trials. The whole fleet takes sides with great animosity. If every action is to be followed by a trial it is easy to see how endless the confusion, how infinite the mischief will be[1].

Eyre C. B. and Cockburn C. J., on the other hand, drew the distinction between acts falling within the powers given by the

[1] 1 T. R. at pp. 548–50.

code of military law and acts which are an abuse of these powers. Acts done under such powers are lawful acts; but there is a wide difference between indulging to situation a latitude touching the extent of power, and touching the abuse of it. Cases may be put of situations so critical that the power ought to be unbounded. It is impossible to state a case where it is necessary that it should be abused. An officer whose conduct is liable to be so questioned is no doubt in a difficult situation. But it must be presumed that the established jurisdictions of this country will be equal to their duty. To situations which require indulgence, they will show it; but be the risk more or less, all men hold their situations in this country upon the terms of submitting to have their conduct examined and measured by that standard which the law has established. No doubt a jury would be advised to presume everything in favour of the legitimate exercise of military authority, and to require cogent and conclusive evidence of its abuse. If the question turned upon nice points of naval or military tactics the jury would be advised to presume in favour of the naval or military authority. But in cases of manifest wrong and proved malicious motives no tribunal is better qualified to form a fair judgment than a jury. It is not incompetent when assisted by professional evidence to form a fair opinion in professional matters. Special juries are doing this every day, and their decisions are on the whole satisfactory. Even if this were not so, it may be fairly questioned how far a court of law is justified, in the absence of positive law or previous decision, in refusing redress in a case of admitted wrong, merely upon the ground of public convenience [1].

Such are the arguments adduced on either side of this question. The paramount importance of the preservation of discipline, and the necessity of freedom from the fear of vexatious actions at law, are the great arguments in favour of the views of Lords Mansfield and Loughborough. These arguments are admitted by those who take the contrary view; but it is contended that a right of action existing only when malicious intent can be proved would not be detrimental to discipline and would be in harmony with the principles of the common law. 'I cannot,' said Cockburn C. J., 'bring myself to believe that officers in command would hesitate to give orders which a sense of duty required . . . from any idle apprehension of being harassed by vexatious actions. Men worthy to command would do their duty . . . and would trust to the firmness of judges and the honesty and good sense of juries to protect them in respect of acts, honestly, though possibly erroneously done under a sense of duty [2].' That this is the case can be seen from

[1] 1 T. R. at pp. 503, 504; L. R. 5 Q. B. at pp. 107–111. [2] L. R. 5 Q. B. at p. 108.

the fact that magistrates and others do not as a rule hesitate to employ force to suppress disorder, although they may be sued, not merely if they act maliciously, but if they fail to hit the exact line between excess and defect.

Human nature, whether military or civilian, is much the same. A technical atmosphere and professional traditions sometimes, all unconsciously, produce moral blindness. Nothing wrong can be seen in the trade custom till the court of law boldly terms it a fraud. It may be that a possibility—even a remote possibility—that it will be necessary to explain and justify acts before a tribunal not composed of men with the same professional sympathies as our own, may exercise a check not the less salutary because it is impalpable. If the dicta in *Sutton* v. *Johnstone* are ever overruled it will probably be on some such grounds as these. In the meantime it must be admitted that the question is in 1902, as it was in 1786, a doubtful question and 'fit to be settled by the highest authority[1].'

W. S. Holdsworth.

[1] 1 T. R. at p. 550.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Introduction to the Study of the Law of the Constitution. By A. V. Dicey, K.C. Sixth Edition. London: Macmillan & Co., Lim. New York: The Macmillan Co. 1902. 8vo. xvi and 533 pp. (10*s.* 6*d.* net.)

The sixth edition of Professor Dicey's well-known, one may almost say classical, work contains considerable additions to the Appendix. There are new notes on Australian Federalism, on Droit Administratif in France, and on Martial Law. The first of these is a very clear and concise account of federalism in Australia according to the Commonwealth Constitution Act (63 & 64 Vict. c. 12). In the main the founders of the Commonwealth are shown to have followed the example of the United States rather than that of the Dominion of Canada. But they followed modern English practice in important points, and in one particular the Australian ministry has more power than the English cabinet, for it can dissolve not only the House of Representatives, but the Senate. Considerable flexibility is maintained, and by an ingenious device amendment of the constitution is made easy, while it can hardly be rash. Altogether Professor Dicey takes a very hopeful view. Notes X and XI concern French *droit administratif*, and Professor Dicey overthrows two important misconceptions of its nature with such ease and lucidity that one almost wonders how they could ever have been fostered. As every one knows, Professor Dicey's special art lies in making the reader imagine that with a little thought he could have himself easily mastered the matter in hand unaided. In the latter of these two notes we have an extremely interesting account of the evolution in the nineteenth century of *droit administratif*, which is 'case-law' and cannot in the belief of French lawyers be codified, and a most instructive analogy between the treatment of *droit administratif* in France in the nineteenth century and that of English equity in the seventeenth. In Note X the question whether *droit administratif* has been introduced into England is answered with a decided negative.

Note XII, on 'Martial Law,' contains perhaps the most interesting and debateable portion of the new material. Professor Dicey's view is that martial law is born of 'Immediate Necessity' and not only cannot exist in time of peace, which is admitted by all, but is confined to the locality of actual war and to the local defence of the peace against the king's enemies. The most important and, as he admits, plausible theory opposed to this is that the necessity need not be in his sense immediate, but that the use of what is called martial law is legally justifiable when exercised for reasonable and probable cause. This he terms the 'Doctrine of Political Necessity or Expediency' (though the necessity would seem to be ultimately political, whether more widely or less widely circumscribed). It may be admitted that from a lawyer's point of view the use of martial law is solely to

preserve or to restore the king's peace, broken through the failure of ordinary civil jurisdiction and authority. Now what Professor Dicey says is in effect this: because at one time certain operations sufficed for this purpose and martial law extended to them and no further, therefore now, when those operations are no longer sufficient, martial law cannot be extended to include any others which would or might be so. Surely this is to defeat the very object of martial law; for if it does not vary with the conditions of the age, it is useless. In the eighteenth century the only acts which could have direct effect on military operations were those confined to the locality of fighting. The area of martial law was therefore *de facto* confined to that locality. Nowadays telegraphic communication has given an extreme importance to acts so far from the seat of war that, while they might have a great effect on military operations, the place where they were committed might yet enjoy perfect peace and the courts there remain open. The prevention of these acts which cannot be secured by the course of legal procedure is exactly the purpose of martial law. The necessity in such cases is in fact as immediate in the strict sense of the word as if it arose from acts committed at the seat of war, for all that the person or persons causing the necessity by their acts may be remote in space from the site of the hostile operations procured or assisted by them, which it is the end of martial law to prevent. If then martial law is to be effective at all, it must be held to cover such cases, and take cognizance of acts which, though committed far from the seat of war, may nevertheless have an immediate effect on warlike operations. The question in fact seems to be one not so much of authorities as of common sense. The authorities are scanty and ambiguous. If 'martial law' is a part, though an exceptional part, of the Common Law, is it not entitled to share in the presumption that the law is founded in common sense?

The nature of Acts of Indemnity is also debated between Professor Dicey and other learned persons. It is not open to doubt that one object of such an Act is to justify, *ex post facto*, various things which it would be for various reasons impossible or difficult to justify in a court of law. But at the same time it is a measure of grace and prudence, passed to remove doubts and quiet consciences. That this is true cannot but be plain to any one who is acquainted with, e.g., the Act of Oblivion and Indemnity passed at the Restoration. Professor Dicey seems to underrate the importance of providing for really doubtful cases. He admits that some extraordinary measures are justifiable at common law in time of war. As it has never been decided exactly how far the justification extends, and there is in fact great difference of opinion, it is obviously proper for an Act of Indemnity to be framed in language of abundant caution. We do not see why this should prejudice the discussion of the pure legal question, except on a presumption, for which there is no authority, that Parliament always knows all the Common Law. The fact that Acts of Indemnity always are framed in comprehensive terms does obviously tend to prevent the exact question as to the extent of common-law powers from being effectually raised. In any case we may hope that martial law and Acts of Indemnity will now be of merely speculative interest for many years.

In Chapter VII, on the Right of Public Meeting, and the very learned Note V thereto in the Appendix (which to a lawyer is even more interesting than the text) there are several new passages due to the need for considering the recent decision of the K. B. D. in *Wise* v. *Dunning* [1902] 1 K. B. 167, 71 L. J. K. B. 165. Mr. Dicey finds it possible, though not altogether

easy, to reconcile this with *Beatty* v. *Gillbanks*, 9 Q. B. D. 308, and adheres to the principle 'that a meeting otherwise in every respect lawful and peaceable is not rendered unlawful merely by the possible or probable misconduct of wrongdoers who to prevent the meeting are determined to break the peace'; which is quite consistent with a more extensive discretion in requiring sureties of the peace.

Roman Private Law in the times of Cicero and of the Antonines. By Henry John Roby. Two vols. Cambridge: at the University Press. 1902. 8vo. Vol. I, xxxii and 543 pp.; Vol. II, xiii and 560 pp. (30*s.* net.)

In this important work Dr. Roby has set forth the Antonine law with a belief, or hope, that much of it is also of Cicero's time. His arrangement resembles that of the Institutes, but inheritance is brought into close relation with family law and *obligatio* is drastically treated. Dissatisfied with the artificial symmetry of Gaius, the author recasts the whole system and classifies obligations on a scheme based on the character of the remedy.

Dr. Roby has taken infinite pains, justified by the result. The matter is handled with enviable certainty of touch: the statements of law are exact and clear, and the book contains a wealth of illustrations from lay writers. As was inevitable, the Digest has been largely drawn upon. This has involved the weighing of countless texts in order to determine how far they represent Antonine law. The learning, patience, and acumen needed for this task he will discover who attempts it with a single title of the Digest. Dr. Roby has been very successful. To test the work fully would be to do it again—with the same resources. 'Non cuivis contingit.' But no passages have been noted in which Byzantine rules are certainly antedated, and few that are even doubtful. If at times principle seems sacrificed to detail, this is probably due to the fact that it is in matter of principle that the Digest is least to be trusted.

Dr. Roby gives us Roman Law, pure and simple. He avoids modernism in thought, if not always in expression, and, warned by the example of some predecessors, he keeps his feet on the ground. He never speculates and, without textual authority, rarely even explains. Indeed to most readers more commentary would probably have been welcome even at the cost of detail. Dr. Roby has avoided 'bottomless controversy,' not for lack of power, and the mere lawyer will regret that some cruces of the law have not been allowed to share the acute analysis bestowed on the 'Pro Caecina' (ii. 510 sqq.) and even on the foolish Buculeius (i. 534 sqq.). The author does excellently in taking his reader to the texts, but is perhaps too much inclined to leave him there.

The rapidly changing law of persons is clearly stated. It may be noted that the author's references do not justify the statements that 'grant of Latinity to a whole community carries with it the Roman power over children' (i. 63), and that one to whom his peculium is given on release acquires it only by usucapion (i. 56, 78).

There seems no authority for the view (i. 529) that a completed gift, by way of datio, beyond the Cincian limit was revocable throughout the donor's life.

Dr. Roby seeks to reduce the various cases of iussus ('adire hereditatem, cum servo contrahere, liberum esse,' etc.) to a common principle. They

differ so much in nature that the experiment seems hazardous. Thus the unwary reader may suppose that a gift of liberty by will was 'revoked by the death of the giver' (ii. 122, 123).

The arrangement of Tort, based on a classification of actions, is of doubtful convenience. Is anything gained by calling Aquilian damage and 'arborum furtim caesarum' semi-delictal and grouping them with the duty to pay a 'legatum certi per damnationem'? (bk. 5, ch. 5).

Upon Possession (i. 451 sqq.) one may sympathize with Dr. Roby's desire to avoid controversy. But here, as indeed in some other places, one feels that the reader will never guess from the author's exposition what doubtful questions are involved. It may also be noted that too much stress is laid on the 'lawful' origin of possession, and the statement that possession is good against all but the owner, though it is true, may mislead a reader who forgets that title was no reply to 'uti possidetis.'

It is doubtful whether even Dr. Roby's authority will rehabilitate the view that the 'vis' forbidden by that interdict may have occurred before its issue. He gives no text suggesting such a possibility in any purely prohibitory interdict. Several seem to negative it (e.g. D. xliii. 13. 1. 12). 'Si vim non faciat' (G. iv. 170) is fatal. It is therefore proposed to read 'si vim faciat' (ii. 447). This is to alter the whole purpose of the 'interdicta secundaria,' which were plainly designed to compel the taking of certain procedural steps. The explanation of this formal 'vis,' which, in view of its peculiar nature, Dr. Roby is surprised not to find at the end of 170, would come more naturally *before*. It was presumably contained in the fifty illegible lines a little before 170, some of which lines were certainly occupied with the discussion of the procedure in this interdict.

The few verbal slips and misprints which have been noted are not important. We have to thank Dr. Roby and the Cambridge University Press for a valuable addition to the list of English books on Roman Law.

A Treatise on the Admiralty Jurisdiction and Practice of the High Court of Justice, the Vice-Admiralty Courts, and the Cinque Ports, &c. Third Edition. By E. S. Roscoe and T. Lambert Mears. London: Stevens & Sons, Lim. 1903. 8vo. liii and 716 pp.

This, the third edition, of Roscoe's Admiralty Practice is considerably larger than previous editions. The Introduction and Part I, which may be called the body of the book, show an increase from 139 pages in the second to 296 pages in the present edition. For the increase Dr. Mears is mainly responsible; it is stated in the Preface that the Introduction and Chapters I–IV are entirely his work. The Introduction (77 pages as against 11 pages in the second edition) contains the best account which has yet appeared of the history and growth of the Admiralty jurisdiction. If it does not add much to what has been in recent years collected from original sources by Sir Travers Twiss and other writers, it presents in a consecutive and useful form the result of their work, and contains besides a variety of historical and antiquarian information which has never before been collected together. Dr. Mears' knowledge of Roman law has stood him in good stead in dealing not only with the history but also with the peculiarities of the law and practice of the court. The busy practitioner would perhaps have preferred that more space had been allowed to the chapters relating to wages, bottomry, necessaries, and matters with which he is more immediately concerned, and in this respect there is a certain want

of proportion in the book; but the chapters on salvage and collision are full, and the latter (Chapters III and IV) contain in their 90 pages the substance of the law upon the subject. Chapter IV sets out the regulations for preventing collision, and illustrates them by a copious citation of cases in the notes. This chapter, one of the longest in the book, appears to be entirely new; it is a useful and necessary addition to the rather meagre chapter III of the previous edition. Legal literature upon the subject of collision grows rapidly. Part II, which deals with the rules and orders applicable to Admiralty practice, is also full and apparently complete. The official position of the principal author specially qualifies him to deal with this branch of the subject.

Notwithstanding its increase in bulk, the book is still compact, and yet seems to contain all that is necessary for the practitioner. In the historical Introduction secondary authorities (e.g. Clowes' History of the Navy) are cited apparently for no special reason; and to the statement (p. 5) that the Duke of Clarence was assisted in his office of Lord High Admiral by a council it should be added that one of his predecessors, Prince George of Denmark, was assisted in like manner.

Principles of Equity. By W. Ashburner. London: Butterworth & Co. 1902. 8vo. lvi, 729 and 49 pp. (21*s.*)

This book contains the most extraordinary statement that it has ever been our fate to read. At p. 673 occur the following passages: 'The restraint upon anticipation can only operate during coverture. It follows that if an interest is given by will to a married woman subject to a restraint upon anticipation, and she is discovert at the testator's death, she is [i.e. in an otherwise appropriate case] put to her election (*b*).' In footnote (*b*) we read: 'Kekewich J. has decided to the contrary. *Haynes* v. *Foster* [1901] 1 Ch. 361.' No other authority is referred to. Surely a decision which must have been reported about eighteen months before the present work was in print ought to have been dealt with in a different manner, apart from any question of the discourtesy involved in the observations. We also think that such a footnote as that at p. 234 n. (*g*) should have been embodied in the text, or the subject-matter left alone. There are four or five other notes to which the same remark applies.

The author's statement of the effect of a sale in market overt (p. 68) is inconsistent with sections 22 and 24 (1) of the Sale of Goods Act, 1893. As the author refers only to the *Case of Market Overt* (1595) 5 Rep. 83 b, in support of his statement, we can but infer that he is not familiar with the provisions of the statute. He cannot, however, plead ignorance of the existence of the Trustee Act, 1893, which he has referred to in eleven places. If he had read section 14 he would have found that his sixth illustration at p. 561 was no longer correct. As most of our readers are aware, the law respecting the effect of depreciatory conditions on sales by trustees was first altered some fourteen years ago. The author also ignores the Bills of Exchange Act, 1882, and the Partnership Act, 1890, and we certainly think that a short reference to the provisions of the Married Women's Property Acts, 1870 and 1874, would not have been out of place in Chapter XII. At p. 133 we have the unmeaning phrase 'military will.' The author might advantageously have followed the language of section 11

of the Wills Act, 1837, which reads, 'any soldier being in actual military service, or any mariner or seaman being at sea,' and have pointed out that the right is limited to personal estate.

We are told (p. 128) that 'the owner of a chattel can only make a complete gift by delivery.' A gift by deed is equally effective; *Irons* v. *Smallpiece* (1819) 2 B. & Ald. 551; 21 R. R. 395; and see 2 Man. & G. 691, n. (*a*); 58 R. R. 533, n. (10). Mr. Ashburner has also not considered the case where the donee already has custody or possession: see per Wills J. [1896] 2 Q. B. at p. 289, and *Kilpin* v. *Ratley* [1892] 1 Q. B. 582. At p. 290 we read that 'the most important term which is imposed upon a mortgagor who comes into equity to redeem is his liability to account.' This statement is not supported by a reference to any authority, nor does the author favour us with his opinion respecting the items to be included in the mortgagor's account. At p. 296 we read that 'a mortgagee is entitled, as part of his right of indemnity, to his general costs of suit, as between party and party, in an action for redemption or foreclosure.' We can find no reference to *Farrer* v. *Lacy, Hartland & Co.* (1885) 31 Ch. D. 42, and this probably accounts for the failure to discriminate between the costs which a mortgagee recovers as an ordinary litigant, and the costs imposed as a term of redemption. More recent authorities than those referred to at p. 475, n. (*c*) show that the critical time for testing the right to a mandatory injunction in the case of interference with ancient lights is the date when the plaintiff first complains, and not the date of the issue of the writ: *Smith* v. *Day* (1880) 13 Ch. D. 651; *Lawrence* v. *Horton* (1890) 59 L. J. Ch. 440. The author seems to have imperfectly stated the law (p. 132) when, referring to documentary evidence to satisfy the provisions of the Statute of Frauds, he writes, 'the date of the writing is immaterial.' This is only partly correct, because it must also have been in existence at the date when the action is brought: *Bill* v. *Bament* (1841) 9 M. & W. 36; *Lucas* v. *Dixon* (1889) 22 Q. B. D. 357. The author also fails to notice that if a married woman 'had an ample provision for maintenance secured to her' she could not assert her equity to a settlement: see *Giacometti* v. *Prodgers* (1873) L. R. 8 Ch. 338.

Mr. Ashburner's exposition of the jurisdiction to give relief against Mistake is not satisfying. It would have been better if he had grasped the fundamental principle, common to law and equity, that in communication between parties either is bound by that sense which his words were reasonably fitted to convey to the other, not necessarily by what he, or the other, thought they meant.

Turning to more controversial matters, exception may be taken to the third of the author's five leading distinctions between private trusts and charitable trusts (see p. 154). As we read the decisions, in the case of charitable trusts, as well as in private trusts, it is a question of construction whether the donee is entitled to the property given to him subject to the discharge of certain obligations, or whether he is merely to fulfil the office of trustee for others, and the charity cases seem to find a close analogy, if not a parallel, in such cases as *Croome* v. *Croome* [H. L. 1889] 61 L. T. 814, referred to by the author at p. 143. Exception may also be taken to the statement (p. 415, n. (*h*)) that the language of Farwell J. in *Powell* v. *Powell* [1900] 1 Ch. at p. 246 is not consistent with the authorities. It is undoubtedly an advance from anything uttered before, but in *Savery* v. *King* (1856) 5 H. L. C. 627 it was held that there was not sufficient independent advice, and the observations of Lord Cranworth (5 H. L. C. at pp. 655, 656) upon which the author relies as justifying his challenge,

even if they amounted to an attempt to define what amounted to sufficient independent advice, would have been spoken *obiter*. Since the publication of the work under review the observations of Farwell J. (which could very well stand on their own merits) have been approved in *Wright* v. *Carter* [1903] 1 Ch. 27 by Stirling L. J., whose accuracy and caution are not generally disputed. In apparent reliance upon some very old cases, we are told (p. 74 and n. (*h*)) that the critical times in a plea of a purchase for value without notice are, at and before the respective dates of the contract for purchase and the payment of the purchase money, and not at and before the respective dates of the execution of the conveyance and payment of the consideration. The latter is the plea sanctioned by Lord Lyndhurst in *Jackson* v. *Rowe* (1828) 4 Russ. 514; 28 R. R. 168; which the author does not refer to.

In the historical introduction some reference to the older reports was unavoidable, but there seems little point in preserving *Anon.* (1697) Salk. 126, when we have the recent decision of the House of Lords in *London Joint Stock Bank* v. *Simmons* [1892] A. C. 201.. There are other instances in which the learned author has given references to cases which one rarely hears cited in court, when later and more recognized authorities exist. It is difficult to appreciate why he has made use of 'Cases in Chancery,' 'a book of notoriously doubtful authority' (see Wallace, Reporters, fourth edition, p. 481) and 'Equity Cases Abridged,' which the practitioner seldom cites without misgivings. Newspaper reports, to two of which the author refers, are clearly inadmissible. We fail to understand why the author should base a statement (p. 321) respecting conveyancing forms on books of precedents published in 1632, 1650, 1652, and 1674. It is perhaps this familiarity with ancient and obsolete precedents which has induced the learned author to refer (p. 273) to the effect of a tender in the case of a mortgage which does not provide for reconveyance, but that the 'feoffment' shall be void upon payment on the appointed day. The curious may read the history of this legal mummy in the judgment of Chitty L. J. in *Durham Brothers* v. *Roberts* [1898] 1 Q. B. 765.

In a book intended primarily for students, it is difficult to object to the omission of any particular case, but there are at least two (both in the House of Lords) which we think might have been referred to, namely *Reeve* v. *Lisle* [1902] A. C. 461, and *Walter* v. *Lane* [1900] A. C. 529. We also think the author might have supplied (at p. 507) the well-known cases sanctioning his statement that covenants for title, even on a conveyance in fee, run with the land. The author has failed to notice that *Ship's* case was affirmed upon appeal, *sub nom. Downes* v. *Ship* (1868) L. R. 3 H. L. 343.

On the whole we regret to have to say that, although there is much to recommend the book, it seems to us to contain too many pitfalls to be a safe road for the student.

The Winding-up of Companies and Reconstruction. By His Honour Judge EMDEN. Sixth Edition by HENRY JOHNSTON. London: Clowes & Sons, Lim. 1902. 8vo. xxvi and 586 pp.

THE method of annotating the sections of an Act and the rules under it is one that commends itself to English lawyers inspired as they are by a constitutional reverence for the oracular utterances of the legislature. But there comes a time when this method is no longer practicable, when

Acts upon Acts and Rules upon Rules—*alii super alios acervatarum legum cumuli* make a chaos only mitigated by eternal cross-references. This is the present state of company law, and the author and editor of the book have wisely recognized that the only way out of it is to deal with the subject rationally and chronologically in a series of chapters—the Petition, the Order, First Meetings, Contributories, the Liquidator, and so on. The result is great gain in clearness and comprehensibility, and incidentally a considerable saving of space. This last edition, the sixth, is also the smallest—a record surely in legal literature. How closely packed the matter is is shown by the fact that between 3,000 and 4,000 authorities are referred to in some 360 pages of text.

The treatment of voluntary winding-up deserves special commendation. It is not sufficiently realized by text-book writers that this branch of the subject is the one which most concerns practitioners. Of the whole number of companies which came to be wound up more than 90 per cent. are wound up voluntarily, and even in the case of those which are wound up by the Court the official receiver—who is a person not in need of instruction in these matters—generally acts as liquidator. There is one slight blemish in this excellent work. The sub-headings in the index are not given in alphabetical order—a mechanical detail, but worth rectifying in a future edition.

A Compendium of Sheriff and Execution Law. By PHILIP E. MATHER. Second Edition. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1903. La. 8vo. lix and 708 pp. (30*s.*)

THE profession will welcome a new edition of Mr. Mather's excellent book. The author has personal knowledge of the requirements of undersheriffs, and in all that directly pertains to their duties and to the privileges and duties of sheriffs he has given such minute and practical directions as are seldom to be found in a law-book. Matters of etiquette, such as the ordering of processions at Assizes, and even down to the seat which an undersheriff should occupy in the judges' carriage, and all sorts of details as to the summoning of juries, provision of judges' lodgings, and so forth, are fully dealt with.

Other portions of the work treat of the law of execution in all its various forms, of bills of sale, interpleader and assessment of damages and compensation. In these portions of the work practical directions are given, and full references are made to the leading authorities and text-books, so that the work whilst containing all that an undersheriff is likely to want forms also an admirable digest for lawyers generally.

The chapters on Civil Execution, particularly in relation to Bankruptcy and on some collateral topics, have been considerably expanded in this edition, and Mr. Mather is quite justified in adding the words '*and execution*' to the title of the work. It now comprises a useful treatise on the law of execution generally.

Upon the subject of assessment of compensation we look in vain for the effects of an award for a lump sum for two or more claims, one of which is bad (see *Long Eaton, &c. Co.* v. *Midland Railway Co.* [1902] 2 K. B. 574, 579)—a matter upon which an undersheriff may well require guidance.

Pleas of the Crown for the hundred of Swineshead and the township of Bristol . . . in the fifth year of the reign of King Henry the Third, A.D. 1221. By EDWARD JAMES WATSON. Bristol: W. Crofton Hemmons. 1902. La. 8vo. 174 pp.

THE record here edited is a small one, as the learned editor says. The work has been very well done, much on the same lines as the Pleas of the Crown for the County of Gloucester with which Mr. Maitland first made his reputation as a legal historian. Mr. Watson has prefixed an excellent introduction which should be interesting even to many readers who do not care to go through the text. We find the inefficiency of criminal law in the first quarter of the thirteenth century amply confirmed. There are several entries of gang robberies and murders, corresponding exactly to what is known as dacoity in India, followed by the lame conclusion 'nullus inde male creditur' or 'nescitur qui fuerunt.' Accidental death, mostly by drowning or the upsetting of a loaded cart, with the consequent deodand, figures as prominently as in the Gloucester rolls. There are many traces of the extortions, apparently quite open and shameless, of Gerard of Athée, one of the worst of King John's sheriffs and a villainous person in every sense.

We have very few critical remarks to make. At p. 146 the jurors of Bristol refuse to present certain new quays as purprestures. They say they are made according to ancient custom and there is no damage to the king, or to the navigation, or to the neighbours; 'and their franchise is such that they may well build on the water's edge provided they do no such damage as aforesaid.' Mr. Watson gives a translation which we cannot follow. At p. 148 the constables are presented for an abuse, seemingly introduced or allowed by Gerard of Athée, of taking 2*s.* for every last of herrings, 'et solebant habere 4 messas 2 [denar.] minus quam alii emptores.' This *messa* is surely the 'mease' of herrings still familiar all round the coast of Somerset and Devon. Mr. Watson gives 'messes,' which fails to make sense; but perhaps this is only a misprint. Finally we regret that Bracton is cited only by the paging of the uncritical and worthless Record Office edition.

A Treatise on the Law relating to Debentures and Debenture Stock, issued by Trading and Public Companies and by Local Authorities, with Forms and Precedents. By P. F. SIMONSON. Third Edition. London: Effingham Wilson; Sweet & Maxwell, Lim. 1902. 8vo. lxii and 522 pp.

DEBENTURES and debenture stock have grown with the growth of company law—some 400 millions is said to be invested on these forms of security—and they now present a formidable body of law, which is constantly receiving new additions from the ingenuity of the draftsman and the exigencies of business. A floating security—which is characteristic of company borrowing—lends itself from its very nature to complications with competing mortgagees and general creditors, and the fact that it is not recognized as legitimate in most foreign countries helps to furnish—now that companies trade so much abroad—nice problems for the jurist. The legislature, by the provisions as to registration of mortgages and debentures in the Companies Act, 1900, has further opened a new and almost endless vista of perplexing questions. In all these Mr. Simonson's book will be found to be a safe and excellent guide. One useful feature

of it is that he deals not only with the debentures and debenture stock of trading companies, but debentures and debenture stock issued under the Companies Clauses Act, 1845, the Railway Securities Acts, 1866 and 1867, and the Local Loans Acts. This is the sort of information which the inquirer finds it very troublesome to hunt up and collate for himself.

The Law relating to Auctioneers, House Agents and Valuers, and to Commission. By HEBER HART. Second Edition. London: Stevens & Sons, Lim. 1903. 8vo. xxxix and 532 pp. (15*s.*)

IN this edition Mr. Hart has considerably extended the scope of the original work. He has added a useful disquisition on the law of commission, a subject which, though it presents no great difficulties, has not been adequately treated of in any other work with which we are acquainted. Upon this topic Mr. Hart has written fully, clearly and accurately. Indeed the same qualities characterize the greater part of the book. Perhaps the least satisfactory part is the chapter on conditions of sale as used in auctions of goods. We find no mention of the submission of disputes to the arbitration of the auctioneer. This condition is a usual one, but in the form in which we have met with it it is not easy to construe. Mr. Hart would have done good service if he had discussed its value and given a better form than that commonly used. Upon the condition that the sale is not to be invalidated by faults or non-compliance with the description in the catalogue the author is not at his best. He fails to distinguish between warranty and condition, and the line of cases of which the leading examples are *Shepherd* v. *Kain* (5 B. & A. 240) and *Taylor* v. *Bullen* (5 Ex. 779) might with advantage have been more carefully considered.

A Practical Guide to the Licensing Act, 1902. By CHARLES L. ROTHERA. London: Jordan & Sons, Lim. 1903. 8vo. xx and 157 pp. (3*s.* 6*d.* net.)

THE author has attempted the difficult task of coping with the modern method of legislation by reference and at the same time of indicating the powers which are vested in the licensing authority as discretionary administrators of our licensing system. Thus the book, being written by a lawyer, may be used as a work of reference by lawyers who will find that the previous law has been carefully brought forward and the modifications introduced by the new law have been indicated, while the licensing justice may find suggestions that will help him to appreciate the general theory underlying our anomalous licensing system.

The various important decisions and leading cases have been judiciously selected and their effect and tendency noted, but the references to the cases cited require revision—many of those in the table of cases being particularly inaccurate. The judgments delivered by the judges in the Court of Appeal on the *Farnham* case are given verbatim in the appendix, together with various suggested forms of notices, magisterial regulations, and Home Office circulars, and the book is well indexed and cross-referenced. It should take a good place among the many works that have appeared on the new Act.

Revue Générale du Droit, etc. Janvier–Février, 1903. Paris: A. Fontemoing.

Prof. Edouard Lambert, of Lyons, concludes in this number a series of articles in which he attacks the authenticity and received antiquity of the Twelve Tables. He regards them as a custumal of the second century B. C. embodying material of very different dates and origins, and seems not to believe that there were any such persons as the Decemvirs. The notes to this article show that M. Lambert's opinion has already, as might be expected, been vigorously disputed by some of his learned brethren in France; and there appears to be every promise of a mighty pretty controversy, which we commend to the not too numerous class of English-speaking Romanists.

Séances et travaux de l'Académie des Sciences Morales et Politiques (Institut de France). Mars. Paris, 1903.

M. Dareste has communicated to the Academy of Moral and Political Sciences a most interesting account of the most ancient law-book known to us, the code of the Babylonian King Hammourabi, discovered among the cuneiform records of Susa, and of a date about 2000 B. C. This paper, which is also printed in the *Journal des Savants*, is founded on a forthcoming translation by Father Scheil of the École des Hautes Études. It is impossible to give an account of the contents in the space at our disposal. Suffice it to say that they prove the existence of an elaborate though archaic civilization, and offer many striking analogies not only to other ancient Asiatic laws but to the oldest known customs of the Germanic tribes. There does not appear to be any mention of Abraham.

We have also received:—

The Law of Employers' Liability and Workmen's Compensation. Third Edition. By Thomas Beven. London: Waterlow Bros. and Layton. 1902. 8vo. lxv and 570 + lviii (index) pp.—Mr. Beven's book is certainly, in our opinion, the most learned commentary on the Acts yet produced, and also the most compact and orderly presentment of the whole subject, including common-law rules as well as statutes. In the present edition the part dealing with the Workmen's Compensation Acts, about five-eighths of the whole, has been rewritten to keep pace with the increase of decisions. The learned author refuses, quite rightly, to apologize for being critical. People who are no lawyers and pass Acts in haste must expect lawyers to criticize them at leisure. In this case some of those who were responsible for the Acts as legislators have been foremost to censure them as judges. We regret that Mr. Beven has thought it necessary to cite newspaper reports, and occasionally County Court cases. A County Court decision is really of no authority at all even in its own court, and ought not to be professionally cited for any purpose. That some County Court judgments are better than some reported High Court cases we do not doubt; but so also are some merely private opinions. We have already too great a burden in the regular reports without adding County Court decisions to them.

A Treatise on the nature and scope of the Science of Law. By Syed Karamat Husein. Allahabad: City Press. 1902. 8vo. 252 pp.—More than two-thirds of this volume consists of appendix, setting out copious extracts from various authors, presumably for the use of Indian

readers not having access to a library. The text is an experiment in classification. Every student of law will admit that there is an art as well as a science of law. The 'artificial' framing of a deed or an Act of Parliament, to use the classical English term, is a work of art, though there must be science to guide the artist. It is not so easy to say exactly what are the respective provinces of the science and of the art. The Sayyid endeavours to make an exact division of the science into Deontology and Nomology. Deontology being pretty much what is commonly called the Theory of Legislation, and Nomology covering General, Historical and Comparative Jurisprudence. Positive Law, on the other hand, considered as a system of imperative and operative rules, belongs, in the author's view, not to science but to art. The argument is ingenious and neatly turned, and will interest those who have time for such exercises.

The Finance Act, 1894, *and the Acts amending the same so far as they relate to the Death Duties and more especially the new Estate Duty.* By J. E. HARMAN. Second Edition. London: Stevens & Sons, Lim. 1903. 8vo. xii, 189 and 14 pp. (6*s*.)—This handy little book can be recommended as a reliable guide to an Act which depends to a great extent on the definitions of its expressions. The Introduction refers to the old death duties and explains at length the effect of the new Act. The notes to the various sections of the Act are excellent, and the references to the cases cited fairly accurate. Forms in use as to Estate and Settlement Estate Duty, and the Rules affecting the Act, together with the Finance Acts, 1896, 1898 and 1900 are included in the Appendix. The difference of opinion among the judges as to the effect of section 9 of the Act with regard to property which does not 'pass to the Executor as such' is set out.

The Law of Copyright. By THOMAS EDWARD SCRUTTON, K.C. Fourth Edition. London: Wm. Clowes & Sons, Lim. 1903. 8vo. xxv and 331 pp. (15*s*.)—We agree with the caustic but thoroughly justified remarks in Mr. Scrutton's preface to this edition on the indolence and ineptitude of Parliament in dealing with the chaos of our copyright law; which, we fear, only reflect the incapacity of the British public at large for taking literature or art seriously. We do not agree with the criticism of *Walter* v. *Lane*, see L. Q. R. xvi. 6, xvii. 1.

The Licensing Acts, being the Licensing Acts 1828 to 1902 . . with introduction, notes, and forms, and reports of *Sharp* v. *Wakefield*, &c. By the late JAMES PATERSON. Fifteenth Edition by WILLIAM W. MACKENZIE. London: Shaw & Sons; Butterworth & Co. 1903. 8vo. c, 498 and 88 pp. (15*s*.)—The fourteenth edition of this work was exhausted within two months of publication. A book that sells so rapidly stands in no need of commendation.

The Question of English Divorce: an Essay. London: Grant Richards. 1903. 8vo. 175 pp. (2*s*.)—A plea for the assimilation of English divorce law to that of other Protestant countries, supported by statistics as well as argument on principle.

The Annual County Courts Practice, 1903. Edited by His Honour WILLIAM C. SMYLY, K.C., assisted by WILLIAM JAMES BROOKS. Two vols. Vol. I containing the Jurisdiction and Practice under the County Courts Act, the Bills of Exchange Act, the Employers' Liability Act, and the Workmen's Compensation Acts, with rules, forms, &c. Vol. II containing the Jurisdiction and Practice under Acts not dealt with in Vol. I. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1903. 8vo. Vol. I. xxxii, 1036 and 116 pp. Vol. II. xiii, 525 and 55 pp. (25*s*.)

A Treatise on the Specific Performance of Contracts. By the Right Hon. Sir EDWARD FRY. Fourth Edition. By W. DONALDSON RAWLINS, K.C. London: Stevens & Sons, Lim. 1903. La. 8vo. liii, 685 and 98 pp. (36*s.*)—Review will follow.

The History and Law of Fisheries. By STUART A. MOORE and HUBERT STUART MOORE. London: Stevens & Haynes. 1903. La. 8vo. xliii and 446 pp.—Review will follow.

A Handy Book of the Fishery Laws. By GEORGE C. OKE. Third Edition. By J. W. WILLIS BUND and A. C. MCBARNET. London: Butterworth & Co. 1903. 8vo. xxiv and 369 pp. (15*s.*)

The Constitution of the Commonwealth of Australia. By W. HARRISON MOORE. London: John Murray. 1902. 8vo. xix and 395 pp. (16*s.* net.)—Review will follow.

Education Law, incorporating the Education Acts, 1870–1902, *and other Acts relating to Public Education.* By T. A. ORGAN and A. A. THOMAS. London: Butterworth & Co.; Shaw & Sons. 1903. 8vo. x, 599 and 34 pp. (12*s.* 6*d.* net.)

Stone's Justices' Manual, being the Yearly Justices' Practice for 1903. Thirty-fifth Edition. Edited by J. R. ROBERTS. London: Shaw & Sons; Butterworth & Co. 1903. 8vo. cxxvi and 1187 pp. (25*s.*)

The Principles of Procedure, Pleading and Practice in Civil Actions in the High Court of Justice. By W. BLAKE ODGERS, K.C. Fifth Edition. London: Stevens & Sons, Lim. 1903. 8vo. lxiv and 504 pp. (12*s.* 6*d.*)

The Yearly Digest of reported Cases for the year 1902. Edited by EDWARD BEAL. London: Butterworth & Co. 1903. La. 8vo. lxxvi pp. and 564 columns. (15*s.*)

Statutes of Practical Utility passed in 1902. With notes, &c. By J. M. LELY. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. xxii and 196 pp.

The Municipal Corporation Acts, &c. By the late Sir C. RAWLINSON. Ninth Edition by JOHN F. P. RAWLINSON, K.C., and J. A. JOHNSTON. London: Sweet & Maxwell, Lim. 1903. La. 8vo. lxvi, 602 and 106 pp. (42*s.*)

The Law relating to Electric Lighting, Traction and Power. Third Edition. By JOHN SHIRESS WILL. London: Butterworth & Co. 1903. La. 8vo. xxx and 511 pp. (25*s.*)

The Education Act, 1902, with notes. By MONTAGUE BARLOW and H. MACAN. London: Butterworth & Co.; Shaw & Sons. 1903. 8vo. viii, 188 and 12 pp. (3*s.* 6*d.* net.)

The Trustee Acts, including a guide for trustees to investments. By A. L. ELLIS. Sixth Edition. By L. W. BYRNE. London: Stevens & Sons, Lim. 1903. 8vo. xii, 175 and 19 pp. (6*s.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.

THE

LAW QUARTERLY REVIEW.

No. LXXV. July, 1903.

NOTES.

WE have again to state that Oxford is not the place of publication of this REVIEW, and the Editor does not live there; and to request that correspondence and book parcels *may not be addressed to Oxford*. The Editor's address is 13 Old Square, Lincoln's Inn, London.

T was from the time of her birth to her death a British subject; she was born out of wedlock in Malta; at the date of her birth her father was an Englishman domiciled in England, her mother was a Maltese subject domiciled in Malta. They afterwards intermarried in Malta. *T* quitted Malta in 1832 and died in 1894 domiciled at Freiburg, in Baden. She executed a will which admittedly was valid. Under her will she gave certain legacies and appointed executors, but she made no residuary bequest. She left movables situate partly in England and partly in Freiburg more than sufficient to pay the legacies. She died therefore as to some of the movables intestate. As *T* had never been naturalized in Baden, the legal succession to that part of her movables which was not disposed of by will was, according to the law of Baden, governed by the law of the country of which she was a subject at the time of her death. Her executors by an originating summons asked for an inquiry, who were the persons entitled to the movable property of the testatrix undisposed of by will, and for directions as to distributing it, and for administration if necessary. It was held by Farwell J. that the undisposed of movables must be distributed according to the law of Malta, i. e. the law of *T*'s domicil of origin: *In re Johnson* [1903] 1 Ch. 821.

This decision is, if it stands, by far the most important which for years has been delivered by an English Court on any

question connected with the conflict of laws; it incidentally cuts through that much agitated question of the *renvoi*, on which, after long discussion, the opinion of eminent jurists still remains divided. It directly lays down a new rule with regard to the thorny point, how the principle adopted in many continental countries, that succession to the movables of a deceased person is to be governed by the law of the deceased's nationality, ought to be applied when the deceased dies domiciled in a country, e.g. Italy, where such principle prevails, but is the subject or member of a state, such as the British Empire, which consists of countries, e.g. England, Scotland, the Isle of Man, &c., governed by different systems of private law, and where the principle is maintained that succession to movables is to be determined by the law not of the deceased's nation, but of his domicil at the time of his death. Mr. Justice Farwell's solution of this difficult problem is that, at any rate in the case of a person dying intestate, succession to his movables is (in the circumstances supposed) to be determined by an English judge in accordance with the law of the deceased's domicil of origin.

It is impossible within the space of a note to deal with or even to state the many and difficult questions raised by *In re Johnson* or, to use a short popular name, by the Maltese case; they, it may be conjectured, will be the subject of more than one article in future numbers of the LAW QUARTERLY REVIEW.

All that a critic can do, writing so to speak on the spur of the moment, is to point out several reasons for doubting whether the principle of the Maltese case can, until affirmed by the House of Lords, be considered part of the law of England.

(1) The principle of the Maltese case is not supported by any decision of the House of Lords or of the Privy Council. There is always rashness in the assertion of a negative proposition, but one would probably not go far wrong if one asserted that the Maltese case was not supported by any reported decision of any English Court.

(2) The doctrine of *In re Johnson* is in the most distinct manner opposed to the doctrine universally laid down in English cases and in English text-books of authority that succession to a man's movable property is governed by the law of his domicil at the time of his death. No doubt the words 'law of his domicil' are from one point of view ambiguous (see Dicey, Conflict of Laws, pp. 75–78), but whatever they may mean, they do not mean the law of the deceased's domicil of origin as such.

(3) The rule that succession is to be determined by the 'law of

the deceased's domicil' at the time of his death has, as interpreted by English Courts, always, it is submitted, been understood to mean that succession is to be determined in accordance with that law, whatever it is, which the Courts of the country where he dies domiciled would, if the deceased's movables were in their hands, apply to it, whence it has been inferred by so eminent a lawyer as Lord Westbury that the whole duty of the English Courts and English executors is, after satisfying the debts, &c. in England, to hand over the movables of a deceased person to those who represent him under the law of his domicil (*Enohin* v. *Wylie*, 10 H. L. C. 1). The inference, it is true, has been disputed (*Ewing* v. *Orr Ewing*, 9 App. Cas. 34; 10 App. Cas. 453), but the premises from which it is drawn have never been questioned (see *Collier* v. *Rivaz*, 2 Curt. 855, 1 Williams, Executors, 9th ed. p. 304).

(4) *In re Johnson* is oddly enough in accordance neither with the views of the jurists who attack the doctrine of the *renvoi*, nor with the views of equally eminent jurists who support it. The judgment in the Maltese case involves at least two most dubious assumptions. It assumes that the question of a man's domicil is a question of law, whereas the whole tenor of the English doctrine is that domicil is a question not of law but of fact. It assumes, and without any adequate ground, that the Baden Courts in effect would have disclaimed jurisdiction, whereas what they really would have done was not to disclaim jurisdiction, but to assert for the choice of law a different rule from the rule adopted by the English Courts.

(5) Two considerations explain and almost justify what to many critics will appear to be the errors involved in the judgment of Farwell J. More than one authority which might have influenced the Court was not brought before it. A matter of more consequence is that the argument against the application of the law of the Maltese domicil took a most unfortunate turn. The unsustainable contention seems to have been much laboured that succession to the property of a British subject dying domiciled in the Grand Duchy of Baden must, of necessity, be determined in accordance with the local or territorial law of England, whereas, it is submitted, the right contention was that an English Court must apply to the movables left by a British subject dying domiciled in Baden the rules, whatever they are, which in the particular case would have been applied to the movables of such intestate by the Baden Courts. The principle, in short, to be adhered to was that the goods of the deceased in England ought to be distributed in the same way in which the Baden Courts would have distributed or rather did distribute the goods of the deceased situate in Baden.

The English Court might, in the first place, have directed that the movables in England should be handed over to the persons, whoever they were, entitled to represent the deceased under the law of Baden, in which case the distribution of these movables would have been carried out under the direction of the Baden Courts, and the English movables of the deceased would have been distributed in the same way as the movables which she left in Germany; this is the course which Lord Westbury held to be the only proper one, and though not now held imperative upon is still apparently open to the representatives in England of an intestate dying domiciled abroad. The English Court might, in the second place, have ascertained according to what law the movables of the deceased would be distributed by the Baden Courts if left in their hands, and have distributed them in accordance with that law, whatever it might happen to be. The ascertainment of this fact in the particular instance apparently presented no difficulty; all that was necessary was to ascertain what was the law in fact applied to the distribution of the deceased's movables which were situate in Germany. The result of either of the courses suggested would have been the same. The movables of the deceased would have been distributed in obedience to a well established doctrine of English law, according to the law of her domicil, viz. Baden, at the time of her death. The only possible way in which it can be maintained that Farwell J. gave effect to this rule is to contend that the deceased had not acquired a Baden domicil; but as the acquisition of a permanent home or domicil is, speaking broadly, a matter of fact, not of law, the contention that she did not die domiciled in Baden all but contradicts the admitted facts of the case.

It is greatly to be hoped, though perhaps hardly to be expected, that the Maltese case will be carried to the House of Lords. The questions which it raises are constantly in one form or another brought before specialists versed in the conflict of laws. It is to be regretted that English law contains no method by which, when a case raises points of great general importance, the House of Lords can, at the public expense of course, call the case before the House, and give a final decision on a matter of principle.

A. V. D.

We differ with great hesitation from our learned contributor, but we cannot follow his objections. It appears to us that the judgment of Farwell J. was perfectly right, though different minds may put different degrees of value on the several reasons given for it. Farwell J. admits that in the first instance we

have to see what the German Court will do (we say German, because the law of Baden is now merged in the general law of the German Civil Code, which had not been passed at the date to be considered in this case). Now the German Courts know nothing of our rules of domicil, and go by the law of the nationality. Thereupon Farwell J. says that, as we are bound to regard domicil, we get no assistance from the German Court, and may treat it as disclaiming jurisdiction or refusing to allow a German domicil to be acquired. Thus the Maltese domicil was, for the purposes of our jurisdiction, never effectually lost. Such is the learned judge's first way. We confess that we think it rather involved. But he puts it another way too. Take it that our business is to do what the German Court would have done. That Court would administer the goods according to the national law of the deceased, whose nationality was British. But there is no such thing as a national private law of the British Empire, or for that matter of Great Britain, which alone is recognized in international relations. (The fact that the law of nations knows nothing of England or Scotland seems to have been strangely overlooked in the argument.) The German Court (taking judicial notice or being otherwise informed of this) would therefore have to inquire what private law would be applied by a British (not necessarily English) Court. The answer to that inquiry would be, the law of the domicil. Now this cannot be, for the present purpose, German law, for that would involve us in a vicious circle. Therefore, on the principles adopted by English Courts, and we believe by all Courts in the British Empire, we have to fall back on the domicil of origin, viz. Malta. So the result of both lines of reasoning is the same. Does our learned correspondent think them both wrong? And what would his practical solution have been? He takes us to the German Court and leaves us there. What ought that Court to have done? We can agree, however, in holding that the Continental rule of nationality, leaving as it does in so many cases a further question which of several local laws is to be applied, has added great difficulty to the subject without any visible countervailing advantage.

The decision of the House in *Starkey* v. *Bank of England* [1903] A. C. 114, 72 L. J. Ch. 402, affirming *Oliver* v. *Bank of England* [1902] 1 Ch. 610, 71 L. J. Ch. 388, puts an end to the attempts that have been made to shake the authority of *Collen* v. *Wright*, 8 E. & B. 647, 27 L. J. Q. B. 215, or to confine it to cases 'where the transaction entered into with the supposed agent was in the nature of a contract.' The rule of a professed agent's implied

warranty of his authority 'extends to every transaction of business into which a third party is induced to enter by a representation that the person with whom he is doing business has the authority of some other person': per Lord Davey [1903] A.C. 119. It is also 'immaterial . . . whether the supposed agent knew of his defect of his authority or not.' Indeed one object of the rule is to exclude the need for proving anything about his state of mind. The rule in *Collen* v. *Wright* has been disputed as repugnant to the spirit of the Common Law. Such artificial limitations of it as were proposed in argument would make it far more so. But we do not admit any repugnancy.

It is seldom that judicial differences are so accentuated as in *Bradley* v. *Carritt* (72 L. J. K. B. 471), the recent House of Lords case on 'clogging.' This dry doctrine of Equity has, like Aaron's rod, been blossoming of late with remarkable vigour: the worst is that the more the cases multiply the more distracting is the state of disquietude they induce in the mind of the lawyer finding himself between

'The fell incensed points of mighty opposites.'

Yet the question in *Bradley* v. *Carritt*, stripped of its accessories, resolves itself into a very simple one. *A*, a shareholder, mortgages his shares to *B* and agrees to use his best endeavours as shareholder to secure that *B* shall have the sale of the Company's teas as broker. Is this term as to brokerage a 'clog' on *A*'s equity of redemption and as such void? Why? It does not prevent in any way redemption on payment of debt, interest and costs. It survives—or may survive—redemption, but if it does it is as a contractual obligation only, personal to the mortgagor, not affecting his right to have the security reconveyed. *Santley* v. *Wilde* ([1899] 2 Ch. 474, 68 L. J. Ch. 681, C. A.) is distinguishable in a very material particular. There the property mortgaged was a theatre, held for a short term of years, and it was made security, first for money borrowed and interest, and secondly for the performance of an agreement entitling the mortgagee to a share of profits earned by the mortgagee during the lease, even though the loan might have been repaid. The result was to burden the property with more than the loan made upon it, and to that extent redemption was 'clogged.' However, under the dogma of the House of Lords' infallibility delivered by Lord Campbell and reverentially received by Lord Halsbury, *Bradley* v. *Carritt* must stand as unimpeachable law.

By the courtesy of correspondents we have the full text (much too long for republication or even useful extracts) of the protests made on April 25 by the Chief Justice of New Zealand and two members of the Court of Appeal against the language used by the Judicial Committee in reversing a judgment of that Court (*Wallis* v. *Sol.-Gen. for New Zealand* [1903] A. C. 173, 72 L. J. P. C. 37) and also against the ignorance of New Zealand statutes, conveyancing, and practice alleged to be shown not only in this but in other specified judgments of their Lordships. It is admitted that such a protest is altogether extraordinary, and to be justified only by extraordinary reasons. We have neither space nor inclination to discuss the controversial questions of manner and taste which are involved; but we cannot believe that their Lordships intended to treat the Courts of New Zealand with contumely, or supposed that their judicial censure of proceedings which they thought erroneous would produce that impression. As to the charge of ignorance, we submit that their Lordships cannot in fact be expected to have judicial knowledge of all the statutes of every colony in the Empire, any more than of the original text of the Koran or the Mitakshara; that it is the business of counsel, or rather of those who instruct them, to see that all the local materials for forming a proper judgment are sufficiently and accurately laid before the Judicial Committee; and that if this is not done, it is not their Lordships who can be held answerable for any consequent inconvenience. A Board of English learned persons hearing appeals from an English-speaking self-governing colony must inevitably assume, so far as not informed to the contrary, that the law and practice of that colony generally resemble those of England. The remedy, as one New Zealand journal has pointed out, is that the colonial Bar should be adequately represented at the argument of such cases; but this is not within the control of the Judicial Committee. We are glad to see, as we go to press, an authoritative declaration that their Lordships had no intention of being personally offensive to the New Zealand Court.

Wise v. *Perpetual Trustee Co.* [1903] A. C. 139, 72 L. J. P. C. 31 is a warning to trustees of clubs and a security to their members. Trustees must be careful, when they incur liabilities on behalf of the club, to see that the club funds available for the purpose of indemnifying them are sufficient; for they have nothing else to look to. The most effectual method, of course, is to limit the remedy of the external creditor himself to the club funds, which is quite possible in law and sometimes practicable in fact. 'Clubs are associations of a peculiar nature. . . . They are not partnerships; they are not

associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognised.' In the particular case an attempt was made to show that certain members had 'ratified' the action of the trustees so as to undertake personal liability; but this failed, and was indeed abandoned in argument. It would seem that such an undertaking as was suggested cannot in any case be a ratification, since the trustees never purported to be agents for the individual members.

Cunningham v. *Tomey Homma* [1903] A. C. 151 is a short case, but of no small constitutional importance. It decides that naturalization in a British colony does not carry voting power as a necessary incident. Consequently a Province of the Dominion of Canada, though it cannot legislate on naturalization, a subject reserved to the Dominion Parliament, can refuse the franchise to any class of persons not being natural-born British subjects, without any exception in favour of such of them as may be naturalized under the law of the Dominion in that behalf.

It was a curious situation which arose in *In re Coley, Hollinshead* v. *Coley* [1903] 2 Ch. 102, 72 L. J. Ch. 502, C. A. The testatrix gave her residuary estate upon trust for her son for life, and after his death for his 'wife' for life. At the date of the will the son had a wife with whom the testatrix was on terms of intimacy and affection. At the testatrix' death this wife was dead and the son had married another wife, who claimed to answer the designation. Prima facie in such a case the gift is to be treated as a gift to the wife living at the date of the will. It is for the second wife to displace this presumption, and this her counsel ingeniously essayed by trying to make out that the will, looked at as a whole, showed a scheme to benefit generally those dependent on the testatrix' son, whether a first or a second wife or a first or a second family; but the argument failed to convince the Court. One is struck in these cases with the wealth of case law on wills. However peculiar the situation or set of circumstances, there is always a parallel to be found for it in testamentary annals. In *In re Coley* there were four at least—*In re Lyne's Trust*, L. R. 8 Eq. 65; *Firth* v. *Fielden*, 22 W. R. 622, and *Boreham* v. *Bignall*, 8 Ha. 131, and *In re Drew* [1899] 1 Ch. 336.

Learned persons who are interested in the working of the Land Transfer Act should carefully consider *Capital and Counties Bank* v. *Rhodes* [1903] 1 Ch. 631, 72 L. J. Ch. 336, C. A., whereby it appears that there is nothing in law to prevent registered land, and the legal estate therein, from being dealt with wholly outside the register by any of the accustomed forms of conveyancing, and nothing in fact to prevent a whole chain of unregistered deeds and titles from being formed, except the risk of an overriding disposition by the registered owner—overriding merely by virtue of an anomalous statutory power. 'The register of proprietors is not material for the purpose of ascertaining where the legal estate is' (Cozens-Hardy L. J.). We do not presume to say whether this was intended by the framers of the Act. Whatever they intended, they have in fact—like many other well-meaning reformers—made matters rather more complicated than they were before.

A document purporting to be a joint and several promissory note is not the less a valid promissory note within the meaning of the Bills of Exchange Act, 1882, s. 83, sub-s. (1) by reason that it contains the following clause: 'No time given to, or security taken from, or composition or arrangement entered into with, either party hereto shall prejudice the rights of the holder to proceed against any other party'; *Kirkwood* v. *Carroll* [1903] 1 K. B. 531, 72 L. J. K. B. 208, C. A. overruling *Kirkwood* v. *Smith* [1896] 1 Q. B. 582, and approving of *Yates* v. *Evans* (1892) 61 L. J. (Q. B.) 446. Thus is finally determined, as far as the Court of Appeal can settle the matter, a point of some little difficulty. The principle of the decision seems to be given in the words of Lord Halsbury L. C.: 'The addition to this promissory note does not qualify it, and I doubt whether the addition is in any proper sense operative.'

The law will imply a contract on the part of a corporation to pay for work done or other services rendered 'in respect of matters for the doing of which it was created,' no less than in the case of like work or services done for a natural person. In other words a corporation cannot order and accept a man's work, and refuse to pay for it—the work being properly incident to corporate purposes—merely because there was not a contract under seal. So the Court of Appeal has held in *Lawford* v. *Billericay Rural Council* [1903] 1 K. B. 772, 72 L. J. K. B. 554, disposing of a long standing conflict between co-ordinate authorities of various dates. It would seem that it now makes no difference, or no substantial one, whether the corporation is engaged in trade or not. Observe that

the contract is, in this case, described as 'implied' for a particular reason. The orders in question were given by a statutory committee which admittedly had no authority to bind the corporation by an express contract.

Re Tollemache [1903] 1 Ch. 955, 72 L. J. Ch. 539, tells us with the authority of the Court of Appeal what, we venture to think, most members of the Equity Bar knew before, that the Court will not sanction a breach of trust merely because it appears that it would be for the benefit of the parties interested. To justify extraordinary interference there must be a real emergency, something like a necessity for averting ruin from the trust estate. It is difficult to understand how the application was thought capable of succeeding before either Kekewich J. or the Court of Appeal. We fear the result of the case being reported may be that judges sitting at Chambers will feel embarrassed in the exercise of their beneficial summary jurisdiction; for a rule of practice always looks stronger when it is formally laid down. A few rash trustees may be restrained, but it is more likely that many prudent ones will be made over-cautious, and will not be blessed by their *cestuis que trust*.

Leave cannot be given for service of a writ out of England under Order XI, r. 1 (e) in an action to enforce an order charging a judgment debtor's interest in shares with the amount due on the judgment under the Judgments Act, 1838, 1 & 2 Vict. c. 110. This is decided by *Kolchmann* v. *Meurice* [1903] 1 K. B. 534, 72 L. J. K. B. 289, C. A. The case is remarkable, not as determining a matter of any great doubt, but as an instance of the extreme difficulty felt by plaintiffs or their advisers, in realizing two facts. The one is that the High Court does not as a general principle exercise jurisdiction outside England. The other is that Order XI, r. 1 taken together with Order XLVIII. *A.* r. 1 strictly defines the exceptional cases in which the Court will exercise extraterritorial jurisdiction, and is in effect exhaustive.

Whatever the lay people may suppose, litigation is not always due to the faults of the law. Thus the law cannot be held answerable for the heroic determination of the plaintiff who was so strong in his opinion that a skylight is not a kind of window as to carry it to the Court of Appeal, and be, for his pains, rebuked by Stirling L. J. out of a school dictionary: *Easton* v. *Isted* [1903] 1 Ch. 405, 72 L. J. Ch. 189.

The English company, Kodak Ltd., which carries on business in the United Kingdom, has purchased and owns 98 per cent. of the shares of an American company, which may for shortness be called the Eastman Co., and thereby has acquired a preponderating influence in the control, election of directors etc., of the American Eastman Co.; the remaining 2 per cent. of the shares are held by independent shareholders, and the Kodak Ltd. has not attempted to control or interfere with the management of the foreign company and has no power to do so, otherwise than by voting as shareholder. The question has come before the King's Bench Division and the Court of Appeal (*Kodak Ltd.* v. *Clark* [1902] 2 K. B. 450, [1903] 1 K. B. 505, 72 L. J. K. B. 369) whether the Kodak Co. is assessable on the whole of the profits accruing to it from the American Eastman Co. or only on such part of those profits as was received in the United Kingdom? Phillimore J. and the Court of Appeal have both held that the business of the foreign company is not carried on by the Kodak Ltd., and that the Kodak Ltd. is not assessable upon the full amount of such profits. It seems further to have been decided, though the point is a minor one, that as the dividends due from the Kodak Ltd. were partly retained in America, and were as to the rest paid in America to American shareholders of the Kodak Ltd., no part thereof is actually received in the United Kingdom, whence the practical result is that the Kodak Ltd. is not assessable to income tax at all in respect of the dividends accruing to it from the Eastman Co.

This case, which is an excessively important one, gives rise to three observations.

First.—The Kodak Ltd. is to be congratulated upon the ingenuity with which it has contrived, while being an English company, resident in England, to derive profits from an American business without becoming assessable in respect thereof to English income tax.

Secondly.—It is a curious question, which we presume will come before the House of Lords, whether the Kodak Ltd. will retain the advantage of its ingenuity. Can it be maintained, as a matter of common sense, that the position of the Kodak Ltd. differs in substance from that of the Peter Schoenhofen Brewing Co. which in *Apthorpe* v. *Peter Schoenhofen Brewing Co.* (1899) 4 Tax Cas. 41, was held by the Court of Appeal to be assessable on the whole of the profits of an American business?

Thirdly.—Have not half the intricate questions as to the country where a business is carried on which since 1889 have perplexed the Courts, the Commissioners of Inland Revenue, and the taxpayers, in reality arisen from *Colquhoun* v. *Brooks* (1889) 14 App. Cas. 493?

In that case the House of Lords admittedly came to a decision which may well have been right, but which assuredly was inconsistent with the most obvious interpretation of the language of Schedule (D). For their Lordships saw fit to hold that though under Schedule (D) a person residing in the United Kingdom is assessable on profits or gains accruing to him from 'any profession, trade, employment or vocation, whether the same be carried on in the United Kingdom, *or elsewhere*,' yet that a person residing in England was not liable to be assessed on profits accruing to him from a trade carried on elsewhere, viz. in Australia, in so far as the same were not received in the United Kingdom.

Under the Income Tax Act, 1853, s. 54, a person who has made an insurance on his life is entitled to deduct the amount of the annual premium paid by him for such insurance from his income assessable to income tax. *T* effects an insurance on his life for an annual premium of £60. Under the insurance he pays annually in cash £30 only, but the insurance company agrees to make him annually a loan of £30, which is a debt from him to the company, on which interest is due from him to the company, and which, together with the interest, becomes a first charge on his policy. Is *T* entitled to deduct the whole £60 or only the £30 which is paid in cash? The K. B. D. hold that he is entitled to deduct the whole £60; the Court of Appeal, reversing the judgment of Phillimore J., hold that he is entitled to deduct only the £30: *Hunter* v. *Rex* [1903] 1 K. B. 514, 72 L. J. K. B. 230. There is something to be said for either view; it is, we submit, clear that if *T* had borrowed £30 annually from a bank on the same terms on which he borrowed it from the insurance company, and then paid it over to the company, he could have deducted the whole £60, but, on the other hand it is one thing to make a payment, another thing to incur a debt. The K. B. D. may keep nearest to the spirit, but the Court of Appeal seem to keep closest to the letter of the Income-tax law.

A person chargeable with income tax on the profits of an office under Schedule (E) is entitled, under the Income Tax Act, 1842, s. 146, 1st Rule, to deduct from the profits assessable 'the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same [i. e. such duties or other sums] have been really and bona fide paid and borne by the party to be charged.'

X is the Deputy Town Clerk of Manchester and receives from the Corporation of Manchester a salary of £800, the whole of

which is admittedly prima facie assessable to income tax under Schedule (E), but by a scheme framed under a local Act the Corporation is empowered to create a fund to which *X*, in common with other officers, must make yearly contributions on the terms that upon his retirement from his office the whole amount of his contributions is to be repaid with interest to himself, and should he die whilst in the service of the Corporation, such amount with interest is to be paid to his representatives. Under the local Act the contribution due from each officer is deducted by the Corporation from his salary. *X* claims the right to deduct the amount of his annual contribution to the fund from the £800 salary assessable to income tax.

Is *X* entitled to the deduction? The decision of the Court of Appeal, which does not follow *Beaumont* v. *Bowers* [1900] 2 Q. B. 204, is that he is not entitled, *Hudson* v. *Gribble*, *Bell* v. *Gribble* [1903] 1 K. B. 517, 72 L. J. K. B. 242, C. A. Nor does it make any difference whether *X* came into the service of the Corporation after the scheme was established, or, having come into the service of the Corporation before the scheme was established, voluntarily submitted to it.

The grounds of the decision are twofold.

(1) The amount contributed was not in strictness payable or chargeable by virtue of an Act of Parliament.

(2) The amount contributed was not really and bona fide paid and borne by the party to be charged, i. e. *X*.

The Crown was under a contract made in 1849 between the East India Co. and the Great Indian Peninsula Co. entitled at the expiration of fifty years to purchase the railway of the company for a lump sum of money to be determined in the manner provided by the contract. The Crown also acquired an option under the contract either of paying such lump sum down at the time of the purchase, or of paying to the company 'an annuity' for ninety-nine years, the rate of interest to be used in calculating the annuity to be determined as specified in the contract. It was admitted that as a matter of fact the 'annuity' represented in part an instalment of the price payable to the company and, as to the residue, interest on the amount of the price for the time being unpaid. The annuity was payable to certain trustees on behalf of the shareholders.

Is that part of the annuity which represents not yearly interest but the annual payment of instalments of purchase money assessable to income tax? This is the question in substance raised in

Scoble v. *Secretary of State in Council for India* [1903] 1 K. B. 494, 72 L. J. K. B. 215, C. A. It was answered in the affirmative by the K. B. D., and in the negative by the C. A.

Most critics will, it is submitted, hold that the judgment of the Court of Appeal is right. Liability to taxation ought not to be increased or diminished by the mere language in which a payment is described. Whether the £900 on which the trustees claim to escape assessment was really interest or was the payment of instalments of purchase money ought to be treated as a matter of fact. If a debtor who has borrowed money on mortgage pays to the mortgagee £20, of which £5 is payment of interest, and £15 is payment in reduction of the mortgage debt, it would seem perfectly plain that the £15 is not income or profits as regards the mortgagee and is not assessable to income tax, and if this be so it can make no real difference that the £20 is paid by the Crown to a company, or that the whole payment is called an annuity. The judgment of the Court of Appeal seems to be strictly in accordance with *Foley* v. *Fletcher* (1858) 3 H. & N. 769. It lays down, or rather reaffirms, a clear and intelligible principle.

The case of *Harington* v. *Sendall* [1903] 1 Ch. 921, 72 L. J. Ch. 396, leaves an interesting question open for discussion. Assume that a club, such as the Oxford and Cambridge University Club, were to change its rules so as to obtain a general power to amend or alter the same; could the club, by a resolution passed at a general meeting, raise the annual subscription, say of ten guineas, against any member who had paid the entrance fee, e. g. forty guineas, at a time when the subscription amounted to ten guineas? Of course a general power to change the rules would include the power to raise the rate of the annual subscription as regards future members, but no rule can give a club or any other body a right to break a contract, and we are driven back on the inquiry, what is the contract made with a person who, being elected a member of the Oxford and Cambridge University Club, pays his entrance fee of forty guineas, and is always ready and willing to pay the annual subscription of ten guineas? It may at least be argued with some plausibility that such a man on entering the club pays the forty guineas in consideration of his being allowed the advantages of belonging to the club as long as he pays the annual subscription of ten guineas, and does not render himself liable to expulsion under the rules. No one, it is submitted, could deny that if a member were allowed to compound for future annual subscriptions by paying down the sum of one hundred guineas, no resolution of

the club could, by raising the subscription to fifteen guineas, compel him to pay an annual subscription of five guineas.

We believe that the correctness of the decision in the principal case is itself doubted, or more than doubted, by several learned persons in Lincoln's Inn. But if it were held that the majority of a society have an implied power to alter the rules in the absence of an express one, there must be some limits to that power. They could not, for example, totally change the purposes of the society. The task of fixing the limits would seem to exceed the functions of a court of justice; it would in fact be supplying omitted legislation by conjecture.

On a marriage in Scotland between *H*, an Englishman domiciled in England, and *W*, a Scotswoman domiciled in Scotland, *W*'s property is conveyed to trustees who are also trustees under an English settlement of the husband's property and who are all subject to the jurisdiction of the English Court. The Scotch settlement creates in the case of *W* dying before *H*, an event which has in fact occurred, an inalienable trust in favour of *H* for his maintenance. Such a trust is valid according to Scottish law, but is opposed to the policy of the law of England. Under these circumstances an English Court will not enforce such an inalienable trust: *In re Fitzgerald* [1903] 1 Ch. 933, 72 L. J. Ch. 430. The point decided is more or less a new one and must be determined on principle rather than authority. The principle followed by the Chancery Division, as enunciated by Joyce J., is that an English Court will not, at any rate as regards transactions in England, enforce a trust for the benefit of a domiciled Englishman which is opposed to the policy of English law. The Court did not express any opinion on the question whether the Scottish marriage contract or settlement ought to be construed according to Scottish or according to English law.

W, an Englishwoman, marries a Frenchman domiciled in France, and thereby acquires a French domicil and French nationality, both of which she retains till her death. Under an English settlement she has a general power of appointment as to certain personalty which is exercisable by will. She executes a will by which she appoints *H* her general and universal legatee, and bequeaths to him all the movables and immovables which shall belong to her at her decease and which compose her estate. The will, being a holograph will, is in a form valid according to French law, but does not fulfil the requirements of the English Wills Act.

On the death of *W* the question arises whether the will is an execution of the power? That it is a valid will and duly admitted to probate is not disputed; the only matter for decision is, in substance, whether it does or does not come within the Wills Act, 1837, s. 27? This inquiry is answered by Buckley J. in the negative: *In re D'Este's Settlement Trusts* [1903] 1 Ch. 898, 72 L. J. Ch. 305. This reply may be logically right. It is certainly difficult to maintain that the Wills Act, 1837, s. 27, which appears to lay down a rule of construction, is applicable to a foreign will containing no express reference to the execution of the power. From a practical point of view the answer is unsatisfactory. The distinction between *In re Price* [1900] 1 Ch. 442, 69 L. J. Ch. 225 and *In re D'Este's Settlement Trusts* is real, but it is a distinction which any ordinary testator would probably fail to perceive, and it is almost certain that the judgment of Buckley J., however sound logically, does not give effect to the intention of the testatrix, who, being unacquainted with the niceties of the English law as to powers of appointment, no doubt meant to bequeath to her husband the very property as to which she has in the eye of the law not executed her power of appointment.

Mr. Hayes Fisher was an unfortunate fly entangled in the cobwebs of Equity. He was a member of a syndicate formed to experiment with a valuable patent. He subscribed £1000 in cash to it, and if he had stopped there all would have been well, but he and the other directors of the syndicate accepted by way of bonus 2000 fully paid shares apiece from the patentee-vendor. Of course if it had been the case of a company inviting the public to subscribe its shares, the acceptance of such a present would have been highly improper, but in the *Telescriptor* case ([1903] 2 Ch. 174, 72 L. J. Ch. 480) the syndicate was a private one: none of the shares were to be sold, and as the members of the syndicate knew all the transaction there was no fraud on anybody. The situation entirely changed however when one of the members in breach of good faith sold some of his shares in the market: the public was then introduced on the scene and Mr. Hayes Fisher and his colleagues found themselves placed in a false position—technically liable at the instance of the liquidator to account to the Company for the secret profit in the shape of bonus shares. Mr. Justice Buckley was perfectly justified therefore in refusing to stay the winding-up proceedings, with the investigation incidental thereto into the affairs of the Company, but looking at the circumstances—the entire absence of fraud and that Mr. Hayes Fisher was 'more sinned against than sinning'—it is to be regretted that the learned Judge should have used language conveying an

undeserved stigma on Mr. Hayes Fisher. The technicalities of Equity are not, after all, the measure of business morality.

Scott v. *Coulson* [1903] 1 Ch. 453, 72 L. J. Ch. 223, is really a very plain case. *A* agrees with *B* to sell to *B* a policy of assurance on the life of *X*, whom *A* and *B* believe to be living. *X* is in fact dead at the date of the agreement. A policy on an existing life is essentially a different thing from a policy which has, in the current phrase, become a claim; and the result is that either there is no contract, on the ground of common mistake, or, which may be the more elegant way of stating it in our law, there is a contract subject to a condition, and the failure of the condition prevents any obligation from arising. If an agreement made in such circumstances has any effect at all, it can only be by estoppel, and there was no suggestion of estoppel in the present case. It is not a question of a contract voidable for misrepresentation, which is valid until rescinded; there is no subsisting contract at all. That being so, the subsequent execution of an assignment can make no difference unless the parties have entered into a new contract with knowledge of the real facts; and in order to arrive at this conclusion it is not even necessary to consider that a policy of assurance is a chose in action, and there is no question of a legal estate passing. The argument for the defendant was made to look plausible only by confounding the rules applicable to contracts voidable for fraud and the like with the quite distinct rules applicable to transactions that are wholly void. It was treated by the Court, we venture to submit, with more respect than it deserved. The decision has been affirmed by the Court of Appeal, W. N. 88.

On April 27 Lord Justice Vaughan Williams took the judgment-seat at a meeting of the Gray's Inn Moot Society. This was, we believe, the first occasion of a member of the Court of Appeal presiding. The question argued was an interesting little point on the measure of damages for wrongful dismissal, apparently not concluded by any precise authority. The Lord Justice commended the arguments for their realism, and said they came 'very near the real thing.' Three of the counsel in the imaginary case were actual barristers. Perhaps it would be better, for purposes of education, if the leader on each side were a barrister and the junior a student. Now that judicial approval is so frankly given to the revival of the ancient practice of Moots, and the law schools of our own colonies as well as of the United States have taken it up for years past with excellent results, will the Council of Legal Education persist in treating lectures and examinations as a sufficient road to knowledge

of the law? or rather examinations alone, for attendance at the lectures is optional, and many men, aided by the ingenuity of coaches or otherwise, pass the Bar Examination without having heard a single lecture. Mr. Justice Walton, who presided at a Gray's Inn Moot a few months earlier than Lord Justice Vaughan Williams, lamented the decay of the ancient system.

The splendid volume of facsimiles of medieval charters in the British Museum lately issued by the Trustees is hardly a subject for an ordinary book review: we choose this place, therefore, to commend it alike to experts and to novices *in re diplomatica*. No one can be an accomplished English lawyer without knowing something of medieval formulas and conveyancing, and any one who makes acquaintance with these will very soon want to know, at least, what an original charter looks like. These reproductions, extending in the present volume from the Conquest to the reign of Richard I, will enable him to satisfy his curiosity in the most convenient manner and with the best possible critical help. Mr. G. F. Warner and Mr. H. J. Ellis are to be heartily congratulated on their editorial work. Real property lawyers will note with special interest the early example of a fine made in Henry II's court at Oxford (no. 55). It is rather sad to see the gradual degeneration of handwriting already becoming apparent before the close of the twelfth century.

We are very glad to see that an independent English translation of the dooms of King Hammurabi (*c.* B.C. 2250) has been produced by Mr. C. H. W. Johns of Cambridge (The oldest Code of Laws in the World, etc. Edinburgh, T. and T. Clark, 1903). The translator has wisely abstained from commentary at this stage, and given what will be more useful, a very full index. Some amendments in this may be suggested from a lawyer's point of view. Thus §§ 9–13, which offer a most interesting analogy to early Germanic law, should be indexed under 'Sale,' 'Voucher,' and 'Warranty,' as well as 'Witnesses.' The Germanic refinement of vouching over to the second and third hand, so as to make out a chain of title if necessary, does not seem to have been known in Babylon. We cannot find any obvious clue to the order of the code. Magic (with cold water ordeal for the accuser, not the accused—rather practical this), intimidation or corruption of witnesses, falsification of judgment, warranty, theft, enticing of slaves, dacoity, neglect and abuse of public offices and official property, agricultural contracts, mercantile agency (danger of King's enemies on journeys is specially provided

for), distress and pledge (these sections assume knowledge of customs not disclosed by the text), deposit, marriage, divorce and incidental effects on property, adoption, retaliation (with fixed fines or compositions in some cases; one wonders whether a custom of private composition was growing up behind the severe old law), negligence of medical men, builders (jerry-building was a dangerous trade under King Hammurabi: 'from his own goods he shall rebuild the house that fell'), navigation (vessel under way running down vessel at anchor is liable for whole damage), hiring of and injuries to and by cattle, an assize of wages and hiring: there is not much system here. No light is thrown on procedure. However it is certain that 'there dwelt a man in Babylon' to some purpose. Sir Toby Belch sang more wisely than he knew.

In the review of Mr. Ashburner's 'Principles of Equity' in our last number, it was suggested that the final decision in *Reeve* v. *Lisle* [1902] A. C. 461, 71 L. J. Ch. 768 should have been cited. We supposed, as nearly as we could guess from the dates of the report in the House of Lords and of the book, that there was time to insert a reference before the printing of the book was complete; but we are informed that there was not, and accordingly we regret not having done justice to the learned author on this point.

We take this occasion to add that we should perhaps have called more distinct attention to the merits of Mr. Ashburner's treatise, especially in arrangement and in the use of historical material still neglected in the common text-books of the subject, some of which continue to repeat fables without excuse. Mr. Ashburner will probably become the preferred guide of a large number among the more intelligent kind of students, and for that very reason, judging his work by a high standard, we thought it proper to point out in some detail a certain number of errors and oversights which appeared to us likely to be dangerous to his readers if they remained uncorrected. A reviewer's most pleasant office is to commend thoroughly good work; sometimes he may have to expose absolute incompetence, and need not feel any compunction about it; sometimes, as here, he feels bound to regret that work in which there is much good is not better.

In the document copied by Mr. Whitwell at p. 8 of this volume, the word 'lens' in line 20 is correct, and means 'therein'; the sense is 'the merchants within London,' as opposed to merchants 'dedens vile et dehors.'

ERRATA.

P. 182 above (April number), last line, *for* 'malicious conspiracy to injure' *read* 'conspiracy to injure.'

P. 185, line 9, *for* 'save that s. 3 of the Act of 1875 affords no protection to masters' *read* 'and it is to be observed that s. 3 of the Act of 1875 affords a protection to capitalists (considered as employers of labour and not as traders) precisely equal to that which it confers upon workmen.'

P. 208, lines 4 and 6, for '*res gestae*' read '*res gesta.*'

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE ORGANIZATION OF JUSTICE IN FRANCE[1].

I.

FOR judicial purposes, France is divided into twenty-five districts, for each of which there is a Court of Appeal. They are called *ressorts de Cour d'Appel*. Each of these districts includes several *départements*. There is in addition a Court of Appeal for Corsica and one for Algiers.

Below the Court of Appeal in the judicial hierarchy comes the Court of First Instance. Every *arrondissement* has its *tribunal de première instance*, which sits at the chief town of the *arrondissement*. To the general rule there is one exception: the *département* of the Seine, although it has three *arrondissements*, has only one Court of First Instance which sits at Paris.

There are in France three hundred and fifty-nine Courts of First Instance.

Below them come the Courts of Justice of the Peace. Every *arrondissement* is divided into cantons, and each canton has its Justice of Peace Court.

The large towns, however, are specially divided into districts or wards, each of which has a Justice of Peace Court. Paris, for example, has twenty of these courts.

Besides these three classes of courts, which form a complete network over the whole of France, there are two other courts which stand in a somewhat different position, and are composed of laymen and not of lawyers. These are the Commercial Courts and the Boards of Umpires. In important centres of commerce the government has power to create *tribunaux de commerce*, or, as they are often called, *tribunaux consulaires*.

And in manufacturing towns the government may also create Boards of Umpires—*conseils de prud'hommes*—to deal with trade disputes between masters and workmen belonging to certain specified trades.

In Paris there are four such boards; one for weaving-trades, one for chemical trades, and two for different divisions of the building-trades.

Mons. Garsonnet, in his Traité de Procédure Civile, draws attention to two points in which this organization is peculiar.

[1] The references D. P. are to the reports published under the name Dalloz, Recueil Périodique.

1. There are no circuits.

The courts cannot sit except at the permanent seat, and in the court-house. The justice of peace may hold a sitting in his house at the chief town of his canton, but if he does so, the doors must be open to the public [1].

2. Nearly all the courts are composed of several judges [2].

The only real exception is the Justice of Peace Court, which is conducted by a single judge.

No judgment of a Court of First Instance can be rendered by a court composed of less than three judges, and no *arrêt*, as a judgment of a Court of Appeal is called, can be pronounced by less than five judges.

The Commercial Courts must also have at least three members, and the Board of Umpires must have at least five members before the court is complete.

These numbers are the minimum. In practice there are frequently more judges present than the law requires.

A moment's reflection will show what a contrast there is in this respect between the French courts and those of England, or of those countries like the United States and the Colonies which have formed their judicial system upon the English model. In England, Scotland, Ireland, Canada, Australia, the Cape, and in the whole of the United States, all civil actions, however important, are disposed of in the first instance by a single judge. The appeal is in most cases to a court of at least three judges. Instances might be given of appeals to courts of fewer than three judges; but, I think, it is a pretty general rule in the Anglo-Saxon world that there is an ultimate appeal provided in all cases of importance to a court of at least three judges.

An enormous number of cases such as would come in France before a Court of First Instance are disposed of in England or America by a single judge, and are not carried to appeal. This makes it possible to administer justice in these countries with a very much smaller number of judges than the French system requires. In England, especially, the judges have always been few in number, and paid upon a much higher scale than in France.

The effect of this is that the leaders of the Bar look forward to a seat on the Bench. A judge appointed to the High Court is seldom younger than fifty, and often considerably older. He has in almost all cases had a large practice at the Bar. In France a young man takes up the judicial career from the beginning, as I shall explain more fully later. And the scale of remuneration is so low that it is difficult for a man without private means to

[1] See Civ. rej., 13 jan. 1892; D. P. 92, 1. 271.

[2] Garsonnet, t. 1, p. 147.

keep up the dignity of the position. It is, therefore, a career generally chosen by young men possessed of some fortune or influence, rather than, as in England, a prize gained by years of successful pleading. France could not afford to pay her army of judges anything like the £5,000 a year which a judge of the English High Court receives. France has produced, and still produces, eminent judges worthy to compare with those of any country; but it is easy to see that the ordinary court in France is hardly likely to contain any lawyer of the same rank in the profession as that of the English judges of the High Court. A judgeship in France is not, as in England, one of the great prizes of the profession. For this reason it may be said, without the risk of being misunderstood, that it is possible that a single judge selected on the English plan is as likely to arrive at a sound decision as the three French judges whose abilities have not been so severely tested.

Upon the continent of Europe generally there is the same distrust of a court consisting of a single judge. It is somewhat singular that this should be so in the very countries whose laws are based upon that of Rome. In the Roman system it was a rule, almost without exception, that cases should be disposed of by a single judge. The Roman law went even much further in this respect than the English, for during the Republic and a considerable part of the Empire there was, generally speaking, no right of appeal. The judgment of the judge before whom the case came in the first instance was final.

There are in France, so far as I can calculate, 2,218 judges, not counting the *juges suppléants* in the Courts of First Instance. These will be three or four hundred, so that we may reckon the number of French judges at 2,500. This is an enormous number from the English point of view.

The scale of remuneration is very low, according to our standards. The premier President of the *Cour de Cassation*, whose position may be said to correspond in dignity with that of the Lord Chief Justice of England, receives a salary of 30,000 francs (£1,200), as compared with the £8,000 received by the English Chief Justice.

An ordinary *conseiller* of the *Cour de Cassation* receives 18,000 francs (£720). A judge of the High Court in England receives £5,000.

A *conseiller* of a provincial *Cour d'Appel* has 7,000 francs (£280), yet this is a position of dignity and importance, and frequently the reward of years of judicial service. The Courts of First Instance are divided into three classes: the first class includes towns with a population exceeding 80,000. Excluding Paris there are ten in this class. The president of a court of the first class

receives 10,000 francs (£400), and an ordinary judge 6,000 francs (£240).

In the second class, in which fall towns with a population between 20,000 and 80,000, there are sixty-one courts. The scale of remuneration is, for the president 7,000 francs (£280), and for an ordinary judge 4,000 francs (£160). But the great majority of the Courts of First Instance are in places where the population is under 20,000. There are, I think, 288 courts in this class. This figure may not be absolutely accurate, but it is pretty nearly so.

In this class the president of the court receives 5,000 francs (£200), and an ordinary judge receives 3,000 francs (£120). In England or America it would be utterly impossible to find men of good character and satisfactory legal attainments to accept positions for which they received the pittance of a clerk, while they had to keep up the social credit of a judge.

But we have to bear in mind that the scale of living in France is in many ways more modest than it is in England or America. And, further, it has to be remembered that young men of the class from which judges are drawn are in France seldom without some private resources, and very rarely marry wives who are not able to bring them a reasonable *dot*. But, according to a recent writer, heiresses are less easy to secure than formerly. The provinces are full of judges who vegetate up to forty or fifty years of age, living unmarried in out-of-the-way towns. They pass their time in hotels and clubs in a sort of perpetual student existence [1].

There is one unfortunate result of the low salaries paid to French judges: they are obliged to be always on the look-out for promotion. This makes them very anxious to please the government of the day. Mr. Bodley says, 'The French judges, though incorruptible in the ordinary sense of the word, are necessarily amenable to political influences, as they are ill-paid functionaries dependent on the good-will of politicians for their promotion [2].'

In this respect the English system is preferable. With us, in nine cases out of ten, a judge remains in the position to which he is first appointed. He is generally an elderly man when he is put upon the bench, and the chance of promotion is so slight that it may be disregarded. It is almost unknown with us that a judge should be suspected of giving a biassed decision in order to curry favour with the government.

Another striking feature of the French system is what is called the rule of the two degrees of jurisdiction. In all cases in which an appeal is allowed the judgment of the second court is final. One appeal, and one only, is to be permitted. Thus there is an

[1] Hugues Le Roux, Nos Fils, p. 141. [2] France, p. 510, note.

appeal from the Justice of Peace to the Court of First Instance, and an appeal from the Boards of Umpires to the Commercial Courts. Upon such appeals the Court of First Instance or the Commercial Court, respectively, pronounces a judgment which is final. Similarly, there is an appeal to the Court of Appeal in cases which originate in a Court of First Instance or in a Commercial Court. It is urged that, considering the fallibility of human nature, there ought to be a right of appeal, except in trifling cases. On the other hand, there is every probability that a second court will do complete justice, and to allow a further appeal would be to encourage protracted and ruinous litigation. This was one of the evils of the old régime where there were five or six degrees of jurisdiction[1].

In the present system it is true that upon questions of fact there is only a single appeal. As regards questions of law, the method of bringing the judgments of the courts under the review of the Court of Cassation, in the way which I shall describe presently, makes the rule of double degree of jurisdiction more apparent than real. French writers insist that the review of the Court of Cassation is not a second appeal. This may be so, but as regards the delay and expense the name makes little difference to the litigant. I shall point out when I come to describe the peculiar system of review in the Court of Cassation that whereas with us the judgment of the highest court, which is generally the third court, is always final, in France, on the other hand, a case which reaches the Court of Cassation and is disposed of there may still have to come before three courts. An obstinate or vindictive litigant has still a fair opportunity in France of protracting a litigation until both litigants are ruined.

Another noticeable point of the French system is that in civil cases there is no jury. A jury-system upon the English model has on many occasions been advocated in France, but has always been rejected. M. Garsonnet argues strongly against it, and suggests that in England and the United States the civil jury is regarded with less favour than formerly. He cites the Code of Civil Procedure for Lower Canada as an illustration of the anxious care which the legislature felt was necessary to protect litigants against the mistakes of juries, by creating numerous remedies by which an erroneous verdict might be set aside[2].

The three most important points in which the French system differs from ours are: (1) The presence in civil cases of a legal official representing the government—*le ministère public*; (2) the peculiar functions of the Court of Cassation; and (3) the existence of

[1] Garsonnet, p. 78. [2] Op. cit. § 43.

separate courts for the trial of administrative cases; i. e. the recognition that *le droit administratif* is withdrawn from the ordinary tribunals. Of the *ministère public*, and of the Court of Cassation, I shall speak later. The *droit administratif* must be reserved.

I now turn to describe the organization of the courts which have been already mentioned, and to indicate, in a broad way, the limits of their jurisdiction.

1. *The Justice of Peace Court.*

The name was borrowed from England, but the institution has very little similarity with the courts of Justices of the Peace in England. The English justices sit in a bench of several. They have a very multifarious set of duties, but their principal business is criminal. The French *juge de paix* sits alone, and has a very considerable and important jurisdiction in civil as well as in criminal matters. Like his English prototype he is very often a country gentleman. In the rural cantons it is usually the most influential man of the community who is made *juge de paix*. But he must not be a priest or minister of religion, an advocate, a government official, or a retail trader. In the towns he is generally a man who has had a legal training. But the remuneration is so slight—generally 2,700 francs or £108 a year—and the chance of promotion so small that a young lawyer of any ambition will not accept the position of Justice of the Peace. But very often a retired lawyer, either an *avocat* or *avoué*, who is too old for practice, accepts the position of *juge de paix*[1]. Unlike the judges of the higher courts, he does not enjoy security of tenure. His commission may at any time be revoked by the government. In addition to the *juge de paix*, two *suppléants* are always appointed, one of whom is to replace the *juge* if he is unable to sit. The *suppléants* are unpaid. The *juge de paix* is a sort of legal maid of all work. Many new duties have been thrown upon him from time to time by statute, and his jurisdiction has been largely increased. The original idea in the revolutionary period when the office was created was to bring to the doors of every one a simple and inexpensive court presided over by a man of good sense who could settle in an equitable way the little disputes of the neighbourhood. He is not strictly tied to the law, and his first duty in every case is to try to bring the parties to an agreement.

The *juge de paix* is competent to try all suits for money or movables up to the value of 200 francs. His judgment in actions below 100 francs is final. But commercial questions and some others are specially withdrawn from him. He can also try questions between

[1] Garsonnet, op. cit. § 110.

innkeepers and their guests, or carriers and travellers or landlord and tenant, and several other classes of actions in which the amount may exceed 200 francs, subject always to appeal when the amount exceeds 100 francs. He has a criminal jurisdiction for petty offences. The finality of his judgments up to 100 francs, and the accepted principle that he is not tied to the letter of the law, enables the *juge de paix* to protect poor debtors against the harshness of their creditors. He often refuses to give judgment even when the legal claim is clear, and compels the creditor to allow time for his debtor to pay. He has also a number of extra-judicial duties, of which that of presiding over the family councils called together to choose tutors to minors and interdicted persons and for other purposes, and that of making an inventory of the property of absentees may be taken as examples.

In cases where the *juge de paix* is competent to pronounce final judgment, his decision cannot be brought under the review of the Court of Cassation. That court can only *cass* a judgment of a *juge de paix* when he has travelled outside his jurisdiction (*excès de pouvoir*). *Excès de pouvoir* is narrower than 'incompetence.' It means such acts as the invasion of the sphere of the administrative courts[1].

2. *The Conseils de Prud'hommes.*

These boards consist of an equal number of employees and employed. The masters elect the *prud'hommes patrons*, and the workmen elect the *prud'hommes ouvriers*. Authority to create such boards has to be obtained from the government upon the recommendation of chambers of commerce and of the municipal councils. These latter councils have to engage to help to defray the expenses. The boards are competent in disputes between masters and men as to matters relating to the employment. Up to 200 francs their judgment is final. Above that amount there is an appeal to the commercial court. They have a limited police jurisdiction as to misconduct of apprentices, and offences which tend to disturb the good order of workshops. They have also the important duty of acting as Boards of Conciliation in trade disputes, and of reporting to the proper authorities contraventions against the laws regulating factories and workshops when a complaint is lodged. The members of the boards are entitled to a small remuneration.

The Commercial Courts (Tribunaux de Commerce)[2].

These courts are created by order of the Government in towns held to be of sufficient commercial importance. The number of

[1] See Pandectes Françaises, s.v. Cassation Civile, Nos. 671–696, and Cass. 29 juin 1901; D.P. 1901, 1.57.

[2] See Code de Commerce, art. 615.

members, never less than three, is fixed by the decree which creates the court. The members are elected by business men from their own number. There are certain restrictions and qualifications too minute to be specified here[1].

Where such a court exists, it has exclusive jurisdiction in commercial cases (*affaires commerciales*). As to what are commercial cases see Code de Commerce, Art. 631 seq.

'Commercial matters' are the following:—

Disputes relative to engagements between merchants, traders, or bankers.

Disputes between partners relative to partnership business.

Disputes as to *actes de commerce* between any parties; *actes de commerce* include every purchase of produce or goods, either to sell again in the same form, or after manufacture, or to let out on hire.

All business contracts to manufacture, to buy and sell on commission, or as to the carriage of goods by land or water.

All business contracts to procure and deliver goods.

Business contracts of agency[2], contracts as to sales by auction, or as to public entertainments.

Banking, stock-exchange and brokerage transactions.

All operations of public banks.

All obligations between merchants, traders, and bankers.

Bills of exchange between any parties.

All business contracts for building ships, and all purchases, sales, and resales of ships, whether for deep sea, coasting, or inland navigation.

All contracts for shipment by sea.

Buying and selling of rigging, ship's furnishings, or ship's stores.

Charter-parties, bonds of bottomry.

Contracts of maritime insurance and other maritime contracts.

All arrangements and bargains with regard to the salary or hiring of crews.

All agreements of seafaring people to serve on a trading-ship.

Actions against mercantile agents, clerks, or servants of traders for acts done on behalf of the trader whom they represent.

Bills drawn by receivers, paymasters, tax-collectors, or other persons responsible for public monies.

Everything concerning bankruptcies (Code de Commerce, Arts. 631–635).

I have translated the word 'enterprise' by 'business contract,'

[1] For details see Simonet, Traité Élémentaire de Droit Public, s. 325.

[2] Agencies, *bureaux d'affaires*, is difficult to translate. An *agent d'affaires* in France may perform very varied services, such as debt-collecting, making inquiries as to the credit of individuals, assisting inventors to obtain patents, and many others. They generally specialize in some branch.

because it implies that the act is not an isolated one. It must be an act done by one whose business is to perform such acts[1].

Commercial cases include therefore a very large number of the most ordinary transactions. The merchants and business men who are competent to decide in the commercial courts upon disputes arising out of these transactions are more skilled than an English jury. On the other hand they have not the advantage of being directed by a judge. Up to 1,500 francs their judgment is final. Above that amount there is an appeal to the *Cour d'Appel*. In places where no commercial courts exist, commercial cases are tried by the ordinary Court of First Instance.

The Courts of First Instance (Tribunaux de première instance).

Every *arrondissement* has its Court of First Instance.

A Court of First Instance consists of a President, of one or more vice-presidents, of ordinary judges (*juges titulaires*), and of assistant judges (*juges suppléants*). The *juges suppléants* are generally young men who are preparing themselves for the judicial career, and waiting for vacancies on the Bench. Until 1900 the *juges suppléants* were all unpaid. In that year salaries of 1,500 francs (£60) were voted for one hundred of these positions, and this has been continued. The other *juges suppléants* are still unpaid[2].

It is usual for the senior members of the court to throw upon the *juges suppléants* the most uninteresting and disagreeable duties which have to be discharged. One of them is frequently designated by the President to act as *juge d'instruction*, i.e. to aid the prosecution in criminal cases by the private examination of the prisoner, and in other ways to aid in discovering evidence of his guilt. The successful conduct of affairs of this kind may help to establish a claim to appointment as an ordinary judge.

The size of the courts varies according to the importance of the place. By far the largest of them is the Tribunal de la Seine, which sits at Paris. It is composed of the President, twelve vice-presidents, seventy judges, and twenty assistant judges. They are divided into eleven chambers. The courts of Lyon, Marseilles, and Bordeaux have each a President, three vice-presidents, eleven judges, and six assistant judges, and are divided into four chambers[3].

The courts in the less populous *arrondissements* vary in size, having from three to eleven judges, divided in all but the smallest

[1] For a full commentary on these articles see Lyon-Caen and Renault, Traité de Droit Commercial, 3rd ed. vol. i. pp. 89–186.

[2] Art. 25 de la loi de finances du 13 avril 1900.

[3] See, for full details of the *personnel* of the Courts of First Instance, Table B annexed to the Loi du 30 août 1883 (D. P. 83, 4. 70).

into two or more chambers. Where there are only two chambers, one takes the civil work (*chambre civile*), and one the criminal work (*chambre correctionnelle*). There cannot be more than six judges in a chamber. All the judges except the President pass successively through all the chambers, according to a scheme of rotation (*tableau de roulement*) prepared annually by the President, the vice-president or vice-presidents, and the senior judge, who is called *le Doyen*[1]. This has the great advantage of making each judge familiar with all kinds of cases, civil and criminal. In the larger courts, especially Paris, certain classes of cases are as far as possible always assigned to the same chamber. The cases on the roll are distributed among the different chambers by the President, and if one chamber is overloaded with work, he may send to another cases which do not belong to the class with which it is generally occupied. But, on the whole, each chamber has its special kind of work.

The *roulement* is also supposed to have the advantage that it prevents a judge stronger or more imperious than his colleagues from obtaining a permanent ascendency in a chamber. When one or more of the judges who form a chamber is unable to sit, so that the quorum of three is not made up, his place is made up if possible by taking a judge or assistant-judge who can be spared from another chamber. Where this is impossible, the senior advocate present, or, if no advocate can be got, the senior *avoué*, may be called on to make up the court. Very precise rules are laid down, and in many cases a judgment has been annulled if the advocate or *avoué* so summoned was not the senior present[2].

The Court of First Instance is the competent court in all matters not falling within the jurisdiction of the *juge de paix*, or of the commercial court where one exists. In actions relating to movables, where the amount is below 1,500 francs (£60), or in actions as to immovables worth less than 60 francs (£2 8*s*.) a year, its judgment is final. In other cases which originate in the Court of First Instance, there is an appeal to the Court of Appeal.

The court has also an appellate jurisdiction. It deals with appeals from the *juge de paix*, and then its judgment is final, according to the rule of double degree of jurisdiction. Its criminal jurisdiction is also partly original, as when it deals with *délits*, and partly appellate, as when it deals with appeals from the *juge de paix* or other police-courts (*tribunaux de simple police*).

A good many of the duties which with us would be discharged by a judge in chambers are in France specially assigned to the President. For example, in actions of separation it is his duty to

[1] Garsonnet, t. 2, § 675.

[2] Cass. civ. 28 juin 1865; D. P. 66, 1. 87.

bring the spouses before him in chambers and to try to effect a reconciliation. But many other duties in non-contentious proceedings are performed in France by a Chamber of the Court sitting in private, and called the *chambre du conseil*. It is composed of judges who belong to one or other of the ordinary chambers, specially appointed for that purpose.

The Courts of Appeal (Cours d'Appel).

These courts are the successors of the old French *parlements*, with the addition of a number of courts of more modern creation. The court consists of a Premier Président, who is the head of the whole court, of a President for each Chamber, and of *conseillers*. The judges are always called councillors—*conseillers*. All but seven of the Courts of Appeal are divided into chambers, and that of Paris has as many as nine chambers. (See, for the *personnel*, Tableau B. in D. P. 83, 4. 58.) The composition of each chamber is changed annually by the *roulement*. The civil chamber or chambers of the Courts of Appeal have for their principal function to review the judgments of the Courts of First Instance and Commercial Courts within their jurisdiction. Certain cases receive a full-dress hearing called *audience solennelle*. This means that two chambers sit together. There must be at least nine judges present. They wear red robes for the solemn audience. The principal classes of cases which have to be taken in this way are—

(1) Cases remitted to the Court of Appeal by the Court of Cassation, according to the system to be explained shortly.

(2) Cases affecting civil status; e. g. questions as to nationality, filiation, demands for interdiction, and requests for permission to adopt a child.

Actions of separation and divorce are not heard in *audience solennelle*, it being thought undesirable to give them greater publicity than is necessary.

In the Courts of Appeal, as in the lower courts, an advocate or *avoué* may be called upon to make up a quorum. But in the Court of Appeal this very rarely happens, as the number of councillors is generally large enough to allow of a few absentees, and to permit the quorum of five to be made up from judges of another chamber. From the Courts of Appeal there is in the ordinary sense no right of appeal. Their judgment upon any question of fact is final. But their decisions on points of law may be brought under review of the Court of Cassation. I shall try to indicate more precisely in speaking of this great court the cases which it is competent to review.

The Assize Courts (*Cours d'Assises*) which try 'crimes' are not permanent courts. They are made up of *conseillers* of the *Cour d'Appel*, or in departments in which there is no *Cour d'Appel*, they may be partly made up of judges of the Court of First Instance. The court always consists of three judges and a jury.

The Court of Cassation.

The court consists of a Premier Président, three presidents, and forty-five councillors. It is divided into three chambers—the Chambre des Requêtes, Chambre Civile, and Chambre Criminelle—each composed of fifteen councillors and a president. When the Premier Président sits he generally presides over the Civil Chamber, so that if all the members were present that court would consist of seventeen judges.

The minimum number which can pronounce a judgment is eleven, including the President. Unlike the lower courts in this respect, the system of *roulement*, or rotation of judges from one chamber to another, is not followed. The judges are presumed to have completed their education before reaching this exalted tribunal. Moreover, the principal object of the Court of Cassation being to bring about uniformity in judicial decisions, it is thought that this is more likely to be secured by having the greatest possible permanence in the *personnel* of the chambers. Historically the Court of Cassation has grown out of the powers possessed by the *Conseil du Roi*, to annul a judgment contrary to law. It is clearly laid down for the first time in an *ordonnance* of Henri IV in 1597 [1].

It was an extraordinary remedy, analogous to the appeal in England to the King's Privy Council in certain cases where the remedy to the King in Parliament was not available. Out of that right of petitioning the Crown has grown the jurisdiction of the Judicial Committee of the Privy Council. Out of the analogous right in France has grown the jurisdiction of the *Cour de Cassation*. But the latter court performs the duties which in England are divided between the Judicial Committee and the House of Lords.

Although the power of the *Conseil du Roi* to annul a judgment was admitted, at least as early as 1597, they do not seem to have been exercised in any systematic or satisfactory way under the *ancien régime* [2]. The practice, however, was irregular, and the principles of cassation ill-defined until the Revolution.

The present Court dates from 1791. After long discussions in the *Assemblée Constituante*, it was decided to create a *tribunal de cassation*, and the main rules were laid down which still guide the

[1] See Pandectes Françaises, s.v. Cassation, Cour de, s. 25.
[2] See Esmein, Hist. du Droit Franç., p. 433.

practice of the court. The new court was installed in the ancient hall of the Parliament of Paris the 20th of April, 1791.

The Court of Cassation can review the judgment of any of the courts, civil or criminal, provided that the judgment was final, i. e. not appealable by any ordinary process of law. Thus it can review a judgment of a Court of First Instance or of a Criminal Court, but not if that judgment was one which could have been appealed to the Court of Appeal. And it may even review a final judgment of a *juge de paix*, but only on the ground of *excès de pouvoir*.

With regard to military and naval courts, there is a distinction. A soldier or sailor cannot request review by the Court of Cassation. But a judgment of one of these courts can be brought under the review of the Court of Cassation by the government, acting through the *procureur général*. And a civilian (subject to certain exceptions) against whom a military or naval court has given a judgment, may bring the matter before the Court of Cassation on the ground that the lower court was incompetent or exceeded its powers.

The bulk of cases dealt with by the Court of Cassation are naturally those in which the judgment attached has been rendered by the Courts of Appeal. For the most important and keenly contested actions will generally be such as are carried to those courts, and their judgments, as already stated, are not subject to appeal in the ordinary sense. The request for review by the Court of Cassation is called a *pourvoi*. It is better to avoid the word 'appeal,' as the rules applicable to the *pourvoi* are so different from those of an ordinary appeal. There are two cardinal rules which govern the practice of the Court of Cassation:

(1) It cannot interfere with the judgment attacked unless in that judgment there has been a violation or an erroneous application of the law.

(2) The Court of Cassation cannot give a judgment on the merits of the case. All it can do is to 'cass' the judgment found to be contrary to law, and then remit the case to be tried over again in a lower court. I will explain later the conditions of this remit or *renvoi*.

One of the most delicate duties of the Court of Cassation is to decide the question of its own competence. This is the sole function of one of its chambers; viz. the *Chambre des Requêtes*.

Every *pourvoi* in a civil case has to come first before the *Chambre des Requêtes*. That chamber has merely to consider if, on the statement of the party attacking the judgment, the court below seems to have violated the law. If no prima facie case is made out, the *Chambre des Requêtes* rejects the *pourvoi*, giving its reasons, and there is an end of the matter. If the *Chambre des Requêtes* thinks

the *pourvoi* ought to be admitted, it issues an *arrêt* admitting it, but giving no reasons, and remits the case to the *Chambre Civile* to be there debated and disposed of. This preliminary inquiry has been severely criticized as causing unnecessary delay and expense, and also as rather tending against that harmony of judicial decisions, to create which is one of the main functions of the Court of Cassation. It has happened sometimes that the *Chambre des Requêtes* taking a certain view of a point of law has invariably rejected *pourvois* in which the opposite view was contended for, although it may be known that the *Chambre Civile* was not of the same opinion as the *Chambre des Requêtes*. But so far the *Chambre des Requêtes* has survived all attacks[1].

As an instance of an important question upon which there is a conflict between the decisions of the *Chambre des Requêtes* and those of the *Chambre Civile*, I may refer to the cases as to the validity of the marriage of an ex-priest of the Catholic Church. Up to 1878 it had been held that the civil law admitted the doctrine of the canon law as to the indelibility of orders. 'Once a priest always a priest.' The *Chambre des Requêtes* reaffirmed this traditional view in a famous case in that year. Req. 26 fev. 1878; D. P. 1878, 1. 113. Ten years later the question came before the *Chambre Civile*. That court held that as there was now complete religious liberty in France, a priest might if he chose renounce his orders, and that no law then prohibited him from contracting a valid marriage (Cass. civ. 25 janv. 1888; D. P. 1888, 1. 97). The result of this conflict is curious. It leaves any Court of Appeal free to decide the question either way with the practical certainty that its judgment will be final.

Suppose the Court of Amiens prefers the old view, and holds a marriage null which has been contracted by an ex-priest. If a *pourvoi* is presented, the *Chambre des Requêtes* will reject it, as it agrees in the law followed by the Court of Amiens. On the other hand, suppose the Court of Paris declines to annul a similar marriage. If a *pourvoi* is presented the *Chambre des Requêtes* will admit it, as it holds that this view is unsound. But the *Chambre Civile* will reject the *pourvoi* when it comes before them. In either case the judgment of the Court of Appeal will stand. It is, to say the least of it, unsatisfactory that such an important question may be determined in opposite senses according as it happens to arise in one jurisdiction or in another. (See Beudant, Cours de Droit Français, Vol. 1, No. 245.)

In criminal matters this preliminary inquiry by the *Chambre des Requêtes* does not exist. The *pourvoi* comes directly before the

[1] See Garsonnet, Tr. de Proc. t. 1. § 97.

Chambre Criminelle, which disposes of it finally. The question of competency in civil cases upon which the *Chambre des Requêtes* has to pronounce in the first instance is one upon which there are a great many decisions not always very easy to reconcile. In general it may be said that the court is competent—

(1) When the court below has violated some substantial form of procedure.

(2) When it has exceeded its competence.

(3) When it has taken a wrong view of a *loi*.

We must bear in mind that *loi* means an act of the legislature. The court must have overlooked or misapplied an article of one of the codes or a statute.

A court which decides a point contrary to previous decisions is not necessarily a violation of a *loi*. The Court of Cassation is not competent to re-examine any finding of fact, or any finding as to the intention of the parties to a contract. But it may review the judgment as to the legal nature and effect of the contract.

E. g. the findings of the court below that a testator was of sound mind, or that a party to an action of separation has been guilty of cruelty (*excès, sévices, ou injures graves*), or that from the terms of a deed of partnership its object was contrary to public order, or that the word *enfants* in a deed includes grandchildren, or that the consent to a contract was induced by fraud, are all examples of findings which the Court of Cassation cannot review. But the Court of Cassation may review a judgment holding that such and such facts establish fault for which reparation is due, or that certain facts proved constituted novation, or that a clause in a deed constitutes a potestative condition. For in such cases the real point at issue is what is the legal result of certain facts[1].

The Remit (Renvoi).

Assuming that in a civil case a request for cassation—*pourvoi*—has been admitted by the *Chambre des Requêtes*, it is sent to the *Chambre Civile*. There it is debated. It is then either rejected, in which case the court pronounces judgment of rejection, stating its reasons, and there is an end of the action, or else the *Chambre Civile* decides to 'cass' the judgment attacked. Having done so it remits the case not to the court which pronounced the judgment cassed, but to that court of the same rank in the judicial hierarchy which lies nearest to the court whose judgment has been cassed. Thus if the judgment cassed is that of a Court of First Instance, the remit is made to the nearest Court of First Instance. If an *arrêt* of

[1] See, for these and many other instances, Pandectes Françaises, s.v. Cassation Civile, Nos. 737–791 and 904–1100.

a Court of Appeal has been cassed, it is to the Court of Appeal which is the next neighbour of the court which has gone astray. When it is an *arrêt* of the *Cour de Paris* which is cassed, the *renvoi* is to the Court of Rouen, or of Amiens, or of Orleans. In criminal cases there is more latitude of choice. The case is remitted to any court of the same rank, irrespective of its geographical situation. And where a judgment in a criminal matter has been annulled for incompetence, the remit is to the court which is held by the Court of Cassation to be the competent court, whatever may be its rank.

The cassation has the effect of a *restitutio in integrum*. The parties are put back into the same position in which they were before the erroneous judgment was pronounced. If the judgment is cassed only in part the remit is only as to the part cassed. The court to which the case is remitted is called the *tribunal de renvoi*. When the remit is made to a *Cour d'Appel* that court is bound to hear the case in *audience solennelle*; i. e. before two chambers sitting together, unless the *Cour d'Appel* has only one chamber. Even then there must be nine judges (*conseillers*) present. In the Courts of First Instance two chambers never sit together (see Dalloz, Répertoire, s. v. Organisation Judiciaire, No. 193)[1].

The Court of Remit is perfectly free to come to any decision either on the facts or the law. It may throw down the gauntlet to the Court of Cassation and reaffirm the proposition of law which that court has just held to be erroneous. When this happens, a special procedure is provided. Suppose Court of Appeal A has laid down a certain doctrine of law. This is held to be erroneous by the Court of Cassation, the judgment is cassed, and the case remitted to Court of Appeal B. That court in *audience solennelle* reaffirms the doctrine laid down by Court A. A second *pourvoi* is presented on the same grounds as before. The *Chambre des Requêtes* if it admits it, as it is pretty certain to do, sends it to the *Chambre Civile*. That Chamber, on seeing that the *pourvoi* directly challenges their previous decision in the case, finds that it ought to be heard in the Court of Cassation before the United Chambers (*chambres réunies*)[2]. The three chambers sit together to hear the case. There must be thirty-four judges present, including the President. If they 'cass' the second judgment upon the same grounds as the first they make a second remit to Court of Appeal C. In that case, however, Court of Appeal C. has not complete freedom of judgment. It can come to any conclusion upon the facts, but upon the law it must bow to the ruling so solemnly laid down by the Court of Cassation. But even here it is only as between the parties and in this case that the rule of law

[1] Garsonnet, t. 1. § 79.

[2] See Cass. civ. 26 nov. 1890; D. P. 91, 1. 345.

is binding. If the same point should come up a week later in any Court in France, of whatever rank, from a *juge de paix* to the Court of Appeal of Paris, that Court is perfectly free to fly in the face of the doctrine laid down by the combined wisdom of the united Chambers of the Court of Cassation. The Court of Cassation for the sake of its own dignity, and also for the sake of what French writers call *l'unité de jurisprudence*, generally adheres to its opinions. But it is not absolutely bound to follow its own previous decisions, as is the House of Lords in England. (See *Att.-Gen.* v. *Dean and Canons of Windsor*, 1860, 8 H. L. C., at p. 391 [1].) It has happened that the court has changed its mind. Upon one famous question the Court of Cassation reversed a decision of its own upon an important point in the law of succession. The majority of the Courts of Appeal preferred the older view which had been followed for twenty-five years. They continued to give *arrêts* contrary to the later doctrine which the Court of Cassation had adopted. These *arrêts* were uniformly cassed. After twenty years of conflict, the Court of Cassation, by an *arrêt* of the *Chambres réunies*, came round to its original opinion [2].

Proud'hon, a writer of high authority, says the Court of Cassation makes sometimes *de glorieux retours sur elle-même*. To an English lawyer it is surprising that a more absolute uniformity of decisions is not felt to be desirable. It may be theoretically sound to say that the legislature and not the judge makes the law, and that therefore every judge is in duty bound to follow the guidance of his own reason, and is not to be coerced into a wrong interpretation because other courts have fallen into error. But surely it might be admitted, if unity of jurisprudence is worth anything, that the view taken by the Court of Cassation with its bench of at least eleven of the most eminent and experienced judges in France was entitled to so much respect that lower courts must follow it, unless the Court of Cassation itself saw fit to change its mind.

Perhaps, as the procedure of the Court of Cassation is so different from that of any of our courts, I may be permitted to give an illustration. I will take a recent case which can be stated very shortly.

In the French protectorate of Tunis the French courts have, by decree of the Bey, jurisdiction to try any 'crime' committed in Tunis by a Tunisian subject to the prejudice of French citizens. Dahman, a Tunisian, and not a soldier, was accused of the delict

[1] [More lately, in *London Street Tramways Co.* v. *London County Council* [1898] A. C. 375, the House of Lords expressly declined to reconsider a decision of its own.]

[2] Cass. civ. 10 nov. 1880; D. P. 81, 1. 81. See Planiol, Traité Élémentaire de Droit Civil, v. 3, § 3079.

of cheating the French army, by deceit as to the quantity of some stores he had sold. He was brought before a military court. He pleaded that the court was incompetent. The plea was rejected on the ground that Tunis was, in the sense of the law, enemy's territory. Being a civilian, Dahman had the right to request cassation. He did so, and the court cassed, holding:

(1) That Tunis was not enemy's territory;

(2) That 'crime' in the Bey's decree was not used in a technical sense, and included delicts; and

(3) That the competent court before which Dahman should have been brought was the ordinary French court—the *tribunal correctionnel*—upon which jurisdiction had been conferred by the Bey's decree. They remitted to the Court of First Instance of Sousse. That court did not agree with the Court of Cassation. It held itself incompetent on the ground that the word 'crime' was not meant to include delict. On appeal the Court of Appeal of Algiers affirmed this judgment. The *ministère public*, or public prosecutor, entered a *pourvoi*[1].

The Court of Cassation held again that crime included delict. They remitted the case to the Court of Appeal of Aix. That court finally held:

(1) That Tunis was not enemy's territory, and therefore that the military court had not competence to try a civilian;

(2) That crime included delict;

(3) That the Court of Sousse was the court of competent jurisdiction, but that it was convenient to exercise the power of retaining the case at Aix and disposing of the merits[2].

Here we have five trials in a criminal matter, and criminal matters are generally regarded as best suited for prompt solution.

F. P. Walton,
McGill University, Montreal.

[1] Ch. crim. 9 nov. 1894, D. P. 95, 1. 49.

[2] D. P. 95, 2. 289.

(*To be continued.*)

IMPLIED INDEMNITIES.

SHEFFIELD CORPORATION *v.* BARCLAY AND OTHERS.

IN the case of the *Lord Mayor and Corporation of Sheffield* v. *Barclay and others*[1], the Lord Chief Justice gave judgment on October 27 last, and held that an innocent purchaser of stock in a company or corporation who sends in his transfer to be registered impliedly agrees to indemnify the company or corporation for any loss they may suffer as the direct result of registering the purchaser as a stockholder.

The following is a brief statement of the facts:—

The defendant, Barclay, became the innocent purchaser of certain stock in the plaintiff Corporation. The transfer deed purported to be executed by two transferors. Barclay, the transferee, sent it to the Corporation with a letter requesting them to register him. He also sent the registration fee. The Corporation wrote to the persons named in the deed as transferors to confirm the transfer, and, getting no reply, registered Barclay in the belief that the transfer was valid. The stock was subsequently sold to other persons who were registered as transferees. One of the original transferors then died and the survivor brought an action to be replaced on the register. A jury found that his signature was a forgery, and it was held that he was entitled to be replaced on the register. The Corporation claimed to be indemnified by Barclay for the expense they had incurred in replacing the original transferor on the register, and the Lord Chief Justice held that the defendant, in requesting the Corporation to register him, had impliedly promised to indemnify them, and gave judgment for the plaintiffs.

As this is a most important decision and one which has come as a surprise to many people, we propose to consider certain decided cases of implied indemnities, and then to examine the judgment of the Lord Chief Justice and the grounds on which it is based.

An undertaking or agreement or promise to indemnify is like any other undertaking or agreement or promise in this, that it may be couched in express terms, or it may arise by implication from the circumstances or situation in which two parties find or have placed themselves. The situation may be such as to lead a jury to infer that, as a matter of fair dealing between man and man, one party must be taken to have implied a promise to

[1] [1903] 1 K. B. 1; 72 L. J. K. B. 8.

indemnify the other. In the case of the *Sheffield Corporation* v. *Barclay* there was no question of any express promise, and so we need only concern ourselves with the nature of implied promises to indemnify, and the various situations and relationships in which such promises are to be inferred.

That the existence of an implied promise is a matter to be inferred as a fact from the position of the parties is clear from the case of *Betts* v. *Gibbins*[1]. Lord Denman C. J. there said :—

'Taking this as a question of fact, I have no doubt that a jury at Guildhall would have said that the partics understood that there was an engagement to indemnify. . . . If the jury had been asked as commercial men whether an indemnity was implied, they must have said that it was.'

We must now invite the reader to the somewhat dreary entertainment of considering the facts of several cases in which a promise to indemnify has been inferred with a view to discovering some common factor among them, some essential circumstance upon whose presence or absence depends the existence or exclusion of an implied promise to indemnify.

The first case of implied indemnity seems to be *Farebrother* v. *Ansley*[2]. That was an action by an auctioneer against the Sheriff of Middlesex. The facts were that a writ of *fieri facias* had been sued out directing the sheriff to levy £363 of the goods of J. Auberey. The sheriff delivered to his officer, Watkins, a warrant to levy under the writ, and Watkins and the attorney for the execution creditor instructed the plaintiff in the way of his profession and business of an auctioneer to sell the goods seized.

There was no evidence of any direction having been given by the defendant to the plaintiff to sell. Watkins by mistake seized goods which were not the goods of J. Auberey, and the plaintiff as auctioneer sold them and was sued in conversion by the true owner, who recovered judgment for £395. The plaintiff then sued the defendant on an implied promise to indemnify. Lord Ellenborough C. J. held that there was no implied promise under these circumstances; that the plaintiff was seeking to be indemnified against the consequence of his own blunder.

The report of this case is defective and unsatisfactory in that we are left in the dark as to the direction given by the sheriff's officer and the effect of any such direction on the action and conduct of the plaintiff. We must satisfy ourselves with observing that Lord Ellenborough does not seem to contemplate any responsibility on the part of the sheriff for the direction given by his officer, while

[1] (1834) 2 A. & E. 57; 4 L. J. K. B. 1; 41 R. R. 381.
[2] (1808) 1 Camp. 343.

he does allude to the plaintiff's 'own blunder.' We are therefore left to infer that the plaintiff acted, at any rate as between himself and the sheriff, on his own motion, and it is expressly stated in the case that there was no evidence of any direction given by the sheriff to the plaintiff. But so much is left to conjecture and surmise that this case cannot be considered one of any great weight. It is at most an authority, if any authority were wanted, for the proposition that one cannot claim to be indemnified for one's own blunders.

The next case in point of date is *Adamson* v. *Jarvis*[1]. In that case the plaintiff was an auctioneer. He was requested by the defendant to sell, and did sell, certain goods and chattels of which the defendant was in possession. The defendant was not the owner of the goods, and he who was the owner sued the plaintiff and recovered the value of the goods. The plaintiff then sued the defendant on a warranty or false representation that he was the owner of the goods. It was held that he might recover on an implied indemnity. One cannot do better than quote some of the words of Best C. J.:—

'Stripped of the technical language with which it is encumbered, the case stated in the second count is this; that the defendant having property of great value in his possession, represented to the plaintiff that he had authority to dispose of such property; and followed this representation by a request that the plaintiff would sell the property for him, the defendant. The plaintiff believing the representation of the defendant as to his right to the property, and not knowing, either at the time the representation was made, or at any time after, that it was not his, as the agent of the defendant, sold the property; and after paying such sums out of the proceeds as he was bound to pay, and making such deductions as he had a right to make, which the defendant appears to have allowed, paid the residue to the defendant.

'The defendant who had induced the plaintiff to make this sale by his false representation and request to sell, and who, after the sale, continued to assert his right to sell, and confirmed the agency of the plaintiff by accepting from him the residue of the proceeds of the sale, had no right to dispose of this property. The consequence has been that the plaintiff, supposing from the defendant's false representations that he had an authority which he had not, and acting as the defendant's agent, has rendered himself liable to an action at the suit of the true owner of the goods and has been obliged to pay damages and costs, whilst the defendant, the sole cause of the sale, quietly keeps the fruits of it in his pocket. . . .

'Every man who employs another to do an act which the employer appears to have a right to authorize him to do undertakes to indemnify him for all such acts as would be lawful if the employer had the authority he pretends to have. . . .

[1] (1827) 4 Bing. 66; 29 R. R. 503.

'Auctioneers, brokers, factors, and agents do not take regular indemnities. These would be indeed surprised if, having sold goods for a man and paid him the proceeds, and having suffered afterwards in an action at the suit of the true owners, they were to find themselves wrongdoers and could not recover compensation from him who had induced them to do the wrong.'

In 1831 the case of *Humphrys* v. *Pratt*[1] was decided in the House of Lords. That was an appeal from the Court of Exchequer Chamber in Ireland. The facts were that a judgment creditor had delivered to a sheriff a writ of *fieri facias* to be executed upon the goods and chattels of Dorothea Power. He pointed out to the sheriff certain cattle upon her land which he represented as being her property; whereupon the sheriff seized them. The cattle did not belong to Dorothea Power, and the true owner sued and recovered in trover against the sheriff. The sheriff then sued the judgment creditor on an implied indemnity, and it was held in the Court of Exchequer in Ireland that he might recover. This judgment was affirmed in the Court of Exchequer Chamber and in the House of Lords. Unfortunately the learned reporters were not present when judgment was given in the House of Lords, but Lord Tenterden privately informed Mr. Richard Bligh[2] that he put the judgment on the ground that the sheriff was a public officer and was 'placed between two fires'; which must mean that the sheriff was placed in a position of doubt and difficulty, and ran the risk of an action at the suit of the judgment creditor if he did not seize the cattle, and at the suit of the true owner if he did.

In *Betts* v. *Gibbins*[3] the plaintiff was a wharfinger. The defendant, a manufacturing chemist, had a quantity of acetate of lime in the plaintiff's keeping. We pause here a moment to observe that the contract between a wharfinger and a depositor of goods is that the former will hold the goods at the disposal of the latter in return for certain dues. Of this acetate of lime the defendant sold ten casks to Messrs. Nyren & Wilson to be paid for by bill at four months on delivery, and he directed the plaintiff to set aside ten casks for the purchasers. He then drew a bill on the purchasers and sent it to them for acceptance; but they neither accepted nor returned it. A week after the bill was drawn the purchasers called at the plaintiff's wharf and took away two of the casks. Shortly afterwards the defendant gave instructions to the plaintiff to deliver the remaining eight casks not to Messrs. Nyren & Wilson but to someone else, which the plaintiff accordingly did. Meanwhile Messrs. Nyren & Wilson had been made bankrupt and their

[1] (1831) 2 Dow & Cl. 288; 5 Bli. N.S. 154; 35 R. R. 41.
[2] See 5 Bli. N. S. 154 at p. 164.
[3] (1834) 2 A. & E. 57; 4 L. J. K. B. 1; 41 R. R. 381.

assignees in bankruptcy demanded the eight casks from the plaintiff. The plaintiff wrote to the defendant asking for instructions as to whether he should resist the claim and defend the action by the assignees, but received no answer from the defendant; whereupon he paid the claim of the assignees for the value of the goods and claimed to recover the amount from the defendant. The declaration in this case stated that the defendant undertook to indemnify the plaintiff in consideration that the plaintiff at the defendant's request would refuse to deliver goods to Messrs. Nyren & Wilson and would deliver them to another person. Lord Denman C. J. held that the plaintiff was entitled to be indemnified, as he had in compliance with the defendant's directions delivered the goods of Nyren & Wilson to the third person.

In *Toplis* v. *Grane*[1] the plaintiffs were auctioneers and the defendant was an attorney. Rent became due to a client of the defendant from one Armstrong, who was also an auctioneer and had on the premises which he occupied goods and chattels for sale which belonged to various owners and were privileged from distress. The defendant gave a written authority to the plaintiffs authorizing them to seize and distrain the several goods and chattels on Armstrong's premises, and concluding with the words 'and for so doing this shall be a sufficient warrant or authority.' He also told the plaintiff's clerk to levy the distress at once as there was a large quantity of furniture in the show room, and that unless the distress were levied at once he would be obliged to give the order elsewhere. The plaintiffs accordingly distrained all the goods on Armstrong's premises and had to meet claims made by ten different owners in respect of the goods. The plaintiffs then brought an action against the defendant for indemnity, and it was held that they were entitled to recover. In the course of the judgment Tindal C. J. said :—

'It is quite unnecessary to lay it down as a general rule of law that a broker who enters under an ordinary warrant of distress and takes goods upon the premises which are privileged by law from distress can look for indemnity from his employer. In most cases the broker has a better opportunity of informing himself as to any exemption from the liability to distress which may belong to the goods found upon the premises than the landlord or his agent can possibly have. The landlord and the agent indeed have frequently no opportunity whatever. To hold therefore as a general proposition that the law gives in all cases an indemnity to the broker would have the effect in many of throwing the consequences of his own wrongful act or want of caution from himself upon his employer, and would tend to render him generally careless in the discharge of his duty.' The learned judge continues: 'But we think

[1] (1839) 5 Bing. N. C. 636; 9 L. J. C. P. 180; 50 R. R. 814.

the facts stated in this special case would satisfy a jury that the defendant by his conduct throughout the whole transaction caused the plaintiffs to believe that they were acting under an indemnity from him, and that such indemnity therefore may be justly inferred to have been given.' . . . 'We think this evidence brings the case before us within the principle of *Betts* v. *Gibbins*[1], that when an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet if such an act is not apparently illegal in itself but is done honestly and *bona fide* in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof.'

In *Dugdale* v. *Lovering*[2] the plaintiffs were the owners of a colliery to which certain trucks had been sent by purchasers of coal. While the trucks were at the plaintiffs' colliery they were claimed by the K. Company as being their property. They were also claimed by the defendant, a trustee in the liquidation of one Phillips, a coal merchant. After correspondence between the plaintiffs and the defendant the latter wrote a peremptory letter ordering the trucks to be immediately filled with coal and sent to him. In compliance with this letter the plaintiffs sent the trucks to the defendant; whereupon the K. Company, the real owners of the trucks, sued the plaintiffs for conversion. To settle the action the plaintiffs paid a considerable sum which they claimed to recover from the defendant on an implied promise to indemnify. The Court of Common Pleas followed *Betts* v. *Gibbins*[1] and *Toplis* v. *Grane*[3], and held that on these facts there was evidence on which a promise to indemnify might be implied.

Now it is to be observed that of the cases above cited the majority were claims by auctioneers or wharfingers, persons classed by Best C. J. with brokers, factors, or agents, who make it their business to act on the mandate or instructions of others; persons who sell or deliver without any warranty of their own title, whose acts are not in the fullest sense their own acts, but the acts of others, 'domini,' as Mr. Haldane called them in his argument for the defendants in *Sheffield Corporation* v. *Barclay*, or 'superiores,' in the sense in which the word is used in the maxim *respondeat superior*, who act through them, and who must ultimately pay if the act is wrongful. Before passing on from this class the judgment of Tindal C. J. in *Toplis* v. *Grane*[3] demands special attention. That learned judge clearly intimates that if general directions only had been given to the broker to distrain for rent due to Armstrong, and the broker had seized goods privileged from distress, he could not have claimed any indemnity; because his means of knowing

[1] 2 A. & E. 57; 4 L. J. K. B. 1; 41 R. R. 381.
[2] (1875) L. R. 10 C. P. 196; 44 L. J. C. P. 197.
[3] 5 Bing. N. C. 636; 9 L. J. C. P. 180; 50 R. R. 814.

what goods might legally be distrained were equal or superior to those of the landlord, and it would have been his business and his duty, if he had had merely general instructions, to inform himself as to what goods might be distrained. If he misinformed himself, it was his own blunder.

Tindal C.J. goes on to point out that in *Toplis* v. *Grane*[1] the evidence showed that the landlord or his attorney had given more than general directions and had practically pointed out the goods to be seized, and that the broker had acted in compliance with those directions. One word more and we pass from the cases of wharfingers, auctioneers, and other agents. Those cases justify us in saying that where two persons are placed in such a relation to each other that one undertakes to act on the mere mandate or direction of the other, and not on his own independent motion, he is entitled to be indemnified if in pursuance of his undertaking he does an act which he has no reasonable means of knowing to be, but which is in reality, a wrongful act.

But one of the cases cited above, *Humphrys* v. *Pratt*[2], was a case of a sheriff. Now a sheriff, as such, is not bound to act on the mandate or direction of an execution creditor. He is the officer of the law and not the agent of the creditor. If notwithstanding the mandate or direction of the execution creditor he acts on his own responsibility, and in so doing seizes the goods of a person who is not the debtor, he is liable himself and cannot claim indemnity from the execution creditor—*Collins* v. *Evans*[3]; but it is otherwise if the sheriff acts in obedience to the mandate or direction of the execution creditor and not on his own responsibility, for if acting in obedience to those directions he seizes the goods of persons other than the judgment debtor he is entitled to an indemnity from the execution creditor — *Humphrys* v. *Pratt*[2]; *Childers* v. *Wooler*[4].

There may be two opinions upon the question whether a sheriff is not declining from his high position as an officer of the law in accepting the mandate and acting on the direction of the execution creditor. If the Court had declined to allow the officer of the law to act on any other motive than his own responsibility, such an attitude might have found favour in the eyes of many lawyers, if not of many business men. No doubt for this reason the cases of *Collins* v. *Evans*[3] and *Childers* v. *Wooler*[4] show a great reluctance on the part of the Courts to hold that the sheriff has acted otherwise than on his own responsibility and at his own discretion, notwith-

[1] 5 Bing. N. C. 636; 9 L. J. C. P. 180; 50 R. R. 814.
[2] 2 Dow & Cl. 288; 5 Bli. N. S. 154; 35 R. R. 41.
[3] (1844) 5 Q. B. 820; 12 L. J. Q. B. 339.
[4] (1859) 2 E. & E. 287; 29 L. J. Q. B. 129.

standing explicit directions given to him by execution creditors; and this reluctance is very natural considering the means at the disposal of the sheriff of informing himself by means of interpleader proceedings as to the real ownership of the goods which he is desired to seize. In both the cases last named the Court refused to find that the sheriff had acted on the direction of the execution creditor.

In *Humphrys* v. *Pratt*[1], where the claim to indemnity was allowed, three points are clear:—(1) the title to the goods was doubtful; at any rate it is to be surmised that the sheriff would not have seized them without the direction of the execution creditor; (2) that the mandate or direction was in fact given; (3) that the sheriff acted on the mere mandate or direction and not on his own motion. The same remarks apply to *Dugdale* v. *Lovering*[2], where the position of the plaintiffs was analogous to that of the sheriff in *Humphrys* v. *Pratt*[1], in that they were under no obligation to act on the instructions of the defendant. The title to the wagons was doubtful; the defendant gave a distinct mandate or direction; and the plaintiffs acted on the mere mandate or direction and not on their own motion. In this class of cases, which is really an extension of the former class, it is clear from the judgment of Brett J. in *Dugdale* v. *Lovering*[2], and from the cases of *Collins* v. *Evans*[3], and *Childers* v. *Wooler*[4], that where the two parties are at arm's length, each acting on his own motion, there is no implied promise by either to indemnify the other. These cases justify us in laying it down that where one person insisting on his view of a doubtful state of facts directs another to act upon that view, and the other person acts on the mere direction and not on his own motion, there is evidence on which a promise by the former to indemnify the latter may be inferred. The question whether *Sheffield Corporation* v. *Barclay* was rightly decided depends upon whether it can be brought within this class of cases. We think it cannot.

It is now time to purge our minds of any doubt which may have arisen from the use of the words 'mandate' or 'direction.' Much force was attributed by the Lord Chief Justice to the 'request' of Barclay contained in his letter to the Corporation that they should register him. Let us say at once that it matters not a whit whether the person seeking indemnity has acted upon a mandate or direction given, or upon a request made, provided that he can prove that he acted on the mere mandate or direction, or on the mere request, and not on his own motion. *Lampleigh*

[1] 2 Dow & Cl. 288; 5 Bli. N. S. 154; 35 R. R. 41.
[2] L. R. 10 C. P. 196; 44 L. J. C. P. 197.
[3] 5 Q. B. 820; 12 L. J. Q. B. 339.
[4] 2 E. & E. 287; 29 L. J. Q. B. 129.

v. *Brathwait*[1] is the leading case upon the legal rights of one who has acted at the request of another. There 'Anthony Lampleigh brought an assumpsit against Thomas Brathwait and declared, that whereas the defendant had feloniously slain one Patrick Mahune; the defendant, after the said felony done, instantly required the plaintiff to labour, and do his endeavour to obtain his pardon from the king, whereupon the plaintiff, upon the same request, did, by all the means he could and many days' labour, do his endeavour to obtain the king's pardon for the said felony, viz., in riding and journeying at his own charges from London to Roiston, when the king was there, and to London back, and so to and from Newmarket, to obtain pardon for the defendant for the said felony. Afterwards, *scil.* &c., in consideration of the premises, the said defendant did promise the said plaintiff to give him £100, and that he has not, &c., to his damage £120.'

From this, the authentic statement of the case, it seems clear that Lampleigh acted not on his own motion but on the mere request of Brathwait; and indeed a little consideration will show us that a dangerous fallacy is involved in the proposition that every one who acts at the request of another is entitled to be indemnified by him. The most common legal relations generally commence with a request by one party to the other. A purchaser of groceries begins by requesting the grocer to sell him a pound of tea, but he does not therefore undertake to indemnify the grocer for any loss he may be put to through selling the tea. If the tea is the property of a third person who sues the grocer for conversion, it would be strange if the purchaser of the tea were bound to indemnify the grocer because he requested him to do what turned out to be a wrongful act. It is well known that a pawnbroker selling pledges does not warrant his title to the pledges he sells. When he requests bystanders to purchase pledges, does he undertake to indemnify them if they purchase and are afterwards sued for conversion? Assuredly not. Because they do not act on the mere request but on their own motion. The holder of shares in a company having heard that a dividend has been declared, but having received no dividend warrant, may write, one would think, to the company requesting them to send him a warrant without undertaking to indemnify them; the occasion for an indemnity arises under other circumstances, for example, when a warrant has already been sent and the company have reason to think it may have been mislaid, in which case, as is well known, companies decline to send a duplicate warrant except on an express contract to indemnify. But then they act in a doubtful state of facts on the mere mandate

[1] (1613) Hob. 105.

or direction or request of their shareholder and not on their own motion, and their sense of the situation is marked by their demand for an express indemnity. In the case under review it is conceivable that the Corporation might have received notice of the transfer and, taking the initiative, might have requested Barclay to send in his transfer deed for registration. If so the Corporation would have been surprised to learn that by that request they had impliedly undertaken to indemnify Barclay for having acted 'post,' and yet not 'propter,' their request. But enough has been said to show that in one sense a request is a common preliminary to almost all legal relations, and it is not necessary to labour the point that a request, when it is merely a preliminary to entering into legal relations, does not give rise to a valid claim for an indemnity.

Now in the *Sheffield Corporation* v. *Barclay* it is clear that the defendant was not a person insisting on his view of a doubtful state of facts, and directing the plaintiffs to act on his view. There was no doubt in the minds of either party that Barclay was the legal transferee of the stock. He certainly believed that he was, and the Corporation made their own inquiries and satisfied themselves that he was the legal transferee of the stock. We do not intend, however, to place too much reliance on the absence of doubt. For it may be said that a doubtful state of facts is not necessary to the implication of a promise to indemnify, and that the true view is that such a state of facts is merely evidence of the more vital and essential circumstances, namely, that a mandate or direction was given, or request made by one party, and that the other acted on the mere mandate or direction or request, and not on his own motion. If so, the whole case depends on the answer to two questions: (1) Did the defendant Barclay give any mandate or direction to the Corporation to register him, or did he make any request (other than as a mere preliminary to their acting on their own motion) that they should register him? and (2) Did the Corporation act upon his mere mandate or direction or request, or on their own motion? The first of these questions cannot be said to be free from doubt; for it has been held in two cases in America, *Brown* v. *Howard Fire Insurance Co.*[1] and *Boston & Albany Railroad Co.* v. *Richardson*[2], that a person presenting a transfer for registration represents, not merely that he honestly believes himself to be, but that he is the legal transferee. With unfeigned respect for the opinions of American Judges, we should be sorry to think that this is the law of England. Companies and Corporations in this country have means at least equal with those possessed by pur-

[1] (1875) 42 Maryland, 384. [2] (1883) 135 Mass. 473.

chasers of stock in the market of testing the authenticity of the signatures of the transferors of the stock purchased. When the means of testing these signatures are equal, why should either party make any representation or warranty to the other beyond that of an honest belief? When two persons have equal knowledge of the surrounding circumstances it is most probable that each of them acts on his own motion. The Corporation of Sheffield, like other corporations and companies, demanded and were paid a fee for registering Barclay, and under the circumstances it is submitted that he gave no mandate or direction to the Corporation that they should register him, and made no request other than as a mere preliminary step towards entering into a legal relation with the Corporation in becoming a registered transferee of their stock upon payment of the usual registration fee.

Further, there seems to be no reason for supposing that the Corporation acted on Barclay's mere request. They had ample means of their own provided by their Act of Parliament for satisfying themselves as to whether the transfer to Barclay was or was not a valid instrument. If they omitted to use the means at their disposal, that was not the fault of the defendant. They were empowered by their private Act to demand a statutory declaration from the transferors of their stock if the circumstances of the case should appear to make it expedient, and surely they are the judges of the expediency, if any. They did not apparently deem it expedient in this case, but they did what they considered sufficient. They wrote to the transferors and, receiving no reply, came to the conclusion that the transfer was in order. It is a common practice for companies and corporations, when a transfer of their stock is sent in for registration, to write to the transferor and ascertain whether the transfer deed has been in fact executed by him. No doubt this is not conclusive, but in the absence of other guidance the common practice affords some indication of what companies and corporations regard as their duty in such matters. But we are not without authority on this point. In *Simm* v. *Anglo-American Telegraph Co.*[1] Lindley J. dealt with the obligation of a company in these terms:—

'Their obligation by statute is to keep a proper register; it is a duty imposed upon them by s. 29 of the Companies Act, 1862; and further than that, when a transfer is brought to them to be acted upon, they do in point of fact take upon themselves the duty or the task of making inquiries about it; and it appears to me that when a person innocently and honestly takes a transfer to the company, it is no more than a statement by him to the following effect:—

[1] (1879) 5 Q. B. D. 188; 49 L. J. Q. B. 392.

'So far as I know the transfer is a genuine document: I shall leave it with you for a certain time to make inquiries, and if you make inquiries and find that it is a genuine document, of course you will receive me as a stockholder; if, on the other hand, the result of the inquiries is to show that it is not a genuine document, then of course you will not register me as a stockholder.' One might add the words 'except upon my indemnity.'

The judgment of Lindley J. was overruled in the Court of Appeal, upon the ground that the duty of a company to see to their register was a duty which they owed to themselves and not to a transferee of their stock. Bramwell L.J. says, 'I believe that the system of inquiry by companies before the registration of a transfer is modern: no doubt that is a very reasonable and proper step for companies to take; nevertheless, as it seems to me, it is clearly a practice to which they have recourse for their own benefit, and not for the benefit of any one else.' But that is sufficient to show that they act on their own motion and not on the mere request of the transferee. So did the Corporation in the case under discussion. They did not act on the mere request of Barclay, but satisfied themselves that he was the legal transferee and registered him accordingly.

If so there is no consideration for any promise to indemnify. From the theoretical point of view that is the conclusion of the whole matter. Unless the person claiming an indemnity has gone out of his way at the request of the person from whom he claims it, there is no consideration for the undertaking or agreement or promise of the latter. From the practical point of view there is much to be said on both sides, and it is difficult to adjust the balance. It is very important that stock in companies should be readily transferable, and that no unnecessary obstacles should be placed in the way of its passing freely from one person to another; but, on the other hand, it is very important that legal holders of stock should have some security in their holding, and that bona fide purchasers of stocks should be certified that they are purchasing stocks and not lawsuits. On the whole it is submitted that the mischief of allowing a company or corporation to rely on the request of any one who presents a transfer would be greater than that of holding that in registering a transfer they act on their own responsibility. If on making their own inquiries they find reason to doubt the genuineness of the transfer tendered, then let them refuse to register except upon an indemnity; but not till then. That will put the transferee on his guard. But until they have some reason for suspicion, what right have they to any indemnity? If a company refuse on insufficient grounds to register a transferee, what is the order made by the Court on a summons

under the Companies Act, 1862? Not to register upon having a proper indemnity, but to register, that is, unconditionally. If a company, without having any reason to doubt the authenticity of a transfer, were to refuse to register it except upon an indemnity, we venture to think that they could be compelled to register unconditionally.

We now come to deal with the grounds upon which the Lord Chief Justice based his judgment. That judgment purports to be founded on the case of *Simm* v. *Anglo-American Telegraph Co.*[1] and to appreciate it it is necessary to say a few words about that case and the judgment in it.

One Coats was the duly registered holder of stock in the Anglo-American Telegraph Co. His clerk without his authority instructed a stockbroker to sell this stock, and it was sold on the Stock Exchange, the clerk forging the transfer, to Spurling & Skinner. The company wrote to Coats to confirm the transfer. His clerk intercepted the letter and, after waiting a week for a reply, the company registered Spurling & Skinner as stockholders, and a certificate was prepared for them, though it was not sent for the following reason. They held the stock as trustees for Burge & Co., who obtained a loan from their bankers and executed a transfer of the stock to Simm & Ingelow as trustees for the bankers to secure repayment of this loan. The loan was paid off, and accordingly Simm & Ingelow, when registered, would have been bare trustees for Burge & Co. Simm & Ingelow and Burge & Co. then claimed to have Burge & Co. registered as the holders of the stock. In the meantime the forgery was discovered. The company claimed an indemnity against Spurling & Skinner. Lindley J. held (1) that the company were bound to keep their register correctly, and to inform themselves as to the validity of transfers presented to them before they registered the transferees: that the company having registered Spurling & Skinner, and Burge & Co. for whom they held the stock having altered their position on the faith of this registration, the company were estopped from denying that Spurling & Skinner were duly registered, and were therefore bound to register Burge & Co. He also held (2) that Spurling & Skinner were not bound to indemnify the company. Both parties appealed. The Court of Appeal reversed Lindley J. on the first holding, and held that, as the loan in respect of which Burge & Co. had transferred the stock had been paid off, Burge & Co. had not so altered their position as to estop the company from denying that Spurling & Skinner were duly registered, and that therefore the company were not bound to register Burge & Co. It therefore became unnecessary to adjudicate upon the appeal

[1] 5 Q. B. D. 188; 49 L. J. Q. B. 392.

from the second holding, viz., that the company were not entitled to an indemnity from Spurling & Skinner, and the Court of Appeal expressly refused to give any opinion on this doubtful question. The substantive decision of the Court of Appeal was that Burge & Co. were not entitled to be registered.

Now how does the Lord Chief Justice utilize this decision? 'It appears to me,' he says, 'that the Court of Appeal did decide that as between two innocent parties, one of whom had innocently and without negligence handed in a forged transfer, upon which forged transfer the company were asked to act, the loss was to fall upon the person who handed in the transfer, or, in other words, that they brought that case within the rule to which I referred, that when one of the two innocent persons must suffer, the party who has innocently put forward the request upon which the other one has acted must bear the burden.' But what the Court of Appeal did in reality decide was that as between two innocent persons, one of whom has innocently and without negligence handed in a forged transfer upon which the company are asked to act, the loss is to fall upon the person who handed in the transfer, if he claims to be registered. When the holder of a forged transfer comes to be registered, the company may refuse to register him, although he is quite innocent of any bad faith. That did not warrant the Lord Chief Justice in saying that the Court of Appeal had decided as a general proposition that as between two innocent persons the loss is to fall on the person who hands in the transfer whether proceedings are brought by or against him, or, in other words, that when one of two innocent persons must suffer, the party who has innocently put forward the request upon which the other one has acted must bear the loss whether he sues or is sued. That party cannot insist on being registered, but it does not follow that if the company or corporation have registered him they can insist on an indemnity. It is consistent with the decision of the Court of Appeal that whichever party moves in the matter must fail, or, in other words, that as between two innocent parties in such a case as this the loss must lie where it falls; for to say that one party moving must fail, is not to say that the other party moving must succeed.

For these reasons we venture, with all respect, to question the soundness of the decision in *Sheffield Corporation* v. *Barclay*.

WALTER HUSSEY GRIFFITH.

A DEFECT IN OUR LAW OF INTERNATIONAL BANKRUPTCY.

A PERFECT system of International Bankruptcy is practically impossible without world-wide international agreement. Such an agreement has only been concluded on any subject in isolated instances, and on the subject of International Bankruptcy it has so far proved impossible to arrive at even a preliminary general agreement as to principle.

Admitted that even approximate perfection is not possible without an almost impossible uniformity of international agreement, the question before us is this: Is our own law as just (for justice and perfection are in this connexion synonymous) as the imperfect condition of circumstances will permit? And the answer is distinctly, No! The most glaring defect is our method of treating insolvent branch establishments in this country; a method which in effect upholds a theoretically perfect doctrine, but which in practice produces unnecessary harshness and injustice to our own subjects. As in almost every other British institution the most unsystematic and theoretically imperfect parts in reality make most for justice and convenience, while where our law happens to coincide most thoroughly with theoretical perfection it falls most into practical difficulties and defects.

The two generally accepted alternative principles are Unity and Universality on the one side, and strict territoriality on the other. Our law is based really on no principle at all, unless compromise and common sense be a principle. Such principles as do exist are there rather by accident than design. 'English Law,' says Von Bar [1], 'in many of the leading points has reached fairly satisfactory results, less perhaps by a discussion of general principles than by the exercise of practical good sense.' Unity and universality are usually supposed to go hand in hand; but our law repudiates the one while it embraces the other. Unity has evidently no place in our system, for while a good deal of authority can be found for the proposition that English law bases jurisdiction on the domicil of the debtor, whether it be in England or abroad [2], s. 6 of the

[1] Gillespie's edition, p. 1011.

[2] *Re Blythman*, L. R. 2 Eq. 23; *Solomons* v. *Ross*, 1 H. Bl. 131 n.; Westlake, p. 134; *Smith* v. *Moffat*, L. R. 1 Eq. 397.

Bankruptcy Act mentions mere residence as being another ground of competence. English courts claim jurisdiction over debtors in many cases where they are not domiciled within the kingdom, and a declaration of bankruptcy in the place of the debtor's domicil is not in law a bar to commencing bankruptcy proceedings here. It is merely a ground for the English court to exercise its discretion as to whether it shall stay its own proceedings or allow them to continue concurrently with the foreign bankruptcy[1]. What could be more unscientific or more redolent of compromise? And yet in result it works far more satisfactorily than many other systems based on the purest theories.

On the other hand the Bankruptcy Act of 1883 was hailed abroad as a triumph of universality[2]. By the combined effect of ss. 44 and 168 the property of a bankrupt divisible among his creditors comprises his 'money, goods, things in action, land, and every description of property whether real or personal, and *whether situated in England or elsewhere.*' And this universality is recognized as affecting not only the property of a bankrupt, but his capacity, no matter where he may be. Lord Lindley evidently took this view when he said[3]—'It must be borne in mind that bankruptcy is a very serious matter. It alters the status of a bankrupt. This cannot be overlooked or forgotten when we are dealing with foreigners who are not subject to our jurisdiction. What authority or right has the court to alter in this way the status of foreigners, who are not subject to our jurisdiction?' A similar universality is allowed to the judgments of foreign courts[4].

In all this English law is strictly theoretical, but in following this very theory has fallen into its gravest defect. We would not find fault with the universal effect given to foreign judgments of bankruptcy over property in England; that is only just, for we claim the same universality for our own. But when the idea of universality as affecting the person prevents our courts from declaring a bankruptcy, which we should be perfectly justified in declaring according to the accepted rules of international law, and when such refusal works greatly to the detriment of our own subjects, it is then that we cannot but wish that the English courts had followed their usual course of unsystematic common-sense, and had not for once stood forward as the staunch supporters of a logical theory. A branch establishment of a foreign firm is carrying on business and contracting debts in England while the

[1] *Ex parte M'Culloch*, 14 Ch. D. 716, per James L. J.
[2] Journal de Droit Int. Privé, vol. xi. 230.
[3] *Re A. B. & Co.* [1900] 1 Q. B. 544.
[4] Except as to land in England.

members of the firm are domiciled or reside abroad and are therefore not personally subject to the jurisdiction of the English courts. At first sight the words of the Bankruptcy Act would seem to bring such a case within the jurisdiction of the English courts :—'A creditor shall not be entitled to present a bankruptcy petition against a debtor unless (among other things) the debtor is *domiciled* in England or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or *place of business* in England.' To any one not accustomed to the surprises which lurk in every clause of an Act of Parliament would it not have seemed obvious that a foreign firm, which carried on a branch business here, was *ipso facto* subject to the English bankruptcy jurisdiction, either as being domiciled here in the commercial sense of the word, or, at any rate, as having a place of business in England?

Such unfortunately is not the case. A string of cases, culminating in a decision of the House of Lords, has deprived our courts of a jurisdiction so necessary for the commercial interests of Englishmen.

Ex parte Crispin [1] commenced the series. A Portuguese subject, domiciled in Portugal, who had contracted some debts while temporarily resident in England, left the kingdom in consequence of being served with a writ. He was held not to be liable to bankruptcy proceedings here as he had not committed any act of bankruptcy in England.

Ex parte Blain [2] goes further. The plaintiff recovered judgment against a firm consisting of eight persons, two of whom had never been in England: he then presented a bankruptcy petition against all the members of the firm. With regard to the two members who had not been in England the petition was refused. 'English legislation,' said Lord Justice James, 'unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English court to give effect to an English statute, applies only to English subjects and foreigners in the jurisdiction.' It would be monstrous, he contended, if an English merchant at Liverpool were summoned to appear and defend bankruptcy proceedings in Honolulu under the code of Kamehameha II, King of the Sandwich Islands. But, we would respectfully submit, if the Liverpool merchant was really carrying on business in Honolulu so as to be commercially domiciled there, even though he had not paid a visit to that particular island in person, there would be no hardship and no illegality in subjecting him, at least so far as concerned his business in the island, to the local bankruptcy code. In this case,

[1] L. R. 8 Ch. 374. [2] 12 Ch. D. 522.

however, it was not contended that the two partners in question were domiciled in England in any sense.

Brett L. J. laid down an important principle in the same case. A firm as such cannot commit an act of bankruptcy; it must be the personal act or default of the person who is to be made bankrupt.

After this decision it was still the belief, or at any rate the hope, of lawyers and jurists that s. 6 of the Bankruptcy Act was to be construed positively as well as negatively, and that any debtor who carried on trade in England was liable to bankruptcy proceedings in England if he committed out of England one of those acts of bankruptcy which in the terms of the Bankruptcy Act may be committed in England or elsewhere.

This seems to have been the opinion of Westlake[1], for after quoting the words of Sir G. Mellish, 'A foreigner not domiciled in England *and not carrying on trade* in England, who quits England without having committed an act of bankruptcy, cannot be made a bankrupt on an alleged act of bankruptcy committed out of England,' he continues: 'It seems difficult to say that a person's having an ordinary residence or a place of business within the jurisdiction is not a fair ground for distributing among his creditors all property of his which can be found within the jurisdiction, on the occurrence anywhere, within a reasonable time, as a year, of one of those circumstances which are deemed in other cases to give fitting occasion for such distribution. Supposing that subjection to the jurisdiction on the ground of domicil is wanting, there is not wanting the element of voluntary submission to it in circumstances which may lead those who give credit to the foreigner to expect an equitable application of his means to their payment after no excessive delay on their part. The better opinion, therefore, probably is that the words quoted from s. 6 of the Bankruptcy Act, 1883, should be read positively as well as negatively, so as to give the creditor a right to present a petition in the cases mentioned in them, wherever the act of bankruptcy was committed[2].'

This view seems to be supported by Piggott[3], and by the judgment of Lord Esher in *Pearson's* case in 1892[4].

Such hopes or beliefs were shown to be unfounded by a recent decision of the House of Lords[5]. The Charles A. Vogeler Company was a firm consisting of two partners, citizens of the United States, who resided and carried on business there. This firm possessed a branch establishment in the city of London, worked by a manager on

[1] Westlake, s. 127, 3rd ed. pp. 147–148. [2] pp. 147–148.
[3] Foreign judgments, p. 329. [4] [1892] 2 Q. B. 263.
[5] *Cooke* v. *Charles A. Vogeler Co.* [1901] A. C. 102.

their behalf: the branch business had assets in England and had contracted debts in England. In January, 1900, two English creditors filed a bankruptcy petition against the firm founded on two acts of bankruptcy—one, that they had through their agent, the manager, given notice in England to their creditors that they had suspended or were about to suspend payment of their debts; the other, that they had in America assigned all their property to a trustee for the benefit of their American creditors (an act which may in the terms of the Bankruptcy Act be committed 'in England or elsewhere'). The debtors disputed the jurisdiction of the court.

Counsel for the plaintiffs argued that the case was clearly distinguishable from *ex parte Blain*, in that the first act of bankruptcy was actually committed in England, and that the second might be committed in England or elsewhere; that if the receiving order should not be made the English creditors would have no remedy: the English assets would be realized by the trustees of the deed and the proceeds sent to America, and employed in paying the American creditors of the firm to the exclusion of the English creditors. The court, however, decided that there was no jurisdiction. Lord Lindley, after dwelling on the serious and universal effects of bankruptcy in the passage we have quoted above, continued: 'I can see the difficulty in construing s. 6. It might possibly be thought that the word "debtor" is so plain as to confer jurisdiction over foreigners. But the Court of Appeal has said that it is not, and I am unable to distinguish the present case from *In re Pearson*.'

In the House of Lords[1] it was not contended that the territorial law will bind people who are not within the jurisdiction; but that for the purposes of bankruptcy the respondents were within the jurisdiction, as having had a place of business within the year. In other words, that commercial domicil alone is sufficient to found jurisdiction. It is sufficient in case of a company or other corporation[2]—why not for an individual? Surely a foreigner sufficiently submits himself to the jurisdiction of our courts, who embarks a large portion of his capital in a commercial undertaking here—who claims the assistance of our courts to recover debts due to him by English debtors by reason of that undertaking, and who incurs liabilities to English creditors for which he can be sued in these courts. Those who enjoy liberty to trade must surely be amenable to bankruptcy, the inevitable issue of unsuccessful trade.

The Lords affirmed the previous decision. Their reasons are

[1] *Cooke* v. *Charles A. Vogeler Co.* [1901] A. C. 102, Sir R. T. Reid.

[2] *Re Commercial Bank of South Australia*, 33 Ch. D. 174; *Haggin* v. *Comptoir d'Escompte de Paris*, 23 Q. B. D. 519.

best stated in the words of Lord Halsbury: 'I am by no means prepared to say that it might not be a reasonable thing to apply the English law of bankruptcy to a trader, who, though himself personally abroad, exercised a trade through the instrumentality of an agent, and possessed assets in this country. . . . But if it is manifest that the language of the statute does not reach the case, no court has jurisdiction to enlarge the ambit of English legislation beyond what the legislature has permitted'; and he goes on to say that the Bankruptcy Act does not reach the case. The word 'debtor' must have some limit, and that limit must be 'a debtor who is subject to the English bankruptcy laws': a foreigner coming to this country and trading here is subject to our laws; but an act of bankruptcy must be a personal act or default, and it cannot be committed through an agent or a firm as such.

Lord Davey struck a note of hesitation in admitting that he had some doubt whether in *ex parte Blain* the foreigners might not have been held responsible for the default of their partners in the course of carrying on the business.

The facts of this case alone sufficiently show the harshness of its result. It is a strict application of the principle of universality—it is an equally striking instance of 'summum ius, summum nefas.' It is a grievous defect in our common-sense system of law, that no matter how far the creditors may have to go, no matter how the laws of the debtor's country differ from our own, no matter what imperfect justice they may obtain when they get there, there is no way for an English creditor to defend his rights by the safeguard of an English bankruptcy, if only his debtor happens to be a partnership and not a company, and none of the partners happen to have personally visited England. The hardship is enhanced by the fact that the mere presence in England of such a branch establishment makes it impossible for a creditor when suing to obtain security for costs[1]. This hardship will fall even more heavily on the colonies. F. T. Piggott, Attorney-General for Mauritius, has expressed a strong opinion as to its effect there and in similar places, where most of the business houses are branch establishments of European firms whose partners have probably never visited the island. The decision comes from the Supreme Court of Appeal, and nothing short of legislation can alter it.

Suppose the legislature inclined to move in this matter, and suppose—a still more improbable supposition—that it could find time to legislate on such a subject, what grounds could be suggested whereby this unjust result of a strict universality could be

[1] *Redondo* v. *Chaytor*, 4 Q. B. D. 457.

avoided without falling into the Charybdis of an equally unjust territoriality.

Foreign positive law is not very fertile in suggestions. Legislation on the international effect of bankruptcy is almost a blank: but there is a mass of 'jurisprudence,' which, though varied and sometimes contradictory, at least shows us what to avoid.

American law makes bankruptcy jurisdiction depend on residence and the commission of acts of bankruptcy within the state, so that a decision similar to the one we deplore might possibly be made in America. Story, however, says[1] that according to the general American doctrine, if Americans are diligent in obtaining the help of their country's laws against property of a bankrupt in the state, there is no reason why they should be sent to get what dividend they can abroad. Before the recent general law[2] superseded them, the laws of several individual states allowed bankruptcy proceedings to be taken against non-resident debtors who had property within the jurisdiction. A decision such as in *ex parte Blain* is prevented by s. 5 (c), by which a court of bankruptcy which has jurisdiction over any one of the partners of a firm may have jurisdiction over all the partners and the partnership property.

By Scottish law sequestration may be awarded when the debtor is *subject to the jurisdiction* of the Supreme Court of Scotland *and* has within a year resided or had a dwelling-house or place of business in Scotland[3]. This seems to show that Scotland would also be affected by the judgment in the *Vogeler* case; but Scottish courts recognize domicil as a basis of jurisdiction, and not the juridical domicil of the law of intestacy, but with the broader meaning of 'home or trading establishment[4].' Whether this distinction would save Scottish law from the defect of the English system may be doubted; but whatever the House of Lords might be inclined to do, it is probable that a Scottish court would recognize trading alone as giving ground for exercising jurisdiction.

Italian law accepts unhesitatingly the principle of universality, but avoids to some extent the difficulties which assail our system by adopting commercial domicil as the basis of jurisdiction. Bankruptcy is pronounced by the tribunal where the debtor has his principal commercial establishment. In the case of a debtor having commercial establishments in different states, if the several establishments form in reality but one house of business, a bankruptcy declared at the principal business seat comprises all the branches; but where the debtor has several distinct houses of

[1] Conflict of Laws, p. 575.
[2] [1898] Sess. II. c. 541.
[3] 19 & 20 Vic. c. 79, s. 13.
[4] *Phosphate Sewage Co.* v. *Lawson*, 1878, R. 1138.

business in different states a declaration of the bankruptcy of one does not affect the others simply because they are managed by the same individual; and this is no departure from the rule of universality, for all property connected with the bankrupt house is comprehended in the bankruptcy wherever it may be situated.

The difference between Italian and French law is illustrated by the case of Hoffman[1]. A trader carrying on business in London but possessing branch establishments in Paris, Brussels, and Milan was declared bankrupt in England. Some of his Italian creditors attached his property in Milan. The court held that the title of the English trustee in bankruptcy was good against the creditors on the ground that Hoffman was domiciled in England, and the Italian branch was connected with the English. After the declaration of the English bankruptcy a French court declared Hoffman bankrupt[2] in respect of his branch establishment in Paris. The French Court of Appeal avowedly preferred the interests of French creditors to the principle of universality, and no one has suggested that internationally they were not entitled to do so. Bankruptcy, they said, is a matter of public order! Articles 3 and 4 of the Code Civil have given Frenchmen the utmost facilities to sue their foreign debtors in France; in view of public order it matters little that Hoffman had his principal establishment in London; and the argument for the expediency of universality cannot prevail against the aforesaid articles of the Code Civil. Such reasoning would make short work of the *Vogeler* case.

The French courts always act on this principle of protecting their own subjects. In 1875 it was held[3] that a commercial firm having its head establishment abroad and a branch establishment in France could be declared bankrupt in the place of the branch establishment, if in consequence of its operations in France such branch establishment had suspended payment. This principle has been followed in several later cases[4].

French law has on the other hand sometimes upheld the unity of the bankruptcy of the domicil. The court of Rouen in 1874[5] held that there can be only one bankruptcy, for a trader has only one domicil; and a debtor domiciled in France who owed the greater part of his debts there was declared bankrupt in France, though he had already been declared bankrupt in England[6]. Again, the court of the debtor's personal domicil has been declared

[1] Journal Clunet, vi. p. 77, viii. p. 251. [2] Ibid. v. p. 606.
[3] Trib. Comm. de Seine, 18 Aug. 1875.
[4] See *Lisner Hooper & Co.*, C. d'Orléans, 27 Mar. 1885, and Journal de D. J. P. xxiv. p. 1021.
[5] *Devaux's* case, Journal de D. J. P. viii. 125.
[6] Trib. Comm. de Seine, 10 May, 1881; Journal, viii. 514.

competent, though he had neither his chief establishment nor any branch establishment in France, and had never carried on business there[1].

These cases are certainly inconsistent with *Hoffman's* case, and seem to show considerable conflict of principle, justifying Von Bar's criticism, that France, though she has made the most praiseworthy efforts, has her bankruptcy law in the state of the greatest confusion. The only consistent principle to be discovered in the French law seems to be this, that French courts recognize the competence of the court of the domicil, but refuse to recognize unity or universality when they conflict with the interests of French creditors. Very unsystematic, almost unprincipled!—but at any rate French creditors have no ground to complain that the law of their country works hardships for its own citizens.

Belgian law is founded almost entirely on that of France, but upholds the reality of the doctrine which French courts profess only in name. The court of Brussels declared in 1851 that 'the state of the bankrupt trader extends its effects everywhere, where the trader possesses any property; the administration of bankruptcy is *one, indivisible and universal*[2].' This is followed by a string of cases all upholding in terms of eloquence and almost affection the principle of unity and universality. Greek law provides a suggestion. The Court of Appeal at Athens in 1892 upheld the declaration of bankruptcy of a firm in Greece, though its chief place of business was situated in Belgium. Competence, said the court, in the matter of bankruptcy is governed by the interests of creditors, and the *statut personnel* of the bankrupt is immaterial. A trader who has an independent establishment in Greece and a principal establishment abroad may be declared bankrupt in both countries. In case of such double bankruptcy each bankruptcy has its own assets, its own debtors and creditors. The foreign bankruptcy is recognized in Greece, but only so far as concerns the foreign bankruptcy[3].

But this solution of our problem is open to the accusation of the injustice which is inseparable from the application of a strict territoriality; namely, that one set of creditors may get a much higher dividend than the others, or even be paid in full, while the others get practically nothing; the inequality depending merely on accident—the place where the goods happen to be—or the place where the bankrupt in the interests of his favourite creditors chooses to deposit them.

Germany too escapes our difficulty. By Articles 237 and 238 of

[1] C. de Paris, 2 Aug. 1883; Journal, xi. 63.
[2] Court of Brussels, 1851, Journal Clunet, vii. 87.
[3] See also C. d'Appel de Patras, 1896, No. 824, Journal de D. J. P. xxv. p. 963.

the new code, 'If a debtor declared bankrupt abroad possess goods in Germany, execution may be had over these. . . . The bankruptcy comprises only the assets which are in Germany, when the debtor possesses an industrial establishment there, but has not his juridical domicil there.' The effect is[1] that German creditors can obtain execution in spite of a foreign declaration of bankruptcy, but at the same time the foreign administrator is recognized, and if he is first in the field can get execution himself.

Most countries will probably continue thus to prefer the interests of their own subjects to perfection of theory and so universality be postponed indefinitely, unless some means be found in the nature of a compromise, which shall safeguard the rights of individual creditors, and yet support the universal effect of the bankruptcy of the debtor's domicil.

An interesting discussion on this point took place at the meeting of the Institute of International Law at the special Conference at the Hague in 1893[2].

After much discussion the following resolution was adopted—

'Bankruptcy can always be declared by the tribunal where a simple branch establishment (*succursale*) is set up—but shall produce no effect except in the country where it is declared.

'In the case of a bankruptcy declared in the country of the principal seat of affairs, the proceedings of the tribunal of the *succursale* shall be stayed.'

The adoption of some such amendment into the domain of positive law would go some way towards removing our difficulty: it would protect creditors from such a flagrant injustice as an assignment of all the debtor's property to trustees for the foreign creditors, and it would prevent the removal of the debtor's assets from the jurisdiction. But creditors would still be often obliged to suffer inconvenience and expense in taking proceedings in a far country.

A perfect solution is to be found, if at all, in a suggestion by Jitta in his book on International Bankruptcy[3]—a suggestion which appears to be original and fertile in great possibilities.

A secondary declaration of bankruptcy, he suggests, should be allowed, whenever there is a secondary establishment in the country, which does not publicly declare that it is secondary—or where such an establishment has existed but has been suppressed within, say, three months of the bankruptcy petition—or again if there is a very large part of the debtor's patrimony within the

[1] Von Bar, 1053.
[2] Annuaire de l'Institut de D. Intl. xiii. 266-280.
[3] Ch. 5.

country. The secondary bankruptcy takes the place of the principal declaration, if that is not or cannot be declared.

When declared, the secondary bankruptcy is a principal bankruptcy in itself until declaration in the 'centre of active life': it then becomes ancillary.

The secondary administrator can do all acts for securing and distributing the property subject, in the latter case, to instructions from the principal administrator, and he can exact proof of local debts before the local court. The local creditors may prove their debts by local law, provided they were contracted with the local establishment: the secondary administrator represents these creditors, votes for them in questions of composition, and demands dividends on their behalf.

There might in this way be several ancillary bankruptcies without inconvenience, and if there should be no bankruptcy in the chief centre of business, one of the ancillary bankruptcies—perhaps the earliest—might be declared principal.

Such is the picture that Jitta draws. English jurisprudence should welcome it, for it is a compromise: and more than that, it is a compromise, which, though illogical as all compromise must be, is useful and workable, and might be adopted into English law without to any great extent disturbing the present form of bankruptcy administration.

Legislation would of course be necessary, but only a short statute of one section, amending the Act of 1883. We would not dare to attempt that most difficult of all tasks, parliamentary draftsmanship, but we can imagine the necessary legislation conceived somewhat in these terms[1]:

§ 1. The word 'debtor' shall, in the discretion of the court, be deemed to include any person, who within a year from the presentation of the petition has had a place of business in England, whether he has resided in England or otherwise submitted himself to the jurisdiction of the court or not.

Provided that where the debtor is not subject to the jurisdiction of the court, the word 'property' shall not include any property of the debtor not within the jurisdiction of the court.

Provided also that if the debtor shall be declared bankrupt by a competent tribunal of any other country, the court shall have power, if it shall think fit, to order that the trustee shall

(*a*) Hold all the property of the debtor in his hands as the agent of the administrator or syndic appointed by the foreign tribunal;

(*b*) Represent as trustee such creditors as shall prove in the English bankruptcy and sue in their name before the foreign tribunal;

[1] See Bankruptcy Act, 1883, s. 168, for meaning of terms.

(*c*) Defend any actions brought in England against the administrator or syndic appointed by the foreign tribunal in the name of such administrator or syndic ;

and that all debts proved in England shall be deemed to have been proved before the foreign tribunal.

We should thus retain our unscientific but eminently useful practice of leaving much to the discretion of the court, and extend the present discretion by adding the power to declare an English bankruptcy to be only ancillary to the principal bankruptcy in a foreign country ; and to declare such a bankruptcy, whether the debtor has personally visited England or not.

It is not claimed that this legislation would produce a perfect system of international bankruptcy law for England ; but it would remove the chief defect of our present system, and would at any rate, during the interval which must elapse before the golden age of international uniformity, place our system in advance of any now existing in possessing a *via media* between the two at present unjust extremes of territoriality on the one hand and unity on the other.

ALFRED F. TOPHAM.

THE NEW 'INVESTIGATION' FOR PATENTS.

THE Patents Act, 1902, makes several important changes in our patent system. The amendment of the law as to compulsory licences has received the greater share of public attention; but the new provisions for an 'investigation' into prior specifications before new patents are granted, will be at least as far-reaching in effect. Hitherto there has been no provision for any such examination, with the result that patents have been granted over and over again for the same invention. In order to avoid the obvious evils which result from the multiplication of invalid patents, both the United States and Germany have for some time had a systematic search as to novelty before granting new patents, the search including both home and foreign specifications and the standard publications on the various subjects as well; in neither case is there any official guarantee as to novelty, but in both the search is so comprehensive that the patents granted after it are seldom upset by the courts. Without instituting any such general examination as to novelty, the new Patents Act provides for what is termed an investigation, designed to cover only previous British specifications, subject to certain exceptions.

The new system may be described thus. When, on any application for a patent, the complete specification is received, the examiner is to make an investigation as to whether the invention claimed has been claimed or described wholly or in part in any previously published British specification; but this investigation is not to extend to specifications more than fifty years old, or to the provisional specifications (not followed by complete ones) which were published in accordance with the old practice before 1884. If, in the opinion of the comptroller, this investigation discloses nothing adverse, the application will proceed in the ordinary way. If otherwise, the applicant will be informed of the particulars; if he then amends his specification so as to avoid the objections of the comptroller, the application will proceed on the amended specification in the ordinary way; while if the specification is not so amended, the applicant may still obtain his patent, but there will be inserted in the specification as published a reference to such prior specifications as the comptroller considers right 'by way of notice to the public.' There are also provisions for an appeal from

the comptroller to the law officer, for shortening the time within which an application accompanied by a provisional specification must be followed by a complete specification, and for the prescribing of a new fee in respect of the new investigation. The investigation is not to be held in any way to guarantee the validity of any patent, and there is to be no official liability in respect of the investigations, or of the reports or proceedings thereon. The system is to be brought into operation by a departmental order, laid before both Houses of Parliament, and is to apply only to applications made after it has been brought into operation. These are the principal provisions of the first section of the new Act; the second section will be considered presently.

These new arrangements will do a good deal towards checking the multiplication of invalid patents. How large a proportion of the patents now granted are of that character may be gathered from the results of the official investigation recently made in respect of complete specifications accepted during certain specimen periods; though the range of that investigation did not extend further back than 1877, the result showed that 'upwards of 42 per cent. of the specifications accepted appear to have been anticipated either wholly or in part by' previous British specifications[1]. Yet all these were granted without any notice to the patentee or to the public of the true state of things. Under the new conditions, the number of patents granted with what may be called 'clean' specifications will probably be much less; and the number of grants as a whole will probably be diminished too, because in cases of serious anticipation, the applicant will sometimes prefer to abandon his application and to save the sealing fee.

It is likely, however, that the volume of patent work will be increased. Though the grants may be fewer, the applications will probably be more numerous, because (except for the additional fee, which is not to exceed £1) the fees will be the same as at present, and will give the applicant the additional advantage of the investigation. With the investigation thus included in the fees, it will seldom be worth the applicant's while to make anything beyond a 'fireside search' through the abridgement volumes. The decrease in the demand for searches will probably be more than compensated for by the increase in the number of the applications of hearings before the comptroller, and of appeals to the law officer. These appeals may be numerous at first, but how far the number keeps up will depend upon the practice adopted by the law officer. In any case, such questions as whether an invention which is described in a previous specification is in fact workable, which might

[1] See the Report of the Departmental Committee (1901), C. 506, p. 4.

be considered at the trial of an action for infringement, will probably not be taken into account at the hearing of this appeal. Whether the appeal is a rehearing or an appeal in the narrower sense, it is unlikely that anything will be considered beyond the specifications themselves. The real question in such appeals will probably be, not whether the new application has in fact been anticipated by the other, but whether the relation is such as to justify the insertion of a reference to that other 'by way of notice to the public.' The validity of the patent, whether the specification is 'notified' or 'clean,' is still left as a matter for the courts to determine; but in practice the prudent investor will not put much money on a patent with a 'notified' specification.

One may regret that the new investigation is not made exhaustive, so far as previous British specifications are concerned. The excluded classes are not very numerous; the number of provisional specifications not followed by complete ones which were published under the old practice is only about fifteen hundred, while the number of complete specifications which will be fifty years old in 1905—when the new system is expected to be brought into operation [1]—will be about thirty thousand [2], which is about equivalent to two years' output at the present rate. The number of specifications more than fifty years old will increase as time goes on; but they will increase at a very much slower rate than that at which new specifications are added, and the system, once it is fairly in working order, should be able to keep pace with the increase of the total number. It may also be observed that, according to present plans, the new series of illustrated abridgements—which include the 'published provisionals' and which are being carried back so as to cover the whole range of British specifications—will be completed by the end of 1906 [3]. With facilities for investigating over the whole period thus provided, it is not unreasonable to hope that the new investigation will yet be extended so as to include the excluded classes.

In accordance with the exclusion of these two classes, the second section of the new Act provides that 'an invention covered by any patent granted on an application to which section one of this Act applies, shall not be deemed to have been anticipated by reason only of its publication in a specification' belonging to either of the two excluded classes. But even if such specifications should be excluded from the investigation, this provision appears to be

[1] See the answer of the President of the Board of Trade to a question in the House of Commons, May 7, 1903.

[2] See Appendix D to the Annual Reports of the Comptroller, and the official Instructions to Applicants for Patents, section 28 (2).

[3] See the Report of the Departmental Committee (1900), C. 210, pp. 7 and 14.

contrary to principle. The new investigation is in no way conclusive. Even when a specification has passed that ordeal successfully, the patent may still be upset if it can be shown to have been anticipated by any previous British specification within the scope of the investigation, even though the examiner may have overlooked that one or considered it irrelevant; or it may be upset in any of the other modes of anticipation to which the investigation does not extend—as, for instance, by any of the foreign specifications to which the public have access at the Patent Office Library, and which are much more numerous than our own[1]. Therefore the mere fact that the specifications of these two classes in question are not included in the investigation, is no sufficient reason for making them any less effective as anticipations than they are now. To do so may lead to a serious narrowing of the rights of the public, by permitting inventions which have become public property to be monopolized again.

What do the words 'by reason only of its publication in a specification' belonging to either of these classes mean? To take them in the narrow sense would make this second section a dead letter, for all the inventions belonging to these classes will be described in the abridgement volumes, while some of them are also described in private abridgements and other compilations. Probably the more correct view is that the term is designed to cover not only the actual specifications, but also any other descriptions and abridgements which are based upon these specifications and upon these specifications alone. But this view would work out to a wide exclusion, probably to an exclusion far wider than was ever intended, and would raise such questions as whether, in various works of reference, the authors have in any way gone beyond the specifications referred to. Any technical restriction on anticipation will probably raise more difficulties than it settles. Whether an invention has in fact been anticipated, should still be left to be determined on the same broad principles as at present. Undoubtedly, the most satisfactory plan would be to include in the scope of the investigation the two excluded classes, and if this were done there would not remain even a semblance of justification for this second section of the new Act.

The principal objects of the investigation appear to be, to check the multiplication of invalid patents and to protect the public by not issuing fresh patents for inventions covered by previous British specifications, without inserting a reference to these in the

[1] As to the anticipating effect of these foreign specifications in the Patent Office Library, see *Harris* v. *Rothwell* (1887) 35 Ch. D. 416. The United States Patent Office alone now issues about 25,000 new patents each year, or nearly twice as many as are issued in this country.

specification of the new patent. But even apart from the two classes already referred to, this is but imperfectly provided for. There will still be not a few cases in which the specifications of new patents which are anticipated by prior but recent British specifications, will still be issued without any reference to these anticipations being inserted.

The new investigation is to cover only specifications 'published before the date of the application' for the patent in question. Previous complete specifications are not to be taken into account till they have been examined and accepted and sent to the printers and published—a series of operations which will generally take about two months. Thus, if several conflicting specifications follow closely the one upon the other, the second application being made before the complete specification of the first is published, that first specification will not be taken into account in the investigation as regards the second, even though it is the clearest possible anticipation. That the specification of the second patent should be thus published without any reference to that of the first, is a serious blot in the new system. The chances of practically simultaneous invention are not so small as may at first sight appear. It is almost a commonplace in the history of intellectual development that several minds attain the same result together; as witness the independent claims of Gray and Bell to the invention of the telephone. Special circumstances also tend to the same result; thus, for instance, when it was proposed to make the use of automatic couplings compulsory, there was a rush of conflicting inventions to meet the anticipated demand; while the recent cab accident to a distinguished statesman produced another sudden rush of similar inventions designed to prevent the recurrence of such a disaster. It is not easy to see how the difficulty here mentioned can be overcome, except by extending the field of the investigation so as to make it cover all the complete specifications of which the patents would have priority of date to the patent of the specification in question. This, however, would involve the making of fresh rules as to the mode and the order of the investigation, as well as several other departures from the proposed practice.

The difficulty just referred to will be the greater, because of our system of provisional protection and of dating patents back to the date of the original application [1]. Suppose, for instance, that two men, *A* and *B*, apply for patents which are in fact conflicting. *A* makes his application, say, in January; he sends with it a provisional specification, and does not file his complete specification till June. Some time between January and June *B* applies, filing

[1] S. 13 of the Patents, Designs, and Trade Marks Act, 1883.

his complete specification either then or later. As the law stands, *A*'s patent will be dated as from the date of his application in January, and will thus have priority. But *B*'s specification, whether published before or after *A*'s, will not have any reference to *A*'s inserted in it, and so, in that case also, the public will not receive the protection which they ought to receive. The further difficulty here referred to arises from the practice of dating the patents back to the dates of the original applications, whether these applications were accompanied by complete specifications or only by provisional ones. There are two possible remedies. One is, to abandon the system of provisional protection and to require every application for a patent to be accompanied by a complete specification. The other is, to revert to the old practice and to give the authorities a limited discretion as to the dating of patents, the acceptance of the suggested date being a condition of sealing. Under these circumstances the authorities would probably decline to date back a patent so as to nullify a patent already granted[1], and the general result would be much the same as if the first alternative had been adopted.

A somewhat similar difficulty arises in connexion with the antedating of patents under the international arrangements. Suppose, for instance, that *A* patents an invention abroad, and that within a year of his foreign application he applies for a similar patent in this country, accompanying his application, as now required in such case, by a complete specification. In the interval between *A*'s foreign and the home applications, *B* applies in the ordinary way for a conflicting British patent—and perhaps has his specification published and his patent granted before *A*'s application for a British patent is received here. *A*, however, makes his home application under the international arrangements, and consequently his British patent when granted will be dated back to the date of his foreign application, and will thus have priority of, and invalidate, *B*'s. But here again *B*'s specification, whether published before or after *A*'s, will not have inserted in it any reference to *A*'s[2]; and so in this instance also the public, in dealing with *B*'s patent, will not have any proper protection. This case cannot be remedied by anything short of some considerable change in our arrangements with other nations; but I mention it as an additional instance of the difficulty of attempting to combine a system of protecting the public by an investigation of previous complete specifications before

[1] As did Lord Hatherley L. C. in *ex parte Bates & Redgate* (1869) L. R. 4 Ch. 577, decided under the Act of 1852. But see the observations of Lord Cairns L. C. in *In re Dering's Patent* (1879) 13 Ch. D. 393.

[2] Whether *A*'s will or will not have inserted in it a superfluous reference to *B*'s seems to depend on whether or not *B*'s specification is published before *A*'s application is received.

granting new patents, with a system of dating the patents out of the order which the order of these complete specifications would suggest.

There are thus three cases in which even a patent granted with a 'clean' specification may be found to have been anticipated by an earlier dated British patent, of which the specification was not published in time to be included in the scope of the investigation. For convenience, they may be classified thus:—

(1) Where the complete specification of that earlier dated patent was received but not published before the date of the patent in question.

(2) Where, though the complete specification of that earlier dated patent was not received before that date, yet the application and the provisional specification were; and the patent granted after the acceptance of the subsequently received complete specification was dated back to the date of the application. By section 1 (8) of the new Act, the time which may elapse between the making of the original application and the filing of the complete specification is reduced, as from the time when that section is brought into operation, from nine months to six.

(3) Where, though even the application for that other patent was not received before the date of the patent in question, the other applicant had previously applied in one of the 'Convention Countries' for a similar patent (afterwards granted), and under the international arrangements his subsequent British patent was dated back to the date of his foreign application. By the Patents Act, 1901, applications for patents claiming to be dated back in this way must be accompanied by complete specifications, and the limit of time for dating them back is extended from seven months to twelve.

In these statutory limits the point of time taken is the date when the application is received; not the date of allowance, or of printing, or of publication. These processes take a considerable time, which in practice must be added to the set period; and that time becomes further extended if the application, instead of being allowed forthwith, gives rise to correspondence. Thus even under the new conditions, and when a British patent is granted with a 'clean' specification, considerably more than a year must elapse before any one can be reasonably certain that it has not been anticipated by some other British patent of too recent a character to be included in the scope of the new investigation.

Quite apart from these serious imperfections, it must be remembered that the new investigation is in no sense a search for novelty. Its application even to previous British specifications is only partial,

and it takes no account whatever of those more numerous foreign specifications to which the public have access, or of any of those other modes of publication or of use which may prove quite as effective anticipations as a British specification. Consequently, the fact that a British patent has been granted even with a 'clean' specification, should not be taken to suggest even a probability that it is valid. This should be kept constantly in mind by the investing public after the new practice has come into operation. Prospectuses will, no doubt, be adorned with statements that the official examiners have been unable to find anything adverse to the patents which the advertisers are putting before the public, and if the public forget that the investigation covers only a small part of the field of possible anticipation and let themselves be lulled into a false sense of security by that alluring statement, the new investigation may prove a pitfall rather than a protection.

There is a preliminary matter which should have been dealt with in the new Act. Patentees and their assigns should be placed under some obligation to give the public reasonable notice both that their articles are patented and also of the patent or patents on which they rely. It is generally impossible for other people to obtain that information in any other way than by laying themselves open to an action for infringement; in the confusion of overlapping patents the 'subject-index' is practically useless for this purpose, and the same observation applies to the 'name-index,' for the names there given are those of the patentees, while the names with which the public are acquainted are generally those of the manufacturers. In some few cases a reference to the patent is given; but under the present conditions that may perhaps weaken the patentee's or the manufacturer's position, and it is seldom done. Thus the initial difficulty is to discover which is the patent in question, and so long as that difficulty remains it does not matter much—for this purpose—whether the specification of that patent is 'clean' or 'notified.' Many patents will still be taken out not in any belief that they are valid, but simply in order to have the privilege of marking articles as 'patented' so as to deter competition [1].

If one examines patented articles from the United States, one finds that sufficient particulars are given to identify the patent. The reason is that section 4900 of the Revised Statutes of the United States contains this excellent provision:—

'It shall be the duty of all patentees, and their assigns and legal representatives, and of all persons making or vending any patented

[1] As to the prevalence of this abuse, see the evidence of several experts given before the Departmental Committee (1901), C. 530, particularly answers 727-36, 2460-3, and 2653-5.

article for or under them, to give sufficient notice to the public that the same is patented; either by fixing thereon the word "patented," together with the day and year the patent was granted; or when, from the character of the article, this can not be done, by fixing to it, or to the package wherein one or more of them is inclosed, a label containing the like notice; and in any suit for infringement, by the party failing so to mark, no damages shall be recovered by the plaintiff, except on proof that the defendant was duly notified of the infringement, and continued, after such notice, to make, use, or vend the article so patented.'

We might well adopt that section practically as it stands, except that, for convenience of reference, we should require the number of the patent to be given, as well as the day and year. Under such conditions it would be to the interest of the patentee and his assigns to disclose instead of to conceal that important information. Such a provision would cut at the root of the practice of obtaining bogus patents in order to use the term 'patented' *in terrorem*, and it would enable the public to reap the full benefits of the new investigation.

J. DUNDAS WHITE.

THE GOVERNMENT OF THE FOREIGNERS IN CHINA.

IT has become the habit of the nations of Europe, when they come into contact with civilization totally different from their own, to conclude treaties with the country of the alien civilization exempting their subjects resident in that country from its laws and jurisdiction, and retaining over them the same rights of protection and jurisdiction as if they had remained at home. Europeans living in such countries carry with them, as far as their rights of law and protection go, a little bit of their home country. From this policy has flowed the modern system of extraterritoriality, and the whole structure of consular jurisdiction. It is proposed in this article to describe the working of this system in China and its effects upon the life and undertakings of British subjects resident in that empire.

When, in the middle of the nineteenth century, the powers of Europe began to take an active interest in the affairs of China, they proceeded to secure freedom for those of their subjects who lived in China from the jurisdiction of the magistrates and the law of the country. An equally accurate statement of the case might be made by saying that the Chinese, when they found that the foreign devils were not to be kept out of their dominions, accepted the inevitable but prayed on all accounts to be excused from the task of governing and administering justice to these barbarians. Whichever view is preferred, by the Treaty of Tientsin in 1858, the British Government secured for its subjects resident in China the privileges of exterritoriality, and the other Western powers secured at or about the same time similar privileges for their subjects also. The broad principle on which this system of exterritoriality rests is that in the event of any charge or claim being made against any British subject or other foreigner in China, the case shall be heard not by the courts of the Chinese Emperor but by a court of an officer of the nation to which he against whom the claim or charge is brought belongs, and shall be tried according to the laws of that nation at that time in force. Consequently for every nationality existing in Shanghai or other treaty ports there is a separate court; claims against Englishmen must be made in the British court, against Germans in the German, against

Portuguese in the Portuguese, and so on. On the other hand, claims or charges made against Chinese by a foreigner are heard by the Chinese court, in which, in addition to the Chinese magistrate, sits an assessor of the plaintiff's nationality. In the foreign courts, when complaints are made against one of their subjects by a Chinese or a subject of another power, no representative of the Chinese or other nationality sits to represent the plaintiff's nationality.

There is no doubt that the exterritorial system in China places the foreigner in a far better position than he would be in had the treaties never been made, and the complaints of foreigners living in Japan, now that the treaties have expired, illustrate the truth of this statement. But the system is essentially a makeshift, and neither produces a satisfactory administration of justice nor adds to the efficiency of the consular service. It is a system which works well enough for small populations and small interests, but it is not adequate to meet the requirements of the large and growing European populations on the coast of China whose interest and enterprises throughout the empire are daily on the increase.

In its administration of justice the system fails from two causes: first, from the fact that justice is administered by consular not judicial officials; secondly, from the inherent limitations of the extraterritorial court having merely personal jurisdiction. The British court in China, for instance, has power only over British subjects in China. It is the sole tribunal in which cases against a British subject in China can be tried, but it must be noticed its powers are limited to and extend only over that British subject. If therefore a Chinaman sues a British subject, the court has no control over that Chinaman. If he perjures himself the court cannot punish him, or again it cannot commit him for contempt of court. The Chinaman can only be prosecuted or punished in a Chinese court and according to Chinese laws, and it has been remarked that perjury is to a Chinaman an offence as venial as punning to an Englishman. The only means that foreign courts have of obtaining control over a Chinese plaintiff is to require him to make a deposit of money as security for costs. This acts as a sort of pledge on behalf of the Chinaman that he will within certain limits play the game as understood by the foreigner, or at least that the rules will not be too obviously disregarded: but the power of the court over him is limited to this security of which it has the physical possession, and the amount of security required cannot for obvious reasons be large. From the same want of control over a plaintiff of another nationality arises another grave flaw in the extraterritorial system. If the defendant has no

defence against the plaintiff but has a counterclaim of equal or greater amount, the court cannot entertain the counterclaim however obvious the validity of that counterclaim may be. The counterclaim is a claim against a man of another nationality, and can be heard only in the court of that nationality and tried according to the law of that nationality. How inconvenient, cumbersome, and expensive such a system must be in the working, very little reflection will show. It is not necessary to give illustrations of this here, inasmuch as it must at once occur to the reader that in almost all mercantile disputes of any complication, and in all actions of tort wherein damages to both sides have taken place, there is a necessity for two actions instead of one to be fought and tried.

Another great weakness of the system, also arising from the fact that the jurisdiction of the foreign courts is entirely personal, appears in all questions relating to land. The rights and property of a British subject in China can be assailed only in His Britannic Majesty's court where the law of England is administered. But does the fact that a British subject owns land in China of itself invest that land with all the characteristics of land in England? It has been tacitly assumed that it does, and lawyers employ the English form of conveyance in transferring land. But the assumption is contrary to the theory of English law, which is that the law which governs land is the *lex loci rei sitae*, that is, in this case, the law of China, and is completely at variance with a recent decision of the Privy Council on an appeal from the court of Zanzibar, where a similar system of extraterritoriality prevails. In that case it was held that the law which the British court administers as to land in Zanzibar is the *lex loci*, and that the British court must take judicial cognizance of that law. If this decision applies to China (and there is no apparent reason why it should not), then the law under which land is held in China by British subjects is Chinese law; and what Chinese law is, beyond an intricate code of punishments and penalties, few would dare to say. The fact is that the lawyers in Shanghai and other treaty ports in China do not really know what the law applicable to land held by British subjects and other foreigners really is. In small communities, where small interests only are involved, society can continue in this uncertainty by the exercise of a spirit of compromise and common-sense. But as soon as interests begin to grow, a more logical system becomes necessary. In the large town that is growing up at Shanghai the inconvenience and absurdity of not knowing whether the English rules as to ancient lights, rights of way, and rights of support apply to land held by British subjects

is already felt, and the system of extraterritoriality becomes farcical when an Englishman may block up the ancient lights of his neighbour and leave his neighbour in the dark and without remedy by a fictitious transfer of his property to, for instance, a Portuguese against whom no such system of law as there is in England may prevail. And it is in itself sufficiently absurd if a Chinaman or Portuguese may block my ancient lights or deprive my house of support while an Englishman may not. It is of itself sufficient to show that no system of jurisdiction which is personal but not territorial can be satisfactory to the persons whom it affects.

So great are the inherent difficulties and shortcomings of the extraterritorial system that it would seem imperative for its efficient administration that the courts should be presided over by judges of no little experience and legal proficiency. In fact, with one exception, their judges are not trained lawyers at all. At the various treaty ports in China reside consuls of the various nationalities with local interests. The members of the consular service are not necessarily, and in fact seldom are, members of the legal profession; they can never be, by reason of their service, trained and practised lawyers. The first duty of a consul is to protect the interest of his sovereign's subjects: it is scarcely consistent to add to that duty the task of administering justice when a complaint is brought against that subject; and the duties of protection of a class and the administration of impartial justice between that class and others cannot but clash. Only too often is the verdict of the extraterritorial court a formula as of course Judgment for the defendant'; and the defendant has then every reason to be satisfied that he has an efficient consular service. This is a reproach which cannot but exist so long as the consular and judicial functions are centred in one man. There is only one court in China which can at present be free from it.

This exception is the British Supreme Court which sits at the chief treaty port and commercial centre of North China, Shanghai. It is the court of appeal from the various British consular courts at the treaty ports in China, and is also a court of first instance in Shanghai. Its chief justice is appointed from the legal profession, and its officers are not consuls and have no consular duties. Consequently this court may be expected to and does administer justice with the same impartiality and success as any other court in England or elsewhere whose presidents are trained lawyers with no other duties than that of administering justice. But the success of this court is grievously curtailed by its inherent limitations as an extraterritorial court already stated.

Such being the justice administered by the extraterritorial courts of the Western powers in China, it is necessary to throw one glance at the one territorial court of His Majesty the Emperor of China left standing, when foreign interests are concerned, among its alien rivals. When a foreigner has a complaint against a Chinese, the case is tried by the Chinese magistrate; in practice he is assisted by an assessor of the plaintiff's nationality. The court that thus sits, being composed of two judges, is known as the Mixed Court. Here we no longer have an extraterritorial court or the limitations and defects of extraterritoriality. The Chinese magistrate has complete jurisdiction over all persons in his district who are not exempted therefrom by treaty, and a Nicaraguan is as much under his jurisdiction as a Chinaman. The defects of the Mixed Court (viewed on its civil side) are limited to a complete absence of any system of law and a tribunal competent to administer justice. The law of the court is Chinese law. Chinese law has not yet distinguished between civil and criminal cases. What we should regard as purely civil cases, such as mercantile disputes, when they occur among the Chinese themselves, rarely come into court: they adjust themselves either by reason of the extreme spirit of compromise inherent in the Chinese character, or by the appearance of the 'peace-maker' beloved of Chinese society, or by the intervention of the guild of that particular trade. Should they come into court, the unsuccessful party usually is punished in some way or another, for the magistrate is administering good morals to his people, and one party will usually in some way have offended against his conception of them. Chinese law is, in short, aimed entirely at a maintenance of general good principles among the people, and its science consists in a diversity of punishments for offences against them. In other words, it does not deal with the rights of persons among themselves so much as with a general conception of their duties to the state at large and the penalties for the infraction of such duties; that is to say, in Western language, it is purely penal. The value of such a system of law in settling the disputes of the purely commercial communities of the treaty ports is difficult to discover.

The result of this is that in the Mixed Court there is no system or code of law administered whatsoever. A case is decided according to a general idea of what the court considers fair. The court is not bound by precedent; it has no fixed procedure; it may decide one thing one day and another the next. It sometimes refers cases to the arbitration of another merchant in the trade, in order that he may decide it according to the custom of the port. But the privacy of arbitration prevents such customs from

crystallizing, and it is a fair generalization to say that in any case when a Chinaman is defendant the result is purely hypothetical, and depends on the relative strength of the Chinese magistrate and foreign assessor concerned.

The evils of the consular jurisdiction of the Western powers are fully felt in the Mixed Court. The magistrate is a Chinese official of a humble grade; even were he of a higher rank his knowledge of commercial disputes would not be of much value. The assessor is a junior of his consular service; he is not a member of the legal profession, he can never be a practised lawyer, and is chosen for his knowledge of Chinese rather than for any legal or judicial qualifications. His duty as a consul is to protect the interests of his nationals, and the Chinese magistrate is fully aware of it. Too often do proceedings in this court develop into a mere wrangle between the assessor and magistrate, each advocating the cause of his own sovereign's subject. Sometimes the court adjourns in high disagreement. At other times, weary of its civil strife, it tosses the ball back to the litigants and bids them see to it themselves. The writer has personal knowledge of an instance of this latter sort, when the decision of the court was as follows: 'This case involves very many difficult points, and the parties must settle the matter among themselves and not cause any further litigation.'

Enough has been said of the evil effect of consular jurisdiction upon the system of law administered where foreigners are concerned in China. It remains to consider the effect that this addition of judicial functions has upon the performance of the consular duties proper of the consular service in China. To arrive at any conclusion upon this side of the subject is not so easy, inasmuch as there is no consular service bereft of these judicial functions with which one can suitably compare that of China. But reverting to first principles, it may be fairly said that the object and end of the British consular service in China is the protection and the furtherance of British commercial interests. Are the chances of an efficient performance of such duties enhanced by an addition to them of the duty of administering justice under the exterritorial system?

The same objection which the lawyer may raise against one whose first object is the protection of his nationals sitting as judge, may be raised by the trader against one who has (if required) to sit as a judge against him being the responsible person to protect and further his interests. But there are more undesirable consequences than this. The fact that the consul is invested with judicial powers over British subjects and British property has

given rise to the abuse of consular influence and protection for interests not really British, necessarily at the expense of British interests proper. The abuse is not by any means limited to the British consular system, but is equally shared by all the foreign consulates in China. To explain its nature it is necessary to give a short account of certain aspects of foreign commercial intercourse with the Chinese.

The Chinese have not been slow to learn that the property of a foreigner in China is in a far more secure position than that of a Chinese. Whether the property be land or goods, it is exempt from the many petty squeezes that a Chinese owner would have to pay to the local officials. If litigation arises over it, the case is heard before the foreign court, where money need not be spent in bribing the judge. The Chinaman therefore has availed himself of the services of his foreign friends in order to employ their names for his property and enterprises. A foreign owner of land, for instance, obtains a title-deed for it through his consulate, who in turn obtains it from the native authorities; this title-deed is practically indefeasible, and the foreigner's property to the land can be attacked only in the court of his own consulate. What simpler than for a Chinaman to make a fictitious transfer of his land to a foreigner, and the foreigner to obtain a consular title-deed for it and stand possessed of that land nominally and to the world as beneficial owner, when he is in fact a bare trustee for the Chinaman? Should there be any dispute as to the property in the land during the negotiations for the title-deed between the consulate and the native authorities, the whole weight of consular authority is thrown into the scale on behalf of interests that do not in reality concern them in the very least. Should it be necessary to sue recalcitrant natives who still maintain some title to the land, the foreign assessor comes to the Mixed Court to influence the magistrate against them. Again, should a native landlord have a difficulty in removing an undesirable native tenant from his property, he executes a lease of the property to a foreigner, entirely fictitious in fact, and it is the foreigner who brings a suit in the Mixed Court and obtains the assistance of his consulate in punishing the tenant for keeping him, the foreigner, out of possession. It is impossible to obtain statistics on a point like this, but the use of it to the Chinaman is so obvious, and the name of the foreign friend can be borrowed so cheaply, that the system is extremely widespread and scarcely any attempt at concealment of it made. It would probably be well within the limits to say that at least half of the land standing in the name of foreign owners at Shanghai is beneficially owned by the Chinese, and

that half of the civil suits brought in the Mixed Court do not beneficially affect foreign interests.

The object of maintaining a consular service to the taxpayer at home for such purposes as this is not very apparent, and it no doubt gives the Chinese a lofty idea of the pride with which we regard the name of our nation. But it should not be imagined that the practice of the foreigner lending or hiring out his name to the Chinese as a cover for their transactions is limited to land transactions. The trade of the foreigner with the Chinese is carried on principally through the medium of a native known as the *compradore*. The *compradore* is an employee of the foreign firm, who is paid a nominal wage and introduces Chinese purchasers and vendors to the foreigner, making his remuneration out of a commission on the transactions. The most suitable person for such a post is of course a native merchant with a considerable business and connexion; and, in fact, the *compradore* of a foreign firm of any standing is always a native merchant of a considerable independent private business. On becoming a *compradore* to a foreign firm, this native merchant in addition to his own name hangs outside his own place of business the business name of his foreign employer in Chinese characters, and carries on his trade with the added *éclat* of the style of foreign merchant. Should he in the course of this business render himself liable to an action at the hand of another, it is not probable that his employer will take upon himself the responsibility for the case as his principal and render himself liable to be shot at in the foreign court; but should the *compradore* have cause of complaint against another Chinese in respect of some transaction arising entirely out of the *compradore's* business, the foreigner's name is almost invariably employed and the assistance of his assessor called in to aid the *compradore* in the Mixed Court against his brother Chinaman. Here again is an instance of the use of consular officials for the protection of interests other than that of their own nationals. A similar abuse of great frequency is that of the *compradore* or any other Chinese merchant using the name of a foreign friend for exporting cargo, and making use in connexion with it, when necessary, of the routine work of a consular staff which exists properly only for the necessary work of goods of their own nationals.

So great is the amount of purely Chinese work thrown on foreign consular officials that it is impossible that they can do it except at the expense of the work of their own nationals, unless indeed they are, for foreign work proper, overstaffed. Either of these alternatives shows an unsatisfactory state of affairs.

The abuses above mentioned to which the system is subject are kept within reasonable bounds in ports where the foreign element is small, and the doings and affairs of every foreigner known to every other foreigner there. But in the larger ports this is no longer so. Shanghai, with its clashing jurisdictions and multifarious population, has already become a most desirable haven for the evil-doer, and presents innumerable chances for small gains to foreigners not delicate for the purposes to which they lend their names. It has been locally observed that quite a new and a most undesirable class of foreign adventurers are now appearing in the ports of the Far East. The same evil is appearing in a lesser degree in the smaller though growing ports of Tientsin and Hankow. It is impossible to expect the relations of China with the West to show any real signs of improvement until the conditions of life and law at the principal places at which foreigners reside are put on a basis more logical and less open to abuse.

It is difficult to see how this can be done until the present extraterritorial system is radically changed. This change can certainly not be made by simply promoting the Chinese to the position of sovereignty over all foreigners in their dominions, as has been done with the Japanese. Viewed historically, the extraterritorial system may be regarded as a makeshift until the people of the native civilization sufficiently approximate to Western methods to be able to come into comity with the Western nations on terms of equality with them. But the Chinese has not shown the Japanese inclination for progress either towards Western industrial or Western legal and intellectual methods; and, in the meantime, the commercial intercourse with the outside world has so much increased as to have thrown a large number of foreigners on to the coast of China. The machinery which was designed to meet the needs of only small populations has become strained and no longer adequate to the requirements; it is now too late for Great Britain to annex Shanghai or any other treaty port; and inasmuch as the very mention of the partition of China brings up visions of a world-wide war, it would perhaps be as well for the powers to consider whether or not some different scheme of government for the larger treaty ports could not be devised. The institution of independent municipalities under international control and guarantee at Shanghai, Tientsin, and Hankow, with complete territorial jurisdiction inside their boundaries, is one method of meeting the problem. The machinery, in the present municipal councils, is already at hand; all the change that would be required would be the cession of the territory and all rights over it from the Emperor of China to the municipality, and the investment by

treaty of the little republic with sovereign powers and independence as regards its internal government and affairs. Objections can no doubt be raised to such a course; but it seems to be the only one which would secure a reasonable working system for the government of the foreign communities in China, and at the same time not awake international jealousies.

A. M. LATTER,
Barrister-at-Law, Shanghai.

BONUS JURISTA MALUS CHRISTA.

A MUTUAL jealousy between the three learned professions has for centuries past disclosed itself in many epigrams and anecdotes that have become historic. But the jealousy has shown itself the most markedly in the attitude of the oldest of the three —the ecclesiastical profession—towards her two younger sisters; or, perhaps it would be more correct to say, her daughters. Renan tells us that in all the voluminous folios of the *Acta Sanctorum* there cannot be found recorded more than two or three saints who were physicians; 'and the biographies of even these few are believed to be spurious.' For men who devoted themselves, however unscientifically, to the observation of biological cause and effect were so apt to develop independent habits of mind that the mediaeval clergy launched against them the angry generalization—'Ubi tres medici, ibi duo athei.' That clerical criticism has its counterpart in a similar censure upon lawyers—'Bonus jurista malus Christa,' or, in its much more common and much older Teutonic form, 'Juristen böse Christen.'

This latter sarcasm might at first sight seem likely to have been inspired by the same sense of intellectual distrust. For the lawyer's lifelong training in the minute analysis of evidence and in the subtle interpretation of edicts and charters might well prove just as perilous to dogmatic authority as is the habit of that patient scrutiny which the physician directs upon the processes of nature. But the actual history of this censorious rhyme seems to show that it took its rise in a distrust not of the lawyers' doctrinal orthodoxy but of their political influence. That history has been minutely traced out by the late Professor Stintzing; (to whose Rectoral Address of 1875 at Bonn I am indebted for the marrow of the present Essay).

The revival of the study of Roman law in the Italian Universities, in the closing years of the eleventh century, was indeed a cause of great political and social changes. For the result of that revival was that 'the monarchy of theology over the intellectual world was disputed. A lay science claimed its rights ... It was a science of civil life to be found in the human, heathen Digest[1].' In the course of four centuries the disputes between theology and law became in

[1] Professor Maitland (Law Quarterly Review, xiv. 32); Pollock and Maitland, History of English Law, i. 23, 2nd ed.

Germany so grave as to give birth to the rhyming sarcasm which we are discussing. As a Christian condemnation of legal science, it presents a striking contrast to the lofty words in which the pagan Ulpian had pronounced jurisprudence to be 'Divinarum et humanarum rerum notitia,' and its followers to be worthy of the very title of *sacerdotes*, 'nam justitiam colimus et boni et aequi notitiam profitemur.' Yet the contrast was not due to there being any taint of classic paganism still lingering in secular law when this Christian censure was first uttered. For so soon as Christianity had acquired political power, she had remodelled law to her own wishes. Indeed, as years went on, she had even come to place the charge of it in the hands of her own clerical servants. In the England of 1100 they were so prominent in the secular tribunals as to give rise to the saying, 'Nullus clericus nisi causidicus[1].' Legal knowledge became, in fact, so peculiarly the property of the clergy that, in mediaeval times, any officer of the secular courts who manifested an acquaintance with law and an aptitude in draftsmanship was distinguished from his unlearned colleagues by giving him the ecclesiastical title of 'clerk.' Not until the middle ages were at an end did there spring up once again a separate profession of unclerically-minded legal experts, men such as the *jurista* whom the Teutonic rhyme contemplates. That profession arose simultaneously with the rise of modern States and with the revival of interest in the great masterpieces of the Roman jurists.

During several preceding generations, the Church, reversing her old policy, had been discouraging the study of Roman law. Although the charters of the Universities provided for professorships of Roman as well as of Canon law, yet the former study took but a secondary place; as was shown by the number alike of its teachers and of its scholars. For the bulk of both the scholars and the teachers of jurisprudence were clerics; and they looked upon Roman law as a mere aid to the study of Canon law. Nor did it continue to be a welcome aid. 'The Church,' as Mr. Jenks says, 'had now grown strong enough to repudiate her foster-mother. Roman law was the work of laymen; and the Church would not acknowledge so merely secular an authority.' The Canon law which, by its help, she had developed was now strong enough to stand alone[2]. Hence, so early as 1219, Pope Honorius III forbade all beneficed clerks to go to lecture on Roman law; and, so far as the University of Paris was concerned, suspended that study altogether for a considerable number of years. Innocent IV, about 1250, tried to extend this prohibition to the whole of France, and

[1] Pollock and Maitland, i. 85.

[2] Ibid. i. 85, 96.

to Great Britain and Hungary. Even in later times the Chair of Roman law in many a University, as at Vienna and Heidelberg, was sometimes left vacant for ten or twenty years.

But the first years of the sixteenth century saw a sudden revival of the decadent science. The general revival of letters had ushered in a new spirit of legal research[1], which, by recalling men from the tedious study of the glossators to the perusal of the original authorities themselves, had awakened a fresh interest in the treasures of Roman law. Thus many laymen were led by intellectual zeal to acquire legal learning; and it was the gradual multiplication of their number, in the course of the sixteenth century, that made possible the development, for the first time, of a national life in the various local States of Germany. The efforts of the various local princes to develop and consolidate, each for himself, a local supremacy had evolved State sovereignties of the familiar modern type. Any such independent self-supporting social organization had much to gain by adopting a secular code of law, if it could find one. One was now available. An adequate knowledge of Roman law had been developed by the Universities. And hence, as the older German political organizations decayed, the Roman jurisprudence came to control an ever-increasing portion of the life of the people. That 'Imperial' (*Kaiserliches*) law thus became familiar as a body of jural rules independent of the Church's Canon law, and not inferior to it in validity. It was of service alike to the political authority which the German princes were consolidating, and to the economic needs of the social life which was rising under each one's sway. It thus secured in Germany for its rules an authority which would not have been won for them merely by the fascination which the name of Rome had always exercised over the German mind, or by the belief that in the imperial authority of Germany the Roman Caesarship still survived. In like manner in England[2] Henry VIII, in 1535, forbade the study of Canon law in the Universities, and soon afterwards filled up the gap by establishing professorships of Roman law at both Oxford and Cambridge. Yet for more than two centuries longer neither University possessed a professorship of English law; an omission which Gibbon, in a manuscript annotation upon Blackstone, explains by saying that in both Universities 'the clergy were the sole masters, and easily proscribed a science which they abhorred. . . . But Mr. Blackstone touches upon this neglect with the becoming tenderness of a pious son who wishes to conceal the infirmities of his parent.'

[1] See Professor F. W. Maitland's English Law and the Renaissance, pp. 5–8.
[2] Ibid. pp. 8–22.

In Germany the laity betook themselves eagerly not only to the study but also to the administration of the new jurisprudence. Thus a body of professional and secular lawyers grew up. And as the State went on strengthening its hold on the administration of the law, a body of public legal officials was also developed. The contrast of all this with the mediaeval days, when the Church had controlled the whole range of social life, was vivid. 'It was the teaching of Roman law,' says a recent French Catholic writer, 'that laid the foundation for Protestantism.' The Church's partisans must often have asked themselves whether secular organizations thus entirely separate from the constituted authorities of the Church could be acknowledged as really Christian. If not, could the chief supporters of those organizations, viz. the jurists, be regarded as sound Christians?

The earliest known display of this distrust had occurred at Basel amidst the commotion of the nascent Reformation movement. In 1517 a friend of Erasmus, Claudius Cantiuncula of Metz, on being called to Basel as professor of Roman law, found that his lecture-room there was empty. A spirit of hostility to Roman law had been aroused amongst the students by the embittered priesthood. He consequently published at Basel, in 1522, a defence of the *Jus Civile* against those who maintained that 'Leges cum evangelio parum conveniunt,' and who alleged that, as the Gospel taught men to forgive their enemies and not to seek their own, jurisprudence could have no business to show them how to come forcibly by their own and to forcibly punish their enemies. The ecclesiastics who had urged these objections urged them only against the renascent Roman law; ignoring the fact that, if of avail against it, they must equally be of avail against the Canon law itself. Cantiuncula met their attack by contending that the old Roman prudentes who framed the Civil law had been providentially guided to formulate it in rules that were divinely purposed to serve afterwards as foundations for the Christian commonwealth. He boldly went on to insist that the general tenor of those rules was much more in accordance with the tenor of the New Testament than were many of the Canonical decrees which Christian ecclesiastics had promulgated. Only three years after this, in 1525, the great reformer Melanchthon delivered at Wittenberg a famous lecture *De Legibus*. In this he pointed out the recognition given in the New Testament to Roman law; and insisted upon the divine origin, and the consequent sacredness, of the secular political organization. Repudiating that disparagement of civil authorities which Hildebrand, four and a half centuries before, had initiated by pronouncing them to be the work of the Devil,

Melanchthon declared the administration of secular courts of law to be 'no work of impiety, but even a sacred duty.' Cantiuncula's cautious attitude towards the Reformation movement had prevented him from grappling expressly, as Melanchthon thus did, with the real issue at stake—the question whether the secular organization of social life has not a foundation as truly divine as has the ecclesiastical. This sacredness of lay authority and lay jurisprudence was repeatedly reasserted with ardour by one of Melanchthon's disciples, Hegendorf, Professor of Civil Law at Frankfort. Him in 1539 we find protesting against (what he calls) the evil adage that 'Ein Jurist ein böser Christ.' (It was thus that for the first time it found its way into print; though almost immediately afterwards we find it cited by another writer on law as being already an 'old' saying.) These advocates of Protestantism realized that their religious movement had a clear affinity with the effort to create political States possessed of a secular jurisprudence. For their own struggle against Church authority in the sphere of theology facilitated the effort of the State to secure for itself supreme authority throughout the sphere of politics.

Yet their great leader himself did not show any similar predilection for the jurists. Penetrated though Luther was with the conviction that secular institutions and authorities are of divine appointment, his temperament nevertheless was one which recoiled from the external and formal character of positive law, and from that dependence on mere conventional rules of justice which is inseparable from all human attempts to force men to be just. Coercive legislation seemed to him an evil which sin may have made necessary for the present distress, but which in a truly Christian community would be a needless fetter. He often employs our 'malus Christa' adage; so often, indeed, that he has sometimes been regarded as its author. But he uses it from a new and opposite point of view; condemning lawyers not because of their denying the exclusive authority of Canon law, but because of their conceding to it any share of authority at all.

In France the position of affairs was different. From about 1550 onwards, during the golden age of French jurisprudence, a majority of the greatest French jurists were struggling and suffering in the foremost ranks of the Huguenot party. Such were Brisson, Hotman, Donel, Dumoulin. French jurisprudence stood at this moment on an intellectual level which it never again attained; a height to which it had been raised by its scientific zeal for an independent investigation of the original sources. Hence its followers, when they turned to the theological commotions of the

time, were naturally attracted by that reforming movement which had itself been produced by a kindred desire for firsthand investigation. Accordingly when, as soon came to pass, the sarcastic German saying became current in a French form—'Bon jurisconsulte, mauvais Chrétien'—it was muttered only by one group of assailants; and not, as in Luther's land, by two. For, though many French jurists were blamed for their zeal in the reformation of the Church, few were accused of any lukewarmness in it. It is true that Cujas, in some respects the greatest of them all, did decline all intermeddling in these ecclesiastical strifes, setting up the unanswerable plea—'nihil hoc ad edictum praetoris.' Aided by an outward conformity to the dominant Catholicism, he thus secured for himself in his lifetime the quiet of uninterrupted study. But, from the other side of the grave, even he disclosed his suppressed heretical proclivities, by significant directions given to his widow in his last will and testament. It thus was probably with an eye to his French contemporaries rather than to his Teutonic ones that Viglius (a President of the High Council at Brussels), who has sometimes been regarded as the author of our proverb, expressed it in the emphatic form 'Plus quelqu'un est grand juriste, d'autant plus est-il mauvais Chrétien.'

In Germany itself, the maxim soon came to gain fresh currency from an entirely new, though very natural, cause. For the rapid development of legal technicalities—inevitable in a system which was not based on indigenous custom but on a foreign code, imported and manipulated by experts alone—soon surrounded the nascent legal profession with an atmosphere of pedantry and craft. In the embittered habit of mind which, as his *Table Talk* shows, often took possession of Luther in his later years, the saying 'Juristen böse Christen, ja Diabolisten' seems to have grown frequent with him. But he now uttered it, less upon grounds of political or doctrinal contention than as a protest against the technicalities which almost inevitably attend the practical administration of justice and against the delays and expenses which make litigation a pitfall for the poor. The gentle Melanchthon, even in his Oration in defence of the secular lawyers, becomes similarly bitter when he confesses that some of their fraternity were already conspicuous as 'legum contortores, bonorum extortores.' Popular experience soon came to embody this feeling of irritation in jingling proverbs like 'Legum doctores legum dolores,' 'Juristae nequistae,' 'Juris consultus ruris tumultus.'

Besides this ethical opposition, and the earlier theological one, a political jealousy soon sprang up. Statesmen complained that the growing importance of the legal profession had given it a pro-

minence in state affairs which caused the current affairs of the Holy Roman Empire to be settled by legal rather than political analogies. The forms and even the chicane of the law-courts had become dominant in the council chambers of princes. The history of the United States of America has afforded us, in modern days, similar illustrations of the way in which a constitution may be both constructed and reconstructed in obedience to the theories and prepossessions of the legal profession.

Of the various currents of feeling which thus gave currency to our proverb, at least one still remains important. From the earliest days of the Reformation, part of the theological hostility to law had, as we have seen, been based on the fact that it encourages the enforcement of one's rights and a resistance to hostile claimants. Such encouragement is still viewed by some theologians as anti-Christian. That view is repudiated by lawyers. And the repudiation found expression in an extreme form, a quarter of a century ago, in the essay which has probably been more widely circulated and more often translated than any other law book of our generation—Rudolph von Ihering's 'Struggle for Right.' He goes so far as to insist that every man is under a moral obligation to exact energetically his due from his debtors. For, as a whole consists merely of the sum total of its parts, the coherence of the whole scheme of legal relations must be weakened whenever a single right is anywhere infringed with impunity. The man who submits tamely to any such injustice, and thereby encourages like inroads upon the like rights of his neighbours, Ihering pronounces to be as contemptible as the soldier who saves his skin by slinking from a battle where he has his country to think of as well as himself. The unwillingness to submit to wrong, he considers to be as important to society as the unwillingness to commit wrong. His position is certainly in accord with the steady drift of modern times to a fuller recognition of the essential connexion between the individual citizen and the State, and of the consequent moral duty of the individual towards the whole. Yet it may, on the other hand, be fairly urged that the analogy of civic duties to military ones must not be pressed too far. The soldier's duties are imposed on him primarily—we may almost say, wholly—for the public benefit. But the citizen's legal rights are given to him primarily for his own personal benefit; and therefore his voluntary surrender of them, even at the expense of whatever small advantage the community might gain by his insisting on them, may in certain cases be permissible or laudable or possibly obligatory. Ihering undoubtedly did good service by reminding us all that a habit of cowardly or lazy submission to hostile infringements of our rights

tends gradually to impair the public sense of justice; and that consequently the duty of helping to preserve that sense unimpaired may warrant, and even ennoble, a strenuous enforcement of claims which in themselves would seem merely petty or pedantic. As has been recently said by no less eminent a theologian than Prof. Herrmann of Marburg, 'If, for the sake of my comfortable indolence, I abstain from enforcing legal rights of mine, and thereby give any encouragement to insolent aggressiveness, or even merely to mendicancy, I shirk a Christian duty. For my surrender of my rights against the wrongdoer helps to make him a worse man. It is therefore in God's own service that we are taking our stand, when we exert ourselves to get the law of the land carried out.'

But this *laus litium* must not degenerate into an actual 'panegyric of quarrelsomeness.' It is true that cowardly idleness cannot be a virtue. Yet it must be remembered that deliberate benevolence certainly is one. Benevolence may often be a virtue more imperative than that of contributing a minute stimulus to the popular sense of justice. There would be as much exaggeration in pressing Ihering's arguments to the point of maintaining that benevolence can never be thus imperative, as in asserting, like some divines, that it must be so always. A theologian justly held in esteem at Cambridge, Chancellor J. J. Lias, says, in his Commentary on 1 Cor. vi, 'It often becomes necessary for a Christian to plead before courts of law, lest violent or covetous men should dissolve the framework of society. Yet we ought rather to suffer wrong than appeal to the law, unless some more important matter be at stake than our individual loss or inconvenience.' Taken literally, this dictum would justify us in appealing to the law on every occasion when any of our rights are infringed; for, as we have just seen, every unredressed wrong involves a weakening of the public respect for justice. But Mr. Lias obviously meant to concede no such complete liberty. Probably he meant to draw a distinction not between circumstances but between motives; and to say that a Christian cannot justifiably go to law when his only motive for so doing is his own protection, and not the protection of the community. That distinction is, at any rate, the accepted theory of the Roman Catholic confessional as to the private prosecution of criminal offences; though St. Alphonso Liguori, with a shrewd knowledge of human nature, remarks that it is a mere abstract theory and not of much practical avail[1]. For, as one of the French commentators upon him adds in explanation, 'It is prudent to refuse absolution to any penitent who says that he

[1] 'Magis speculativè quam practicè, vel saltem rarissimè, verum est'; (Theologia Moralis, II. 29).

forgives his enemies but that he nevertheless wishes the law to take its course upon them in order that wickedness may meet its deserts. I never believe in a man's disinterested zeal for the punishment of wrong-doing, if he only troubles himself about proceeding against those who injure *him*, and leaves all other wrongdoers undisturbed.' He had evidently met with Parisian penitents resembling the English rustic who said, 'Parson, I forgive my enemies; so I'll leave it to the Lord to play the devil with them.'

These theories of the inherent moral wrongfulness of exacting one's legal due—these attempts, in other words, to take Christianity's ideal counsels of perfection as the rigid and literal code of everyday life, and to condemn positive law because it differs from that code—are happily not widely current. But the fundamental point of view from which they spring is still current enough; at any rate among the Latin races where the black spectre of Ultramontanism is still a living force. For, at bottom, all these theories take their rise from the conviction that law and civilization are things earthly and unholy except when based upon the will of ecclesiastical authorities. The social Manichaeanism which asserts this unethical dualism between the Church and the State—instead of regarding both of them as means to the same supreme end, the perfecting of human life—was checked by the Reformation, but was not overthrown. The same conviction which stirs Leo XIII to his conflict with the Quirinal stirred the founders of the Free Kirk to the Scottish Disruption of 1843. Yet what the modern State sets before itself is a moral aim—the completion of human development, the attainment of the sum of man's ethical well-being. By the sacredness of this aim it is rendered a sacred organization; and it is not made any less sacred by its refusal to take upon itself the direct discharge of the more spiritual and impalpable of the social functions through which that aim may be advanced. For all the powers which thus remain in the hands of the Church have to be exercised within a sphere which the State controls, and under the shelter of a protection which the State alone can afford; so that—indirectly, at any rate—even these high functions receive the care and rest upon the arm of the secular State.

COURTNEY KENNY.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A History of English Law. By W. S. HOLDSWORTH. London: Methuen & Co. 1903. 8vo. Vol. I. xli and 460 pp. (10*s.* 6*d.* net.)

A SHORT history of English law has been a badly needed book. To recommend a short history of German or of French law has been easy. The inquirer could be sent to Schröder or to Esmein. If he asked for a short history of English law, we had to tell him that there was none to be had. There were some elaborate histories of periods—for the more part early periods—and there were some elaborate histories of branches, institutions, doctrines. But a summary view of the whole was nowhere to be had. We had no Schröder, no Esmein. This was bad for the law student at the outset of his career, and it was perhaps worse for the lay historian —the man who wanted to tell some piece of the general history of England. The copious legal materials that he might have used for the illustration of his theme he dared not touch; he had no guide where a guide was much wanted.

This gap Mr. Holdsworth has set himself to fill. As yet he has given us but one volume. It is entirely filled by the history of the courts. It is to have one successor and, as we understand, one only. It is a handy and handsome volume.

The full measure of the praise that we are inclined to bestow upon it we will reserve until we have seen what follows. To put an accurate but readable history of the courts into some four hundred pages is one task, to compress the tale of our substantive law into a like space is a different task. We hope that Mr. Holdsworth will seriously consider whether his second volume shall not become two volumes. Can he say what is worth saying and what will be intelligible to beginners and to laymen about such matters as high treason and bankruptcy, the estate tail and the joint stock company, the relief of the poor and the contingent remainder in four hundred pages? No doubt, the historian of English 'law in general' must refrain from the detail of any and every branch of the law. Still all the great lines of development should be indicated, and a few additional words of explanation and illustration may make the difference between a book that repels and a book that attracts those whom we would see attracted to the history of our legal system.

Up to the present however Mr. Holdsworth has done well: indeed he has done admirably well. He has written a cleverly schemed, learned, lucid, and interesting book about an important matter. It can confidently be recommended to students of English history and to all who are beginning the professional study of English law. Especially we may hope that it will have a considerable sale at Oxford and Cambridge. Its author makes no parade of uncommon erudition, and indeed it may be doubted whether he sets before us much that he would claim as a discovery of his own.

But in all quarters he has gone to the best books, and, at least so far as the Middle Age is concerned, it would be difficult to find any serious deficiency in his equipment. He has gone to Mr. Pike for the Common Law side of the Chancery, to Mr. Leadam for the Court of Requests, to Mr. Marsden for the Admiralty, to Mr. Turner for the forests, to Mr. Lapsley for the Palatinate of Durham, to Thayer for the jury, to Mr. Gross for the coroners. It is pleasant to observe that the band of investigators who have helped him to his history, though small, is growing, and that twenty or fifteen years ago his book could not have been written. He owes much to others; but those others will owe much to him for placing the results of their labours in his well-conceived scheme.

When the Middle Age is left behind Mr. Holdsworth occasionally vouches a warrantor who is open to exception. We see Lord Campbell's name in footnotes rather more frequently than we like. 'Lord Campbell,' we are told, 'vividly describes the hearing of the petition of the House of Massachusetts for the recall of the Lieutenant-Governor and Chief Justice in 1774.' Lord Campbell 'vividly described' a great many things that he never saw and some things that were never seen by any one. In the present instance a reference either to the firsthand evidence for the famous scene or to some careful modern book would have been more to the point than a citation of the Lives of the Chancellors.

An earlier Chancellor, Lord Ellesmere, almost certainly did not write the tract on his office which passes under his name (see Dict. Nat. Biogr. *s. v.* Egerton, Sir Thomas), but contains opinions contrary to his, *e. g.* as to relief in equity after judgment at law; the tract however is not later than his time, and Mr. Holdsworth does no more than quote it by its current title. A sufficient account of the Marshalsea Court is given, but the modern history of its offshoot the Palace Court is overlooked. See Encycl. Laws of Eng. *s. v.*, and Thackeray's 'Ballads of Policeman X,' *s. t.* 'Jacob Homnium's Hoss,' where the constitution and practice of that Court *temp. Vict.*, before its abolition in 1849, are well explained.

Someday the history of Henry VIII's reign should be written by somebody who takes little interest in a showy but futile foreign policy and no interest in religious movements, but a deep interest in national finance. Then we shall begin to know something about the Statute of Uses, its causes and effects. In the meantime we must, it is probable, put up with the conventional history that can be obtained from preambles and from the legal expositors of a later age. Still it seems highly doubtful whether we ought to treat that statute as a proof of the 'vitality' of the common law. It was wrung from a reluctant parliament by a self-willed king, and to increase his revenue was the main if not the only object of those who framed it. He was the one person in the kingdom who had all to gain and nothing to lose by the extirpation of uses, for other lords, if they had one interest as lords, had another interest as tenants. We know with fair certainty from the despatches of foreign ambassadors that King Henry had been demanding more even than he obtained; even 'one third of the feudal property of deceased persons,' so it is written. This however is matter for debate, and Mr. Holdsworth is not to be blamed for adhering at such a point to traditional lines. It is more to be regretted that he seems to have missed Mr. Ames's remarks on Tyrrel's Case and on the Chancellor's enforcement of secondary uses: Mr. Cyprian Williams has adopted and confirmed them. When writing his second volume Mr. Holdsworth will, we may hope, pay due regard to whatever Mr. Ames has written.

On a few little blunders in antiquarian matters we will not dwell. Our author reads a passage in the printed Hundred Rolls as saying that the abbot and convent of Tavistock hold of the king 'quindecim fœda et dimidiam ense de Hauglebergh' and very naturally he puts a note of interrogation after these strange words. If he looks again he will see 'quindecim feoda et dimidium en fe de Haubergh,' and then if he perceives that there is a lapse from Latin to French he will obtain the sense of the passage:—fifteen fees and a half 'en fief de hauberc' if we adopt continental spelling. The passage happens to be a very interesting one just because it contains a term well known in France and but rarely found in English documents. A certain tendency to deprave texts which stand in no need of depravation we have noted. Really the jurors of Tavistock did not say 'quod locum de Tavistock . . . aliquando fuit . . .' They said quite plainly 'quod locus . . . fuit . . .' We must be just even to Tavistock men. Every decently educated person will see that there is an error in 'dies datus est a die Paschae in unum mensam'; but Mr. Holdsworth should remember that there are undergraduates and others whose first guess will be that the *unum* and not the *mensam* requires amendment. If Fortescue C. J. when speaking of the creation of palatinates really said 'le Roy sanz parlament ne poit prendre son lige home de droit,' we have not the faintest idea what he meant by it, though we have some little hope that if we went behind the printed Year Book we might find that *prendre* was a mistake for *priver*. We cannot easily believe that the style of a pie powder court contains the words 'coram majore et duobus convicibus,' for 'concivibus' seems much more probable. But these are little matters, and the great matter is that Mr. Holdsworth has begun well and has already written a very good book.

F. W. M.

The Silent Trade: a contribution to the early history of human intercourse. By P. J. Hamilton Grierson. Edinburgh: Wm. Green & Sons. 1903. 8vo. x and 112 pp.

Der Eid: ein Beitrag zu seiner Geschichte. Von Rudolf Hirzel. Leipzig: S. Hirzel; London: Williams & Norgate. 1902. 8vo. vi and 224 pp.

We bring the titles of these two books together to show how various are the points of contact between historical jurisprudence and anthropology. The first-named work appears to be a lawyer's, which of course makes it more valuable for our purposes. Nowadays we think of trading with enemies as forbidden. But there is much reason to think that all trade was originally between enemies. Within a nomad or pastoral tribe there is nothing to trade in, every family being self-supporting; and all external tribes may be presumed to be hostile. In fact all the stages of 'silent trade' have been observed among savages in modern times. Barter between people who mistrust and fear one another (with additional superstitious motives, as often as not) is managed by one party leaving his goods on the ground and going away. The other comes and takes what he wants, and leaves of his own wares what he judges an equivalent. Adjustment of values under such conditions is clumsy, but it gets done. Next comes the stage where the parties are not afraid of being seen, but do not speak. Then we find the primitive market. Neutrality is required for the conduct of business, and developes into a truce with religious sanctions. Markets had a special peace even in medieval Christendom.

Later the trader ventures into the strange country, and we find elaborate customs of hospitality and guest-friendship to protect him, all this being still compatible with regarding hostility between the tribes as the normal state of things. Down to the thirteenth century, again, we find in our own land, as one may read in Bracton, the rule that a man who keeps a stranger more than three nights must answer for him as one of his own household. We cannot pretend to verify Mr. Grierson's numerous authorities, but we take his word for it that the subject has never yet been so fully treated, and he has made a very good story of it. No doubt other explanations of this and that detail may be offered, and may at first sight be plausible, or may even be correct in special cases. But it is clear, for example, that mutual ignorance of language will account for silence, but will not account for the buyer and seller not meeting face to face at all; and, if Mr. Grierson's theory is to be improved upon, it must be by something which also explains things as a whole, and explains more.

'Der Eid' is the work of a philologist, and only touches the fringe of jurisprudence. None the less the lawyer who is a Greek scholar and can read German will find excellent vacation reading in it. Prof. Hirzel of Jena seems to have all Greek literature from Hesiod to modern Greek folk-lore at his fingers' ends, but we think he has a preference for the Attic dramatists, for he knows everything about them, including Dr. Verrall's almost too ingenious studies of Euripides; and he illustrates the religious and social operation of the oath in different stages of civilization with a delightful wealth of instances. One is not sorry, besides, to have for once a work that contrives to make a serious contribution to anthropology and yet keep clear of the everlasting discussion of savage totems (though there is now, if we may say so, a slump in totems), tabus, and disgusting ritual and other customs. We have not space to give a systematic account of Prof. Hirzel's history, and moreover the Whitsuntide vacation is very short. Enough to say that he traces with great skill the gradual process of rationalizing the oath till it ceases to be a primary source of obligation, becomes a mere auxiliary sanction to public or private contracts or to judicial evidence, and is interpreted not literally, but according to the sense of the transaction. Of judicial oaths, however, he says but little. His distinctions look at times rather too sharp. One cannot in practice draw a clear line between the 'assertory' and the 'promissory' oath. An oral witness, here and at this day, swears before he speaks that he will speak the truth (which is 'promissory'); a deponent swears to the truth of that which is already written in his name (which is 'assertory'); but there is no substantial difference. Defined categories, however, are necessary for orderly exposition in a subject so rich in details, and it is quite fair to make things look in outline more definite than they are, and supply the qualifications afterwards. The merely sportive element in the 'strange oaths' of colloquial expletives is perhaps underrated. We have heard of a traveller returning from Bayreuth who crushed the obstinacy of some petty official by the formula *Potztausend-Götterdämmerung-Donnerwetter-Himmelsapperment*. It would be rash to infer that he intended to devote either the official or himself to the conflagration of Valhalla. But, if he was a good Wagnerian, this may come under the formula 'man schwört bei Allem, was theuer ist.' Finally, we learnt German long enough ago to be rather well pleased that our learned author's spelling is unreformed.

F. P.

Encyclopädie der Rechtswissenschaft in systematischer Bearbeitung, begründet von Dr. FRANZ VON HOLTZENDORFF unter Mitwirkung von G. Anschütz, L. von Bar, &c., herausgegeben von Dr. JOSEPH KOHLER, ord. Professor der Rechte in Berlin. Sechste, der Neubearbeitung erste Auflage, 1. Lieferung. Band 1, Bogen 1–5 enthaltend. Leipzig: Duncker & Humblot; Berlin: Guttentag. 1902. 8vo. 80 pp.

THIS is the first instalment of the new edition of Holtzendorff's well-known Encyclopaedia of Law and Jurisprudence (see L. Q. R. vol. i. pp. 62–79) which is now being brought out by Professor Kohler under a remodelled plan, necessitated by the great changes introduced into German law by the enactment of the new Civil Code. The greater part of the instalment is occupied by the editor's essay on 'Legal Philosophy and Universal Legal History,' which is the subject of the present notice.

In the first part of the article Professor Kohler defines legal philosophy as the study of the evolutionary processes by which law is formed, and contrasts this view with the belief formerly held in a science aiming at the discovery of an abstract and immutable system, called the law of nature. The chief merit of having destroyed this belief is ascribed to Hegel, who is stated to be the founder of the science of legal philosophy. The term 'positivism' is used by Professor Kohler to denote the attitude of those who confine their attention to the study of positive law, which attitude is condemned as not less opposed to scientific inquiry than the theory of natural law. Utilitarianism as represented by Ihering—the English Utilitarians do not seem to be known to Professor Kohler—is also treated with great severity. 'Legal politics,' being the art of adapting laws to the conditions prevailing at a given time, and 'Rechtstechnik,' being the method of interpreting existing law, are also distinguished from legal philosophy, which, as mentioned above, is the inquiry into the evolution of legal institutions; for this inquiry the material is furnished by universal legal history, which may also be described as the science of comparative law. An enumeration of the sources from which materials for this universal history may be gathered is given together with some rules as to the mode of using such materials.

The second part of the article deals with legal institutions under four heads: (1) Relation of man to nature; (2) relation of man to man; (3) formation of collective bodies; (4) influence of collective bodies on individuals. Under the first head the evolution of proprietary rights including 'the right in ideas' is described; under the second a distinction is made between the intimate ties of sexual and parental relationships and the looser ties formed by dealings between strangers; on the one side the evolution of marriage, paternal power, the artificial extensions of the family, inheritance and other similar institutions; on the other the history of the recognition of obligatory rights and of the means of enforcing them is commented upon. The chapter dealing with the formation of collective bodies traces the evolution of the modern states from primitive communities, and that relating to the influence of collective bodies on individuals contains a summarized historical statement on the subject of criminal law and criminal procedure.

It is obvious that a survey extending over a field of such huge dimensions and varied aspect contained in the space of sixty-nine pages must be condensed in form and dogmatic in expression. Having regard to the fact that it is based on materials which can only be mastered by long and

patient study, it is outside of the competence of the present writer to express an opinion on the author's conclusions, and he can only give utterance to his admiration of the way in which the breath of life has been made to enter into the multitudinous skeletons brought to light by antiquarian and ethnographic research. Professor Kohler's extensive knowledge of general literature and his artistic temperament charms and fascinates the reader and makes him indulgent to some faults which might otherwise have an irritating effect. Among these faults the aggressive manner in which the work of others on similar subjects is commented upon is specially conspicuous.

Some subjects seem to be introduced for the special purpose of controversy. Thus, for instance, it seems obvious that the inquiries to which Professor Kohler gives the name of legal philosophy are not in any way dependent on the inquirer's position with reference to the theory of knowledge and the problems of ontology; the author's statement (p. 7) that the rejection of 'Kantian errors' is a condition on which the scientific nature of such inquiries must necessarily depend, seems, therefore, to have no purpose other than the display of animosity against Kant's critical method. In the survey of modern writers on legal philosophy on p. 12 only two English writers, Austin and Professor Holland, are mentioned, and they are dismissed in one sentence in which they are called 'Naturrechtler' and representatives of a 'Stand der Betrachtung über den wir uns längst erhoben haben.' Sir Henry Maine is entirely ignored, and his name only occurs in the list of the works of an Italian writer, Vanni[1], one of which has the title of 'Gli studi di Sumner Maine.' A somewhat closer study of English writers might possibly have suggested some aspects of the subject of legal philosophy which do not seem to have occurred to Professor Kohler. Thus, for instance, the perusal of the observations on the law of nature in Professor Holland's 'Jurisprudence,' besides showing him that the term 'Naturrechtler' as applied to that author was somewhat inappropriate, would have called his attention to some effects of the notion of a 'jus naturae' which no writer on the evolution of law ought to overlook. Moreover, Sir F. Pollock's articles on the 'History of the Law of Nature' (Journal of Comp. Legisl. 1900, p. 418; 1901, p. 204) would have shown him how the assumption of the existence of an ideal principle to which positive law ought to conform has in itself influenced the growth of law. This belief in natural justice, which, as shown in the articles referred to, is by no means inconsistent with a belief in the doctrine of evolution, has in itself played a part in the evolution of law which is at least as important as the beliefs and customs of primitive times, such as totemism and ancestor worship, to which so much space is given by Professor Kohler.

E. S.

A Treatise on the Specific Performance of Contracts. By the Right Hon. Sir Edward Fry. Fourth Edition. By W. D. Rawlins, K.C. London: Stevens & Sons, Lim. 1903. La. 8vo. liii and 783 pp. (36*s.*)

This fourth edition of 'Fry on Specific Performance' makes no substantial alteration either in the amount or in the arrangement of the

[1] We have to regret the loss of Prof. Icilio Vanni, who died some months ago.—Ed.

matter contained in the third edition, which was published eleven years ago. There is the usual inevitable addition to the Index of Cases, but space has been made for the consequent additions to the text by slightly increasing the amount printed on each page, the net result being a small diminution in the total number of pages.

The numbering of the sections remains unaltered, so that those who habitually refer to the book in actual practice may find the latest decisions upon any point in the place where they have always been accustomed to search for cases upon that point.

Some of the general rules stated in the book are subject to so many qualifications and exceptions or apparent exceptions that it would be more convenient if those rules were now re-stated with greater precision in a qualified form. For instance, s. 821 states as a rule that 'the Court will not . . . generally compel specific performance of a contract unless it can execute the whole contract'; and later on ss. 839–866 are occupied with the statement and discussion of nine classes of exceptions or apparent exceptions to this general rule, all of which so-called exceptions are referable to the equally important general principle that the Court can and will in proper cases interfere to enforce specific performance of part of a contract where such partial interference cannot work any possible injustice to either contracting party. All these classes of exceptions or apparent exceptions would really illustrate and fall into line with the general rule if that rule were re-stated subject to the necessary qualification as follows: 'The Court will not specifically enforce part of a contract except where that part can be separately enforced without any possible injustice to the defendant.'

So again in s. 460, under the defence of 'want of mutuality,' it is stated as a general rule that a contract cannot be specifically enforced unless 'it might at the time it was entered into have been enforced by either of the parties against the other of them,' and in ss. 464–475 numerous exceptions to the general rule are stated which appear to be all referable to the same general principle, viz. that the defence of 'want of mutuality' will not avail to prevent the Court from exercising its beneficial jurisdiction where the contract can be properly enforced without any possible injustice to the defendant, provided a corresponding equitable remedy becomes available against the plaintiff on or before his institution of the action.

Another improvement may be suggested in the arrangement of the 'Defences to the Action' in Part III of the book, which again contains twenty-five separate chapters, in each of which a different head of 'Defence to the Action' is separately discussed. There is some apparent want of system in the treatment of these numerous defences, which might with advantage be grouped under some half-dozen heads indicating the common origin and characteristics of the defences comprised in each group, e. g. defences relating to (1) the person, (2) the substance of the agreement, (3) the form of the agreement, (4) the subject-matter of the contract, and so forth.

The retention of the unqualified statements of general rules and the omission of any classification or arrangement of the numerous 'Defences to the Action' are probably due to the editor's expressed desire 'to interfere as little as possible with the author's language and to preserve the general structure and arrangement of the work'; but it is permissible to express a hope that this desire may not be allowed in future editions of this most useful book to exclude any revision and amendment of the general rules

or any more systematic arrangement of the 'Defences to the Action' which may be capable of introduction with advantage to the general scope and design of the author's treatment of the subject.

OLIVER A. SAUNDERS.

A Treatise on the Law of Contracts. By the late C. G. ADDISON. Tenth edition, edited by A. P. PERCEVAL KEEP and WILLIAM E. GORDON. London: Stevens & Sons, Lim. 1903. cxxiv and 1245 + (Index) 107 pp. (£2 2*s*.)

IN our opinion the editors are greatly to be commended for their efforts to reduce the bulk of this book, and we do not think that any one will complain of the judicious excision to which they refer in their preface, or consider that it has in any way impaired the value of the Work. Between nine and ten thousand cases are referred to in the volume besides a large number of statutes, and it must be obvious to every one that the task of dealing with such a mass of material must have been a very difficult and laborious one. The learned editors are to be congratulated on the industry and ability which they have displayed. So far as we have been able to test the present edition it seems to us to contain nearly everything which is worth knowing about the Law of Contract, but at the same time we must confess that considerable research is sometimes necessary before one arrives at the exact piece of information one requires. For example, one might expect to find the comparatively recent case of *Lamond* v. *Richard* ([1897] 1 Q.B. 541) dealt with under the heading 'Who are guests and travellers,' instead of which it is dealt with under the headings 'duties of innkeepers' and 'lien of innkeepers.' If the book has any serious fault we are inclined to think it is this, that for a text-book it partakes too much of the nature of a digest of case-law, and that the general principles to be collected from the cases have not been brought into sufficient prominence. On page 50 the question of conditions precedent is dealt with, and we are correctly informed that whether particular stipulations are to be conditions precedent or not depends upon the intention of the parties to be gathered from the particular instrument. A long list of stipulations follows which have been held to be or not to be conditions precedent, but no general rule is laid down to guide one in ascertaining the intention of the parties from the instrument. We notice on page 51 and again in the index that the case of *Bettini* v. *Gye* (1 Q.B.D. 183) is referred to as *Bertini* v. *Gye*. The statement on page 111 that 'as a general rule a contract will not be enforced unless it is valid by the law both of the country in which it was made and of that in which it is to be enforced' is not correct. In fact it is rightly stated on page 55 that 'if the contract is valid by the law of the country where it is made it is valid everywhere unless *contra bonos mores* or for the doing of a thing directly prohibited and forbidden in or contrary to the public policy of the country where the contract is sought to be enforced.' After all these are not great matters, and what we have called the digest form of the book has no doubt come down to the present editors from those who have gone before. The present edition is well up to date, and all the more important cases on the Law of Contract which have been decided during the last two or three years are to be found either in the text or the addenda, which face page 1 of the text.

One of the most important of these cases is *Keighley Maxsted & Co.* v. *Durant* [1901] A. C. 240, which is correctly but somewhat summarily dealt with in four lines on page 301 without any reference to the judgments of the present Master of the Rolls and Lord Justice Romer in the Court of Appeal. The chapter on the sale of goods has been rewritten, and the existing law under the Act of 1893, copiously illustrated by decisions both before and after the passing of the Act, will be found in the text.

We notice on page 2 a statement that Bracton, who wrote in the time of Henry III, is the first of our lawyers who treats of naked promises. This is literally true, but misleading. Bracton's treatment of Actions and Obligations (fo. 99 sq.) is copied partly from the Institutes and partly from Azo's commentary, as Mr. Maitland has shown in detail, and has very little to do with any real English law and nothing with our modern doctrine of consideration. *Nudum pactum* meant for Bracton something quite different from what it meant for an Elizabethan lawyer.

An Encyclopaedia of Forms and Precedents other than Court forms by Eminent Conveyancing and Commercial Counsel. Under the general editorship of ARTHUR UNDERHILL, assisted by CHARLES OTTO BLAGDEN and WILLIAM E. C. BAYNES. Vol. III. Building Societies to Commission. London: Butterworth & Co. 1903. La. 8vo. liii and 815 pp.

THIS volume fully maintains the high character of its predecessors. It contains a vast amount of information which is not generally accessible to the practitioner. The preliminary discussions are full of valuable matter. The precedents appear to contain everything which will be required in practice by either branch of the profession. The most important subjects discussed in this volume are Building Societies, Chapels, Charities, Choses in Action, and Churches.

The forms relating to Building Societies are divided into (1) Forms relating to the incorporation of a Society; (2) Forms relating to the rules and constitution of a Society; (3) Forms for use in the conduct of a Society's business, which include those relating to loans to a Society; these forms, so far as we are aware, are not in any of the precedent books; and (4) Forms relating to the dissolution of a Society.

The preliminary note to Chapels contains information relating to the 'Model deeds' used by Nonconformists, much of which cannot be found elsewhere in books usually accessible to the practitioner. There is a large collection of precedents. Under the head 'Charities' there is not only a preliminary disquisition and numerous precedents, but also a collection of forms used by the Charity Commissioners.

While the preliminary note to 'Choses in Action' contains much useful information, we are, we must confess, puzzled by the statement that 'the term legal chose in action appears to include all rights the assignment of which a court of law or equity would before the (Judicature) Act have considered lawful.'

The difficulty arises from the use of the word 'lawful.' If it only means 'not contrary to law' or, in other words, 'valid,' the term legal chose in action is according to the definition extended to all choses in action except those few which are absolutely incapable of being assigned either at law or in equity. On the other hand, if by 'lawful' is meant 'valid at law as distinguished from equity,' the definition excludes most

choses in action except negotiable instruments and except some which are assignable by statute.

The true distinction between a legal and an equitable chose in action has nothing to do with the question whether before the Judicature Act the chose in action could be assigned; it depends solely on the question whether the person originally entitled to the chose in action could, before the Judicature Act, have enforced his rights by an action at law, or whether he could only enforce them by a suit in equity; if he could enforce them at law, it was called a legal chose in action, if he could enforce them in equity only, it was called an equitable chose in action.

We cannot help thinking that the author has been misled by the cases which he cites, in which the question was not, What is a legal chose in action? but, What is a legal chose in action within the meaning of the Judicature Act, s. 25, sub-s. 6? Nothing in those cases shows that where the person originally entitled to a chose in action whose rights are enforceable in equity only assigns it in accordance with the provisions of the Act the assignee can bring his action at law.

The precedents under the head Choses in Action include forms of contracts and conditions of sale of reversionary interests and policies, reversions, life interests and shares in companies, assignments of interest of various natures. We may fairly say that we are not aware of any collection of precedents of this nature which contains so large a variety.

The preliminary note on 'Churches' discusses the different manners of acquiring land for ecclesiastical purposes, and of the various powers of dealing with the land so acquired. It contains an apparently complete statement of the various manners in which land or buildings may be given or sold for providing a church, how land may be given or sold for providing or enlarging a churchyard or church, or for a parsonage house or glebe. There is also an explanation as to the manner of making leases or mortgages of Church land, of making sales of glebe land either with or without the approval of the Board of Agriculture, and lastly exchanges of glebe lands are considered. The precedents contain forms (1) relating to the clergy; (2) acquisition of property for Church purposes; (3) Diocesan Trusts; and (4) dealings with Church property.

The last subject treated of in this volume is Clubs, a matter which to our belief has not hitherto been discussed by conveyancers, though there has been a good deal of learned talk over the recent case of the Oxford and Cambridge Club (*Harington* v. *Sendall* [1903] 1 Ch. 921).

In conclusion, we are of opinion that this volume will be a very useful addition to the conveyancer's library; he will find information which it is difficult to obtain, and forms and precedents of excellent quality, some of which are we believe unknown to the greater number of the Bar.

The Constitution of the Commonwealth of Australia. By W. Harrison Moore, Dean of the Faculty of Law in the University of Melbourne. London: John Murray. 1902. 8vo. xx and 395 pp. (16*s.* net)

Those who desire to become acquainted with the principles of the Australian Constitution cannot fail to derive much useful information from this book. The learned author has brought a wide and varied knowledge to bear on his subject; the arrangement of his matter is clear; he shows a firm grasp of principle, and his observations are at times

compressed and suggestive—a fact that by no means detracts from the merits of the work.

By the arrangement of the subject-matter which he has adopted, the author is enabled to bring into juxtaposition and discuss in one place subjects which are somewhat scattered in the Act; but, as the Act itself is printed with paginal references to the work, and a good index is added, the book can be used as an annotated text. Readers desirous of solving some of the many problems which are likely to arise in the working of this new Constitution will derive material assistance from the clear statement of the legal principles upon which their true solution depends.

The opening chapter on the sources of the laws and institutions of the Colonies contains a careful analysis well calculated to impress those who are imperfectly acquainted with the subject with the multiplicity of those sources. It also gives a clear explanation of the rule against the extra-territorial operation of Colonial statutes. The distribution of powers in the Commonwealth—legislative, executive and judicial; the relations of the Senate and the House of Representatives; of the Parliaments—Imperial, of the Commonwealth and of the States: the Cabinet system; the constitution and jurisdiction of the Federal Courts; the constitutions and powers of the States; and the subject of finance and trade are all matters which receive due attention.

In his chapter on the distribution of powers in the Commonwealth, Professor Harrison Moore is careful to point out that, though the doctrine of the separation of powers is now thoroughly established in the American Courts as an independent principle, the more important cases in which attention has been called to this principle have been decided, not on the prohibition implied from such separation, but upon express restraints imposed on the Legislature by the Constitution, such as the prohibition of bills of attainder, and the making of *ex post facto* laws; and he adds: 'However mischievous and dangerous may be *ex post facto* laws and *privilegia*, their very mischief lies in the fact that they are something other than judicial acts; and the propriety, the justice, or the expediency of an Act of Parliament is a question which lies outside the jurisdiction of any Court. It may be conjectured that in this matter of the distribution of powers, our Courts will not closely follow the American precedents, which would assign to the Commonwealth Parliament in its sphere a position quite different from the States Parliaments in their sphere. . . . It is suggested, therefore, that those questions of *generality* as to persons or circumstances, and of prospective or retrospective operation, which are discussed in America on the distribution of powers among legislative, executive, and judicial organs, have not the same importance in the Commonwealth Government. The question of generality, it is true, may be important, but as an incident of the distribution of power between Commonwealth and State rather than of the distribution of powers among the organs of the Commonwealth Government.' Whether these conjectures of the learned author are destined to be fulfilled, or on the other hand whether the Federal High Court, when constituted, will be called on to decide whether a particular enactment amounts to an encroachment on the judicial power which is expressly vested by the Constitution in the High Court, time alone will reveal.

In speaking of the qualification of members of either House of Parliament, it is interesting to note the conclusion to which the author appears to have come: that, as women may be electors in both South and Western Australia, those women are eligible in any part of the Commonwealth as

Members of the Federal Parliament—a conclusion to which Sir John Quick and Mr. Garran in their Annotated Constitution of the Australian Commonwealth also seemed to incline.

It may safely be predicted that Mr. Harrison Moore's book will establish its position as a valuable and trustworthy handbook to the Australian Constitution.

Company Precedents. Part III. Debentures and Debenture Stock. By Francis Beaufort Palmer. Ninth Edition. London: Stevens & Sons, Lim. 1903. La. 8vo. lx and 794 pp. (25*s.*)

It is about three years since the eighth edition of this part of Palmer's Company Precedents was published, and the subject was then dealt with in a separate volume for the first time. The separate volume contained several hundreds of pages, but the new edition is still larger. The enlargement is to some extent due to the provisions, with reference to debentures and debenture stock, of the Companies Act, 1900, but since 1900 there have been numerous decisions apart from those occasioned by that Act, with reference to this important branch of company law which have required consideration and notice. Before the eighth edition appeared Mr. Justice Kennedy in *Bechuanaland Exploration Co.* v. *London Trading Bank* [1898] 2 Q. B. 658 had adopted the author's views, expressed in previous editions of 'Company Precedents,' as regards the negotiability of debentures. In *Edelstein* v. *Schuler & Co.* [1902] 2 K. B. 144, Mr. Justice Bigham went, perhaps, a little further, for he not only followed Mr. Justice Kennedy's decision, but added, 'I go, perhaps, further than Kennedy J. intended to go, for I think that it is no longer necessary to tender evidence in support of the fact that such bonds are negotiable, and that the Courts of law ought to take judicial notice of it.'

Mr. Palmer is naturally much gratified with this result. 'This satisfactory termination of a long-standing controversy,' he says, 'renders the draftsman's task in framing a debenture to bearer a comparatively simple one. All that is necessary is to make the instrument in terms payable to bearer, and to take care that no condition or stipulation appears which is repugnant to or inconsistent with the nature of a negotiable instrument.' And so thoroughly convinced is the author of the soundness of his own views as to negotiability, backed up as they are by judicial decisions, that he has now in his form of a debenture to bearer discarded many clauses which formerly were inserted *ex abundanti cautelâ*.

Sections 9 and 10 of the Companies Act, 1900, with reference to the filing and contents of prospectuses inviting subscriptions for debentures and debenture stock, have necessitated some very considerable additions to the work. Every company lawyer has amused himself with the remarkable phraseology of section 9, which was admirably criticized in the author's smaller work on the Act of 1900. Section 10, with the many doubts and difficulties which it has occasioned, is carefully dealt with in the work under review, as also are the provisions (sections 14 to 18 of the Companies Act, 1900) in relation to the registration of debentures. Mr. Palmer expresses the opinion, for reasons duly stated, that 'the form of words adopted by Buckley J.'—in making an order for the extension of time for registering debentures in *In re Joplin Brewery Co.* [1902] 1 Ch. 79—'requires some modification.' Mr. Justice Buckley has, however, quite recently defended the use of the words objected to—viz. 'without prejudice

to the rights of parties acquired prior to the time when such debentures shall be actually registered,' and has contended that words having precisely the same effect have since been used by the Court of Appeal: see *In re Anglo-Oriental Carpet Manufacturing Co.* [1903] 1 Ch. 914. But it is well known that eminent company lawyers often widely differ in their views of the law. The chapter on 'Remedies of Holders of Debentures and Debenture Stock' has been greatly enlarged in the new edition, and it now deals not only with remedies to enforce these securities, but also with remedies connected with their issue, including actions for rescission of contract, actions under the Directors' Liability Act, and actions under section 10 of the Act of 1900. The chapters embodying the general practice of the Courts in actions to enforce securities, &c. have been accurately brought up to date. The ninth edition contains 160 more pages than the eighth edition contained, and fully sustains the reputation of the author, who in his preface acknowledges the assistance rendered to him by Mr. Frank Evans and Mr. E. W. D. Manson.

That reputation is, by the way, recognized in the preface to the sixth edition of Lord Lindley's work on Company Law, the editor of which there acknowledges 'his indebtedness for the assistance which he derived from Mr. Palmer's well-known volume on debentures'—then in its eighth edition—'in the preparation of the portion of the present work which relates to that subject.'

The Law and Practice relating to the Formation of Companies (Limited by Shares) under the Companies Act, 1862 to 1900. By VALE NICOLAS. London: Sweet & Maxwell, Lim. La. 8vo. xiv and 114 pp. (*7s. 6d.*)

THIS little book professes only to relate to Companies limited by shares and to 'deal exclusively with matters connected with the *formation* of companies of this class.' In his preface the author says: 'The registration of unlimited companies and companies limited by guarantee is, to-day, so seldom effected, that the author feels justified in disregarding them.' Sixty pages are accordingly devoted to matters connected with the formation of companies the liability of which is limited by shares. Chapter I is introductory and Chapter II deals with Incorporation. Chapters III and IV relate to the Memorandum of Association, and Chapter V deals with Articles. The remaining eight chapters are devoted to the following subjects: Classes of Shares, Preliminary Agreements, Underwriting and Placing Shares, Prospectuses, Allotment of Shares, Commencement of Business, Promoters, and Directors. This arrangement has, at any rate, the merit of novelty. There is an appendix of forms, &c. occupying thirty-four pages.

Mr. Nicolas has given his readers a good deal of company law, necessarily in a compressed form, in the first sixty pages of his book. His form of articles takes up twenty-two pages of the appendix, and not much space, therefore, was left for other forms. He has twenty-nine object clauses in his form of memorandum of association, but practitioners and directors are supposed to like a great number of these clauses. Some judges of the Chancery Division would be much shocked if asked to approve of a memorandum containing so many of them.

The History and Law of Fisheries. By STUART A. MOORE and H. STUART MOORE. London: Stevens & Haynes. xxxvi and 446 pp. (21*s.*)

THE publication of Mr. Stuart A. Moore's book upon the History and Law of the Foreshore effected a considerable change in the general view as to the prevailing right of the Crown to the foreshore, and it seems probable that the present work will alter or modify some of the generally accepted doctrines as to the origin, history, and law of fisheries. In no branch of the law is an acquaintance with original documents more important than in that which relates to foreshore and fisheries. Mr. Stuart Moore's name is sufficient guarantee that in Part I of the present book, the part which deals with what may be called the common law of the subject, there has been brought to bear an experience, skill, and confidence which can be acquired only by long and intimate acquaintance with the treasures of the Record Office. The amount of information which has been extracted from the records is surprising. The number, extent, and value of English fisheries must, from the frequency of their occurrence in Doomsday, on the plea rolls, and elsewhere, have been far greater in early than in more recent times. More than 500 fisheries are mentioned in Doomsday, and the names of more than 2,000 (a very incomplete list) are collected by our authors from other records. When we compare these numbers with the scanty total of reported cases from which the whole of our common or general fishery law has been evolved, one is forced to the conclusion that the reported cases do not contain the whole of the law or of the facts necessary for a proper understanding of the subject. The fact is, as Messrs. Stuart Moore emphatically state more than once, that much of our fishery law has been elaborated by judges and text-writers, who (excepting always that master of records, Lord Hale), for the most part, knew little of the facts relating to fisheries in which our records abound. Moreover the records have been mis-read and mis-quoted by some of those who have cited them. A remarkable instance of this is pointed out by our authors in a case which Manwood cites as an authority for the statement that rivers which bound a forest belong to the king. He arrives at this conclusion by overlooking or suppressing the word 'dominica,' which occurs in the record. A dictum of Lord Coke (Co. Lit. 4 b, 122 b) is responsible for the erroneous opinion that long prevailed that fisheries are for the most part incorporeal hereditaments. As to tidal fisheries this notion prevailed until 1891. It would seem that it is with reference to tidal fisheries that our judges and text-writers have gone most astray. Hitherto it has been thought that a several fishery in tidal water is exceptional. This, say Messrs. Stuart Moore, is a mistake; such fisheries were formerly, and consequently still are, by no means unusual. The importance of this discovery, with reference to the ownership of the foreshore, may be considerable.

One of the most interesting chapters is that (ch. ii) relating to the putting of rivers 'in defence.' Mr. Stuart Moore brings forward cogent evidence from early records to show that, when the early kings put rivers 'in defence,' they did so, not for the purpose of fishing in them, but of fowling or hawking over them. This suggestion throws doubt upon the view that Magna Carta put a stop to the creation by the king of several fisheries in tidal waters. It would seem, however, that if the king hoped to find wild swans, herons, or wild fowl on a river when he was going

a-fowling, it would have been as necessary to prohibit, not only fowling, but fishing and even navigation.

The book consists of two parts and an appendix. Part I (pp. 109) deals with the history and common law of fisheries; Part II (pp. 55) with the statutory law; and the Appendix (pp. 175) sets out the statutes and Fishery Districts. That part of the book which deals with statute laws appears to be fully and carefully done; but the main interest of the work is in Part I. An index locorum is unusual in a law-book, but it would be a useful addition here.

Year Books of the reign of King Edward the Third, Years XVII and XVIII. Edited and translated by LUKE OWEN PIKE. London: Printed for His Majesty's Stationery Office by Mackie & Co., Lim., and to be purchased from Eyre & Spottiswoode. 1903. La. 8vo. l and 685 pp.

WE are glad to see Mr. Pike's excellent work on the Year Books continuing. At p. 72 there is an interesting little discussion, showing that the tender of suit had become merely formal before the middle of the fourteenth century. In an action of debt the defendant's counsel meet the allegation of 'good suit' with the demand 'Let his suit be examined at our peril'—which obviously surprises the other side ('Do you mean that for your answer?' they say)—and, on the objection 'suit is tendered merely as part of the form of the count,' they try to make the distinction that 'in a plea of land, where suit is tendered, it is only by way of form; but in a plea which is founded on contracts, which requires witnessing,' it is otherwise. But the Court says, 'Certainly it is not so; and therefore deliver yourself.' In the Preface Mr. Pike also points out that our common phrase 'vouch to warranty' is really a mistranslation. The Latin is *vocare ad warantum*, call on a man to become a 'warrant': being vouched, he is 'warantus' until he takes the tenant's place in the action as 'tenant by warranty,' or else counterpleads with success and is discharged.

The Municipal Corporations Acts. By the late Sir CHRISTOPHER RAWLINSON. Ninth Edition. By JOHN F. P. RAWLINSON, K.C., and J. A. JOHNSTON. London: Sweet & Maxwell, Lim. 1903. La. 8vo. lxvi and 708 pp. (42*s.*)

THE eighth edition of this work was published in 1883, very shortly after the passing of the Municipal Corporations Act, 1882. Since then the law has been changed or explained by the passing of some thirty Acts of Parliament and the decision of numerous cases. Consequently most of the notes have had to be rewritten and there is little in this edition to remind one of its parentage. The present editors have done their work well, and we are convinced that the book will now be restored to favour as the authority on the modern law of municipal corporations. As an annotated edition of the Statute law it leaves nothing to be desired, and we can only regret that the learned authors did not see their way to adding a chapter on the history and common law of borough corporations, thereby making of the book a complete treatise on an important and interesting branch of our legal institutions.

The Legal Handbook of Practical Law and Procedure, with tariffs of fees of office and stamps in British South Africa, together with a Law List. 1903. By W. H. SOMERSET BELL and MANFRED NATHAN. Grahamstown, Cape Colony: African Book Co. 1902. 8vo. xi and 762 pp. (21*s.* net.)

THIS book is described in the Preface as an attempt to present 'an epitome of all such portions of the Statute Law, and of regulations framed under the Statute Law, as are applicable in daily practice.' The work is, in fact, 'a digest of South African Statute Law—with here and there illustrations from the Common Law—bearing on matters, mainly administrative, of practical importance.'

As a handy work of reference the book should be useful. It contains a mass of information relating to the laws and procedure of the South African Colonies (including the Transvaal and the Orange River Colony) not accessible elsewhere, but the arrangement is rather haphazard. The first 127 pages deal with the allied subjects of Registration of Deeds, Patents, Trade Marks, Copyright and Designs. After these we get Insolvency, Marriage, Superior Courts and Arrest in the order named. Further on there is a Law List, followed by information relating to sheriffs and deed registries in the Orange River Colony and the general section on Stamp Duties. We think an alphabetical arrangement would have been more convenient; and the place for the Law List is obviously either at the beginning or the end of the book. The law and practice of the subjects dealt with are given shortly and clearly, but, with the exception of the section on Arrest, very little commentary is attempted and but few cases are cited. These features will no doubt be expanded in future editions. There is a full index.

We have also received:—

Principles of the English Law of Contract. By Sir W. R. ANSON, Bart. Tenth Edition. Oxford: At the Clarendon Press. 1903. 8vo. xxxvi and 400 pp. (10*s.* 6*d.*)—We collect from the Preface to this edition that Mr. Graham-Harrison is to a considerable extent answerable for the additions of recent cases and other modifications rendered necessary by lapse of time. The work appears to have been neatly and skilfully done. Substantive comment on a treatise which has taken an unique place among elementary text-books is now superfluous. As a microscopic criticism, we may observe that it is no longer correct to cite 'Judge Chalmers' (p. 264).

The Elements of Mercantile Law. By T. M. STEVENS. Fourth Edition. By HERBERT JACOBS. London: Butterworth & Co. 1903. 8vo. xxxix, 452 and 32 pp. (10*s.* 6*d.*)—Our general commendation of the second edition (L. Q. R. xiv. 211) remains applicable to the fourth, which appears to have been judiciously brought down to date and pruned of matter rendered superfluous by lapse of time, or found not to be in place. Some small errors have been duly corrected, and, although in so concise a book there is inevitably much that will not satisfy an intelligent student without farther explanation, we do not observe anything open to serious exception. The chapters on Sale of Goods, Negotiable Instruments, and Partnership, are in effect commentaries on Acts of Parliament, of which the text appears

only in a few extracts; and within a short time the same remark will probably apply to the law of marine insurance. It is to be hoped that students using the book do not omit to have the text of the appropriate Act at hand in reading these portions. The statement that the income of 'property is *sometimes* settled upon trustees' for a married woman on trust for her separate use without power of anticipation is needlessly guarded. A conveyancer would have written 'constantly.' We do not believe that a corporation aggregate is a fictitious person, but that is not matter for beginners. We think, on the other hand, that even beginners might usefully be told something more about the mercantile importance of the law of estoppel.

A Handy Book of the Fishery Laws. By GEORGE C. OKE. Third Edition by J. W. WILLIS BUND and A. C. M'BARNET. London: Butterworth & Co. 1903. 8vo. xxiv and 369 pp. (15*s.*)—Although styled a third edition of 'Oke' this is in fact a new book, embodying 'Oke,' 'Paterson's Fishery Laws,' and 'Bund's Salmon Fishery Acts.' The book is mainly a collection of the General and Local Acts relating to fisheries, with short chapters dealing with the general law of public and private fisheries and legal procedure. It does not deal at any length with the intricate and difficult subject of the history and origin of fishery rights, but it appears to be a full and accurate exposition of the statute law, illustrated and explained by some 150 of the more important decisions upon fishery cases. It is, as described by the authors, 'a guide to those who have to administer the law, those who have to enforce it, those who desire to avoid breaking it, and those who want to know what the law is.'

Hints on Advocacy. By RICHARD HARRIS, K.C. Twelfth Edition. London: Stevens & Sons, Lim. 1903. 8vo. xvii and 356 pp. (7*s.* 6*d.*) —We do not notice any recent changes in this well-known and well-tried book, which has the rare felicity, for a law-book, of not needing to be posted up with the latest decisions. Mr. Harris has now for many years been preaching against the abuse of cross-examination. We wish we could believe that any serious amendment had taken place in the general practice of that difficult and dangerous art.

Employers' Liability to their servants at Common Law, and under the Employers' Liability Act, 1880 *and the Workmen's Compensation Acts,* 1897 *and* 1900. By C. Y. C. DAWBARN. Second Edition. London: Sweet & Maxwell, Lim.; Liverpool: Littlebury Bros. 1903. La. 8vo. xxxii and 299 pp. (10*s.* 6*d.*)—This is a new edition of Mr. Dawbarn's work on Employers' Liability, to which has been added another book on the Workmen's Compensation Act, 1897. The work is arranged in three books dealing with the liability of employers (1) at Common Law, (2) under the Employers' Liability Act, 1880, (3) under the Workmen's Compensation Acts, 1897 and 1900. The authorities cited are numerous and appear to be quite up to date; and the Rules and Forms under the Act of 1897 are given.

Fifteen decisive Battles of the Law: being a study of some leading cases in the Law of England. By E. A. JELF. London: Sweet & Maxwell, Lim. 1903. 8vo. xii and 115 pp. (3*s.* 6*d.* net.)—A pleasantly written little book, which may be of some use to students as an introduction to the reports at large. Some things are, for elementary purposes, wisely concealed, such as the difficulties that have arisen in ascertaining what *Hadley* v. *Baxendale* really did decide.

The Law and Practice on Enfranchisements and Commutations. By ARCHIBALD BROWN. Third Edition. London: Butterworth & Co. 1903. 8vo. xxiii and 521 pp. (16*s.*)—This is the third edition of Mr. Brown's well-known little book. In addition to the annotated text of the Copyhold Act, 1894, and a useful summary of the law, the book contains an appendix of forms, precedents and statutes.

La Justice Internationale, Ire année, No. 1, 25 mai 1903.—This is the first number of a new monthly review specially devoted to promoting international arbitration (editor, M. Gustave Hubbard, 3 rue Chaptal; manager, M. Joseph Dournier, 31 rue Monge, Paris). It very wisely begins by setting out the French text of the Hague Convention in a handy form. There is some interesting discussion of the prospects—now more promising than they have ever been—of an Anglo-French treaty.

Empire and Sovereignty. By ERNST FREUND. Chicago: University of Chicago Press. [From vol. 4 of Decennial Publications.] 4to. 32 pp.—A concise and sound exposition, including the subject of Protectorates, and distinguishing accurately, for the benefit chiefly of American readers, between the constitutional understandings of British practice and the legal limitations imposed on sovereignty by written constitutions.

L'affirmation du droit collectif. Par EMMANUEL LEVY, avec une Préface de CHARLES ANDLER. Paris: Société Nouvelle de Librairie et d'Édition, 17 rue Cujas. 8vo. 31 pp. (75 c.)—This pamphlet comes to us accompanied by a ready-made laudatory notice. We have to state that it is not the custom of respectable English journals to accept or print such notices except as paid advertisements.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS and ARTHUR B. CANE. Vol. LX. 1841–44 (2 Y. & C. C. C.; 13 Simons; 3 Man. & Gr.; 3 Sc. N. R.; Drinkwater; 9 M. & W.). London: Sweet & Maxwell, Lim.; Boston, Mass.: Little, Brown & Co. 1903. La. 8vo. xv and 941 pp. (25*s.*)

Commercial Law: an elementary text-book for Commercial Classes. By J. E. C. MUNRO. Second Edition. By J. G. PEASE. London: Macmillan & Co., Lim. 1903. 8vo. x and 194 pp. (3*s.* 6*d.*)

Reports of Cases decided by the Railway and Canal Commissioners. By J. H. BALFOUR-BROWNE, K.C., WALTER H. MACNAMARA and RALPH NEVILLE. Vol. XI. London: Sweet & Maxwell, Lim. 1903. La. 8vo. xiv and 317 pp.

The Official Reports of the High Court of the South African Republic, translated into English, with Index and Table of Cases. By WALTER S. WEBBER: revised by the Hon. J. G. KOTZÉ, K.C. Vol. I. 1894. London: Stevens & Haynes. 1903. La. 8vo. xv and 416 pp.

La succession aux biens réels dans les coutumes anglo-normandes: son développement en droit moderne. Par EDOUARD ESCARRA. Paris: Henri Jouve. 1903. La. 8vo. 355 pp.—Review will follow.

La fonction du droit civil comparé. I. *Les conceptions étroites ou unilatérales.* Par EDOUARD LAMBERT. Paris: V. Giard & E. Brière. 1903. 8vo. xxiv and 925 pp.—Review will follow.

Les justices seigneuriales en Bretagne aux XVII^e et XVIII^e siècles (1661–1791). Par ANDRÉ GIFFARD. Paris: Arthur Rousseau. La. 8vo. xxviii and 392 pp.—Review will follow.

A Treatise on the Law and Practice of Injunctions. By W. W. KERR. Fourth Edition. By E. P. HEWITT, assisted by SYDNEY E. WILLIAMS and J. M. PATERSON. London: Sweet & Maxwell, Lim. 1903. La. 8vo. xlviii and 656 pp. (35*s.*)—Review will follow.

A Treatise on the Law relating to Pleasure Yachts, being a second edition of 'Yachting under Statute.' By C. F. JEMMETT and R. A. B. PRESTON. London: Sweet & Maxwell, Lim. 1903. La. 8vo. xii and 185 pp. (10*s.* 6*d.* net.)—Review will follow.

Halbsouveränität. Von M. BAGHITCHÉVITCH. Berlin: Julius Springer. 1903. 8vo. xi and 254 pp. (m. 5.)—Review will follow.

The Law of Public Education in England and Wales. By G. EDWARDES JONES and J. C. G. SYKES. London: Rivingtons. 1903. 8vo. xx and 791 pp. (21*s.* net.)

Coronation of King Edward VII: The Court of Claims. Cases and Evidence. By G. WOODS WOLLASTON. London: Harrison & Sons. 1903. 8vo. xii and 322 pp. (25*s.* net.)

Ford on Oaths. Eighth Edition. By F. H. SHORT. London: Stevens & Haynes. 1903. 8vo. xvi and 159 pp. (3*s.* 6*d.* net.)

A Practical Guide to the Law of Education, with the Text of all the Acts and Forms. By W. R. WILLSON. London: Sweet & Maxwell, Lim. 1903. 8vo. xi and 732 pp. (21*s.*)

The Education Act, 1902, with Notes, &c. By MONTAGUE BARLOW and H. MACAN. Second Edition. London: Butterworth & Co. 1903. 8vo. x, 236 and 26 pp. (3*s.* 6*d.* net.)

The Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 and 1900, with Statutes, Cases, Rules and Forms. By A. H. RUEGG, K.C. Sixth Edition. London: Butterworth & Co. 1903. 8vo. xxxii, 558 and 33 pp. (15*s.*)

The Workmen's Compensation Acts, 1897 and 1900, with Notes, Rules, &c. By W. ADDINGTON WILLIS. Eighth Edition. 8vo. xxii, 185 and 15 pp. (3*s.* 6*d.*)

The Metropolis Water Act, 1902, with Circulars, Notices and Orders. By DOUGLAS C. BARTLEY. London: Stevens & Sons, Lim. 1903. 8vo. xi and 200 pp. (6*s.*)

Mario Sarfatti: La Nozione del Torto nella dottrina e nella giurisprudenza inglese. Con prefazione del G. P. CHIRONI. Milano: Società editrice Libraria. 1903. 8vo. xii and 83 pp.

A Treatise on the Power of Taxation, State and Federal, in the United States. By FREDERICK N. JUDSON. St. Louis: F. H. Thomas Law Book Co. 1902. La. 8vo. xxiii and 868 pp.

The Law of Settlement and Removal. By JOHN F. SYMONDS. Fourth Edition. By JOSHUA SCHOLEFIELD and GERARD R. HILL. London: Butterworth & Co.; Shaw & Sons. 1903. 8vo. xxiv, 226 and 18 pp.

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
His address is 13 Old Square, Lincoln's Inn, *not Oxford.*

THE

LAW QUARTERLY REVIEW.

No. LXXVI. October, 1903.

NOTES.

The Corpus Professorship of Jurisprudence.

THE Corpus Professorship of Jurisprudence—a chair which has been occupied since its foundation, first by Sir Henry Maine and afterwards by Sir Frederick Pollock—is now vacant. The appointment to this Professorship is a matter which concerns every one who is interested in the study of law.

It is desirable to explain that under the statute of the University which governs the Professorship the subjects upon which the Professor may lecture are very various. He is required 'to lecture and give instruction on the history of laws and the comparative jurisprudence of different nations; in addition to which he may, if he think fit, treat of the principles of laws in general, and of any other matters relevant to the subjects of his chair which he may judge to be advisable.'

The Professor is elected for a term of five years and is re-eligible. He is required to reside in the University for twenty-eight days in each academical year during term time and to lecture in two of the three University terms.

The emoluments of the Professorship are £500 a year, and the Professor will be entitled to be admitted to a Fellowship of Corpus Christi College.

Applications are to be sent in to the Registrar of the University of Oxford before November 16.

The meeting of the American Bar Association held in the last week of August at Hot Springs, Virginia, was of special interest in more than one way, being the first held in a Southern State, and

partly coinciding with the annual meeting of the Virginia Bar. For an English guest it was a novel and most pleasant experience to be among picked representatives of the profession from New England to Texas, and observe how the shrewd composure of the North, the businesslike energy of the Middle States, and the traditional eloquence of the South, all bore their fitting parts in the serious and fruitful discussion of legislation and legal policy. Nor was opportunity wanting to learn something of the charm of Southern society, or to hear Northern and Southern veterans of the Civil War comparing notes, in the friendliest manner, within a short journey of the Virginian battle-fields—but these are not professional topics. Perhaps that which impresses a visitor most is the excellent work being done by the Commission for uniformity of legislation. Already a Negotiable Instruments Act has been passed, with a few minute local variations, in about half the jurisdictions of the United States, and there is good hope that the rest will follow before long. A Sale of Goods Bill has been prepared by Prof. Williston of Harvard, and a Partnership Bill is to be taken in hand by Prof. Ames. As a rule, the State legislatures have frankly recognized that the improvement of the law is above politics. We may have more to say of this and other matters when the report of the proceedings is published. One thing the visitor did regret, that he had not brought the White Book with him; for the interest of our American brethren in English Courts and procedure is as inexhaustible as it is flattering. Only one thing is less exhaustible, American and Virginian hospitality. F. P.

The Income Tax Acts do not tax capital as income, the tax is therefore not payable on that part of a so-called 'annuity' or annual payment, which is in fact repayment of capital by instalments. This is the important principle maintained by the Court of Appeal in *Scoble* v. *Secretary of State for India* [1903] 1 K. B. 494, 72 L. J. K. B. 215, and affirmed by the House of Lords [1903] A. C. 299, 72 L. J. K. B. 617.

The decision of the House of Lords in *Bradley* v. *Carritt*, noted from the Law Journal at p. 248 above, is now reported in the Law Reports [1903] A. C. 253.

Sharpe v. *Midland Railway Co.* [1903] 2 K. B. 26, 72 L. J. K. B. 486, C. A., affords an example of the statesmanlike determination on the part of the Courts to give full effect to the Workmen's Compensation Acts. A railway guard receives, in addition to his regular wages, certain allowances to meet his costs out of pocket whenever in the course of his business he is compelled to sleep from home.

There is no proof that he made any gain whatever from these allowances. He is killed by an accident in the course of his employment. His widow, in an action against the company, claims that the allowances shall be taken into account in computing the guard's earnings, and the claim is admitted by the Court of Appeal. The admission is reasonable, but it is one which a Court inclined to construe the Act in a narrow spirit might have refused to make.

When it is said that fair comment on matter of public interest is no libel, the word 'fair' means that the criticism is relevant and published in good faith; in other words, that, right or wrong, it is genuine criticism of some sort. A jury cannot find a criticism to be unfair because their taste does not agree with the critic's: *M'Quire* v. *Western Morning News Co.* [1903] 2 K. B. 100, 72 L. J. K. B. 612, C. A. It would seem, on the same principle, that a critic's technical competence is not open to discussion in a court of law, save that gross incompetence might in some circumstances tend to show bad faith. If the law were otherwise than as laid down by the C. A., the just and necessary freedom of criticism would be at an end. It remains settled law that mere personalities and imputations of motive are not protected.

Forged transfers raise nice questions of equitable casuistry, and it was not to be wondered at that the Lord Chief Justice, balancing the equities in *Corporation of Sheffield* v. *Barclay* [1903] 1 K. B. 1, should have been perplexed to allocate the loss as between two innocent persons, but the capital fact to be borne in mind in solving these cases is, as the judgment of the Court of Appeal ([1903] W. N. 151) in that case shows, that the company is the guardian of the register of shareholders or stockholders. The public has access to this register, and is invited to rely upon it; it is to be rectified from time to time to make it correspond with the true state of affairs, and this being so it is the bounden duty of the company to see that no name is improperly entered thereon. When a transferee tenders a transfer to the company for registration he is merely asking the company to perform its statutory duty—nothing more: he makes no implied representation as to the genuineness of the transferor's signature. He has indeed no better means than the company has of knowing whether the signature is genuine or not. It is for the company to satisfy itself by what evidence it may think fit to require that the transfer has been duly executed by the persons purporting to transfer. If, acting on a forged transfer, the company transfers *A*'s stock to *B*, *A*'s title

remains unaffected, and it is the company which must in the first instance make good the wrong whatever its rights over against the transferee may be. In practice no doubt a company seldom inquires, provided the documents for registration are 'in order'; it takes the risk of forgery, which is after all slight, but having elected to take the risk it is not entitled, if the risk issues in a loss, to shift the loss on to the transferee.

A person, when asked to ride on an engine by an agent authorized to represent the owner thereof, is entitled to be carried with reasonable care. If there is any failure of reasonable care, the owner of the engine is responsible for any damage done to the person who has accepted the offer of a gratuitous ride on the engine: *Harris* v. *Perry & Co.* [1903] 2 K. B. 219, 72 L. J. K. B. 725, C. A. What, one wonders, are the exact rights of a person who, at the invitation of a friend, takes a ride on a motor car. Can he recover from his friend compensation for any injury inflicted by the car being driven beyond the rate allowed by law?

The powers given by the Forfeiture Act, 1870, to the administrator of a convict's property are so wide that they need to be closely watched. The administrator has vested in him by the Act the complete control of the property—to sell, mortgage, or deal with it as he thinks best: he may pay all costs, charges, and expenses out of it, satisfy debts or liabilities, make compensation for alleged injuries by the convict, pay for the support of any wife or child of his, and the residue (if any!), after providing for these various disbursements, he holds in trust for the convict. Meanwhile the person chiefly interested is in enforced seclusion, and cannot, if he would, challenge the administration proceedings. This absence of check leads naturally to a lax administration, as *Carr* v. *Anderson* [1903] 2 Ch. 279, 72 L. J. Ch. 534, C. A. revealed. The sense of trusteeship slumbers. Let us hope it will be awakened by Lord Justice Romer's vigorous language. The Court of Chancery has had—and no doubt still has—its imperfections: it has been derided for its dilatoriness, its propensity to hair-splitting, its 'piety and love of fees'; but who can say how much the country owes to the standard of strict integrity which that Court has consistently upheld for centuries?

Though the covenant not to assign in a lease is not a 'usual covenant' in the technical sense, it is in practice rarely omitted, and it is one of no small importance to lessees, for who cares in these migratory days to be committed to a compulsory residence in one spot for twenty-one, fourteen, or even seven years? The

result is a conveyancing compromise. The lessor reserves to himself the right to grant or withhold his licence. The lessee stipulates that the licence shall not be unreasonably withheld. It seems rather a strange construction of 'reasonable' to hold that the lessor may simply say 'No!' without assigning any reason—*stet pro ratione voluntas*—but it seems he may do this; only if he does assign reasons the Court may judge of their validity. This is the effect of *Young* v. *Ashley Gardens Properties, Ltd.* [1903] 2 Ch. 112, 72 L. J. Ch. 520, C. A., where the lessor's conditions of leave were weighed and found wanting. The same principle has been adopted by the Courts in regard to directors' discretion in passing transfers. The directors may decline to give their reasons for objecting to the transfer, but if they choose to state them the Court will examine into their reasonableness. Of course there is a difficulty about compelling the truth in such matters, whether from directors or lessors, for the truth may involve delicate personal considerations, but a sphinx-like silence of blank negation is certainly irritating.

The doctrine of 'clogging' threatens to become an intolerable nuisance—an interference with the freedom of the subject. It was a useful enough doctrine in a primitive and more technical age when ignorant people were often entrapped into oppressive bargains, but to-day it is an anachronism and might with advantage be jettisoned. Instead the Courts have taken to emphasizing the doctrine in all its original crudity. It was open to them a few years since to have moulded the doctrine to meet the changing conditions of modern life, and to have confined redress to cases where there was something oppressive or unconscionable in the bargain, to make this the test, as it was the origin, of the doctrine; but the Courts have preferred to adhere to technicality and an unprogressive judicial policy. The decision of the Court of Appeal in *Jarrah Timber and Wood Paving Corporation* v. *Samuel* [1903] 2 Ch. 1, C. A. was inevitable after *Noakes & Co., Ltd.* v. *Rice* [1902] A. C. 24; but see to what a conclusion it leads. A company with a board of directors composed of experienced men of business, advised by a competent solicitor, after it has invited a loan and settled considered terms is supposed to be the victim of some oppression at the hands of the mortgagee, because it has given the mortgagee an option of purchasing the mortgaged property at a certain price, and is permitted by the Court to repudiate its own bargain deliberately entered into in its own interests—surely a proceeding more unconscionable than anything involved in the so-called 'clogging,' if there is any such thing as sanctity in contracts. Alas! for those cobwebs of

technicality which lawyers are so fond of spinning, and which so often shut out the daylight of common sense.

Mr. Tulliver, in the Mill on the Floss, was of opinion that the law was made to favour 'raskills,' but this pessimistic view is not always borne out: Mr. Tulliver belonged to the pre-Common Law Procedure and Judicature Acts age. It would have received some countenance, however, if the purchaser of the policy in *Scott* v. *Coulson* [1903] 2 Ch. 249, 72 L. J. Ch. 600, C. A. had been successful in his claim. There is such a thing in mercantile circles as insuring a ship 'lost or not lost.' In this species of speculative contract the parties have fully in contemplation, on the face of it, the possibility of the subject-matter of the insurance being at the bottom of the sea at the date of the contract. But no sane person ever wanted to sell a life policy after he knew that the life had dropped: any agreement to sell such a policy is entered into on the basis of an implied assumption that the assured is still living, and not all the sophistry or subtlety of Equity counsel could convince the Court of Appeal that the purchaser was entitled to keep his bargain. The stock illustration of the law's defective moral sense—the case where *B* buys land of *A* knowing of a mine in it which *A* does not—offers no analogy, the mistake there does not go to the root of the contract as it does in the case of the policy.

The rule now well settled in the winding-up Court which, on a winding-up petition, gives one set of costs only among creditors and one among contributories supporting the winning side was a pretty stroke of judicial policy. It effectually stopped multiplicity of appearances on the part of creditors and contributories, for the more numerous they were the less there was to share among them. But the winding-up Court is one thing and the Court of Appeal another. The Court of Appeal knew not the one-set-of-costs-rule. There any contributories or creditor might appear to support the order, and if it stood was prima facie entitled to claim his costs *ex debito justitiae*. This was hard on companies, and the Court of Appeal has devised a more excellent way: *In re Ibo Investment Co.* [1903] 2 Ch. 373, 72 L. J. Ch. 661, C. A. The company's solicitor writes to the creditors and contributories who have appeared below, and says, 'We do not intend to challenge the order below so far as relates to your costs: you may appear on the appeal, but if you do so you must take the risk of the Court not allowing your costs.' It will be interesting to see how many after this warning dare the arbitrament of the Court of Appeal as to their costs.

Now that large banking companies are extending their connexion far and wide by purchasing the business of country banks, *Bell* v. *National Provincial Bank of England* [1903] 2 K. B. 249, 72 L. J. K. B. 590, becomes a somewhat important case as to the incidence of income tax. It determines that where a banking company purchases the business of a country bank there is not a succession by the purchasers to the business of the country bank within 5 & 6 Vict. c. 35, Schedule D, s. 100, 1st & 2nd Cases, 4th Rule, that the new branch is not a business which had been set up and commenced within three years of the year of assessment within the 1st Case, 1st Rule, and that therefore putting the matter broadly, the business carried on by the purchasers is simply their former business enlarged by the acquisition of the business of the country bank, and the purchasers are not liable to additional assessments in respect of such business. The result is that a large bank in London may go on purchasing the businesses of country banks without incurring additional income tax in respect of the gains, if any, made by the country banks during the three years preceding the purchase. This seems reasonable and one hopes is good law.

The estate of a deceased partner *Y*, who has been a member of the firm *X* and *Y*, is not liable in an action for the price of goods sold and delivered where the order for the goods is given by the firm in the lifetime of *Y*, but delivery does not take place till after his death: *Bagel* v. *Miller* [1903] 2 K. B. 212, 72 L. J. K. B. 495. This decision may perplex students a little, but it is good law. The order is merely an offer, and is accepted by delivery. Till the delivery takes place there is no obligation to accept, or debt on the part of *X* and *Y*, but at the time of delivery *Y* is dead. *Y*, therefore, was never under a contract to accept or pay for the goods. Hence, too, the liability of *Y*'s estate is not increased by the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 9.

Note that the case would have been different if the order or offer had been accepted by *A*, so that before the goods were delivered there had been an obligation or contract on the part of *A* to deliver, and on the part of *X* and *Y* to accept and pay for the goods.

A father effects an insurance on his son's life, then aged eleven years, to commence at the age of twenty-one, and on this ten yearly premiums only are to be paid. The father has no insurable interest in the son's life, and pays all the premiums. Upon the marriage of the son after he attains the age of twenty-one, the

father, with the approbation of the son, and of the son's intended wife, assigns the policy of insurance and all moneys assured or to become payable under it to trustees upon trust to invest the insurance moneys and to pay the income to the wife for life. After the death of the son the insurance moneys are paid to the trustees, who invest them in accordance with the trusts of the settlement. The question arises whether the money paid under the insurance policy on the son's death is liable to estate duty as an interest purchased or provided by the son in concert or by arrangement with his father within the meaning of the Finance Act, s. 2, sub-s. 1 (d): *Att.-Gen.* v. *Murray* [1903] 2 K. B. 64, 72 L. J. K. B. 408. It is held by Ridley J. that the insurance moneys are so purchased or provided and are liable to estate duty. The decision seems within the spirit of the Finance Act, if a statute can have any spirit, but is it within the letter? On this point there is some ground for doubt. Is it under the circumstances of the case maintainable that the interest was purchased or provided by the son in concert with the father?

Harse v. *Pearl Life Assurance Co.* [1903] 2 K. B. 92, 72 L. J. K. B. 638, decides, or goes near deciding, four points.

(1) The fact that a son may be at some future period morally, though not legally, under an obligation to pay for the funeral of his mother, does not give him an insurable interest in his mother's life.

(2) An insurance by a son to cover the expenses of his mother's burial is void and illegal.

(3) If a son is induced to make such an insurance in reliance on the bona fide but false assertion by an agent of an insurance company that the insurance is valid, he may recover any premiums paid since the parties are not *in pari delicto.*

(4) Under the circumstances supposed the son is not precluded from recovering the premiums by the fact that they were paid under a mistake of law.

All these points are probably well decided, but the result is that the rule against the recovery of money paid under a mistake of law, as well as the rule against the recovery of money paid under an illegal contract, are maxims of very narrow application.

There was once upon a time—as those who know their Sandford and Merton will remember—a big boy who had a little coat, and a little boy who had a big coat, and the big boy asserting a natural equity took the little boy's coat and gave him his own—a proceeding justly rebuked by Cyrus, as Mr. Barlow pointed out; for

what would happen if every one took to making their own convenience, however reasonable, the measure of other people's rights? One is reminded of this story by *Cowper* v. *Laidler* [1903] 2 Ch. 337, 72 L. J. Ch. 578. In that case the owner of the cottage occupied a position analogous to that of the little boy. He was absolutely entitled to his ancient lights as the other to his coat. The defendant builder was in the position of the big bully, and was proceeding to appropriate the little boy's property; that is, he was putting up a large building obstructive of the cottage owner's ancient light. The cottage owner stood for an injunction: the builder resisted it —it was only, he contended, a mode of extorting money—and the Court had to determine the question between them, injunction or damages. It awarded an injunction. The case for damages is much stronger where the wrong has been already done than where it is merely threatened. Awarding damages in the latter case is virtually compelling the plaintiff to sell his legal right to the defendant at the Court's price. To say that the plaintiff can use his injunction in such a case for purposes of extortion is only saying that he has the rights of an ordinary owner of property to sell at what price he pleases. If the builder must have the property for his scheme, it is his concern, and he must be prepared to pay a fancy price. It is an incident of schemes, building or other.

A's trade is to let out chairs for use in places of public entertainment. *L* hires 300 chairs from *A* and sublets them to *N*, who in compliance with the rules of a Town Council, fixes the chairs to the floor of a hippodrome used by *N*. *N* then mortgages the building to *X & Co.*, bankers, who on *N* making default take possession of the hippodrome under the mortgage. They claim that the chairs have passed to them as mortgagees of the freehold. The claim is utterly opposed to all our ordinary ideas of justice and common sense, but it may be supported by certain decisions as to the law of fixtures. One is glad to think that the King's Bench Division, as represented by Joyce J., has given judgment in favour of *A*, the original owner: *Lyon & Co.* v. *London City and Midland Bank* [1903] 2 K. B. 135, 72 L. J. K. B. 465. One regrets, however, that Joyce J. could not affirm the broad principle that a mortgagor cannot give his mortgagee a better title than he possesses himself. Surely the law of fixtures has under judicial handling become far too complex.

Ogdens, Ltd. v. *Nelson* [1903] 2 K. B. 287 is a case of which the circumstances are somewhat complicated, but the general principle on which the judgment of the Court rests is, it is submitted, clear,

namely, that when two parties have entered into a contract, neither of them is at liberty to do anything which disables him from performing his part of the contract; whence it follows that where *X*, in consideration of *A* giving up certain advantages, agrees to pay *A* for four years a certain proportion of the profits to be earned by *X* in a particular business, it is an implied term of the contract that *X* shall not during four years cease to carry on the business, or do any act which disables *X* from earning profits of the business.

Is a contract made, e. g. in France, with the intention of being performed in France, and valid by the law of France, to be held invalid in England simply because if it had been made in England with a view to performance in England it would have been opposed to the policy of English law, and therefore invalid? The masterly, and we venture to say decisive, judgment of Wright J. in *Kaufman* v. *Gerson* [1903] 2 K. B. 114, 72 L. J. K. B. 596, answers this question in the negative. A contract which is in effect wholly governed by the law of France will as a rule be valid, and therefore enforceable in England. The judgment in *Kaufman* v. *Gerson*, however, does not exclude the possibility that a contract of the kind we have described might be held unenforceable in England if it were opposed to English notions of morality.

The Stock Exchange, it is well known, has a curious domestic forum of its own for insolvent members. When a member is declared a defaulter the contracts for the sale and purchase of stocks and shares which have been made by him for the next settling or account day are closed by the official assignee at the market prices of the stocks and shares, the subjects of the contracts at the time of the default, and those members who, on that footing, owe differences upon their contracts with the defaulter are bound by the Rules, on pain of being themselves declared defaulters, to pay those differences to the official assignee; and the official assignee is bound by the Rules to employ the moneys thus received by him in the first place in paying to those members to whom upon the same footing differences are due upon their contracts with the defaulter the differences so due to them. The moneys thus received by the official assignee are an artificial fund, not an asset in the member's bankruptcy passing to his trustee; if the defaulter goes on to distribute an outside asset such as his banking balance, the trustee in bankruptcy can intervene and claim it. This was the case in *Tomkins* v. *Saffery*, 3 App. Cas. 213. The latest question which has arisen in regard to these Stock

Exchange settlements is whether a Stock Exchange creditor, who has participated in the distribution, is entitled to present a bankruptcy petition in respect of a judgment for the unsatisfied balance of his debt: *In re Mendelssohn*, 10 Manson B. R. 9. The suggestions made on the debtor's behalf were that the Stock Exchange settlement constituted a *cessio bonorum*, and that though it contained no stipulation that the dividend was to be taken in full satisfaction of the debt, satisfaction ought to be inferred on the principle of *Whitmore* v. *Turquand*, 3 De G. F. & J. 107; or if not quite that, that the creditor was like a creditor who had assented to a composition deed, *Ex parte Stray*, L. R. 2 Ch. 374. It is obvious that neither of these views is sound or fits the facts. The settlement is not in any true sense either a *cessio bonorum* or a composition. It is outside bankruptcy altogether, and leaves that remedy untouched.

A learned correspondent writes from Aberdeen :—

'An interesting point is raised in *Houghton* v. *Houghton* [1903] P. 150, 72 L. J. P. 31. Jeune P. there held, although apparently with some difficulty, that where a husband, guilty of incestuous adultery, which the wife has condoned, is afterwards guilty of desertion, the desertion revives the condoned adultery, and entitles the wife to divorce. The Scots case of *Collins* v. *Collins* (1884) 9 App. Cas. 205, does not appear to have been referred to in argument. In that case the wife had been guilty of adultery with *A*, which the husband condoned. The husband afterwards brought an action of divorce, alleging that when he forgave his wife, and resumed cohabitation with her, he did so on the condition that she should not speak to or hold any communication with *A*. Subsequently the wife met *A* by appointment several times, under suspicious circumstances, but admittedly no act of adultery could be proved. The husband's action raised sharply the point whether any condition, express or implied, could be attached to condonation of adultery, so as to cause a revival of the adultery upon the condition being broken. It was held by the House of Lords that no condition could be attached to condonation of adultery: that condonation followed by cohabitation as man and wife affords an absolute bar to any action of divorce founded on the condoned acts. That is the law of Scotland. Is it not also the law of England? The case of *Houghton* was undefended, and cannot be quoted as a binding authority, but it stands in the books. It is unfortunate if the case cannot be carried further by the intervention of the King's Proctor. In arriving at the result in *Houghton's* case the President appears to have relied upon *Dent's* case (4 Sw. & Tr. 105). But that case must be regarded as of doubtful authority in view of the

way in which it was treated in *Collins's* case. The Lord Chancellor (Selborne) stated that he did not agree with Lord Penzance that in law a condition is imported into the condonation, and he also stated, "I do not understand any English decision to have determined that in England married parties can make their condonation of a matrimonial offence revocable in the event of the non-performance of a condition conventionally agreed upon between themselves, which is not in law a sufficient reason for a decree of divorce or of dissolution of marriage."

'Condonation of adultery is different from condonation of cruelty. The rule in Scotland appears to be wise and just, and if a different rule really exists in England a nice question may one day arise if the two rules come into conflict.

R. M. W.'

The point certainly deserves consideration. We can see no good reason why there should be different rules in England and in Scotland.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE MARINE INSURANCE BILL.

I PROPOSE in this paper to criticize The Marine Insurance Bill, to explain what seem to me its chief merits, and to indicate in what respects it appears defective or capable of improvement. I shall also attempt to show on what points it alters the existing law or makes the law more certain.

On examining the Bill it will be found that its object is to codify the law which relates *exclusively* to marine insurance, that is to say, to enunciate the principles of law which are peculiar to that particular subject, and to avoid stating any law which more properly belongs to some other subject or department. Thus the Bill does not lay down any principles which apply to contracts in general, such as those relating to fraud, mistake, illegality, construction, or evidence; nor any rules of law relating to such special subjects as the duties of the master of a ship, salvage, general average, or the apportionment of the expenses incurred by putting into and going out of a port of distress; nor does it attempt to define who is to be deemed, in time of war, an alien, enemy, or a neutral, or by what acts the character of neutrality may be forfeited. All such matters are excluded, although they are intimately connected with marine insurance, and involve most important and difficult questions, on which the liability of an underwriter, or the extent of his liability, must in many cases depend. They are excluded because they more properly relate to other departments of law, such as the law of contracts, the law of evidence, the law of shipping, or international law.

Thus the Bill is silent on subjects which occupy by far the greater part of the ordinary textbooks on the law of marine insurance; and for this reason it provides in the 93rd clause 'that the Rules of the Common Law, including the law merchant, save so far as they are inconsistent with the express provisions of the Act, shall continue to apply to Contracts of Marine Insurance.'

It seems that the course thus adopted is the proper, and indeed almost the necessary course, to be taken in codifying the law relating to a particular subject, since it is the only way in which successive codifications of the law relating to various departments

can be effected, so as to prevent the different codes from overlapping each other, and becoming intolerably cumbrous and voluminous.

The next important point to notice with reference to the method or the form of the Bill, is the remarkable manner in which general principles are concisely stated, the Court being left to deduce from those general principles the special rules of law required for the determination of particular cases.

To take one out of many instances, the only definition of seaworthiness to be found in the Bill is that given in the 40th clause, which provides that 'a ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure (? voyage) insured.' There is no express provision that there must be a competent master and crew, or that the ship must be properly equipped and adequately supplied with stores, coal, provisions, or other necessaries; the Bill assumes that all these conditions are sufficiently expressed by the words 'in all respects.'

Similarly there is no provision in the Bill as to the degree of seaworthiness required for vessels of a peculiar character or build, such as formed the subject-matter of the insurances in the well-known cases of *Burgess* v. *Wickham*, 33 L. J. Q. B. 17, and *Clapham* v. *Langton*, 34 L. J. Q. B. 46. It is assumed that, in order to determine whether a ship is *reasonably fit*, regard must necessarily be had to the nature and character of the vessel, as described in the policy or as otherwise known to the underwriter, and if she is as fit as a vessel of that description can reasonably be made, she is reasonably fit, and therefore satisfies the warranty of seaworthiness. In fact this is exactly the process of reasoning by which the Court arrived at the decision in *Burgess* v. *Wickham*.

In addition to this, it is not unimportant to notice that the above general definition of seaworthiness given in the 40th clause will also be useful for the purpose of determining the law which should be applied to new cases that may from time to time present themselves, differing more or less from any of those which have hitherto been decided.

This method of stating a principle of law in the most general language has two important advantages.

One advantage is that such a general statement comprises many particular rules which would otherwise have to be searched for in textbooks or through numberless cases, and thereby one of the main objects of codification is attained. The other and not less important advantage is the following. The most powerful argument which has been urged and can be urged against codification is founded on its tendency to stereotype the law, and prevent its

being moulded (as the Common Law has in fact been moulded by our judges), so as to satisfy the ever-varying exigencies of trade, commerce, and civilization. Now this argument, which is one undoubtedly of great weight, will apply with little, if any, force to those provisions of a code which state only general principles and leave the Court to deduce such special rules as are directly applicable to particular cases.

II. I will now proceed to make some observations on certain parts of the Bill, pointing out where the Bill, notwithstanding the many amendments it has from time to time undergone, seems to me defective or capable of improvement, and showing in what respects the existing law has been altered or made more certain.

The provisions to which I will first direct attention are those relating to insurable interest. They form, I think it will be generally admitted, one of the least satisfactory parts of the Bill, nor will this surprise any one who considers the intrinsic difficulty of the subject. Marine adventures may be of the most diverse kinds, ranging for instance from the insurance of goods by an ordinary voyage policy to the insurance effected by a shareholder in an electric cable company on the successful laying of the cable. Indeed it is difficult to fix any limit to the adventures which may be the subject of marine insurance, and it must therefore evidently be a matter of great difficulty to define with precision the insurable interest necessary to entitle a person to recover on any conceivable policy of marine insurance.

The 5th and 6th clauses which relate to insurable interest are as follows:—

5. (1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular:—

(*a*) A person is interested in a marine adventure where he stands in any legal relation to the adventure, in consequence of which he benefits by the safety or due arrival of insurable property, or is prejudiced by its loss or by damage thereto or by the detention thereof, or incurs any liability in respect thereof.

(*b*) A prospect or possibility of loss or gain which is not founded on any right or liability in, or in respect of the subject-matter insured, is not insurable.

The proposition that a person has an insurable interest who is interested in a marine adventure is so self-evident a proposition that it seems scarcely fit or useful for insertion in an Act of Parliament.

I venture to suggest that after a consideration of the admirable judgments of Willes J. in *Seagrave* v. *The Union Marine Insurance*

Company, L. R. 1 C. P. 305, and in *Wilson* v. *Jones*, L. R. 2 Ex. 139, it will be found that the following provision contains a sufficiently precise definition of insurable interest:—

Subject to the provisions of this Act, a person has an insurable interest who stands in such a legal relation to the adventure insured, that its total or partial frustration by perils insured against will cause damage to the insured. Provided always that a prospect or possibility of loss or gain, which is not founded on any right or liability in or in respect of the subject-matter insured, does not constitute an insurable interest.

I may observe that the words 'cause damage to the assured' are taken from the judgment of Willes J. in *Seagrave* v. *The Union Marine Insurance Company*, and are sufficient to include the case of a person losing a benefit or incurring a liability.

The sub-clause (2) (*a*) may be then usefully added as a particular illustration or instance. Indeed the clauses following, viz. those from 7 to 15, are nothing but applications of the same general principle.

I will now pass to the 6th clause. The first sub-clause is as follows:—

(1) The assured must be interested in the subject-matter insured at the time of the loss.

Provided that where the subject-matter is insured 'lost or not lost' it is immaterial that the assured may not have acquired his interest until after the loss, if at the time of effecting the contract of insurance he was not aware of the loss.

That the assured must be interested at the time of the loss is self-evident. What, however, is not self-evident, and ought therefore to be distinctly stated, is that the assured need not *at the time of effecting the insurance* have an insurable interest; he need only have such an interest at the time of the loss. In fact, this rule of law was not established until some years after the decision of the celebrated case of *Lucena* v. *Craufurd* in the House of Lords (2 Bos. & P. N. R. 269; 1 Taunt. 325), and it is probable that some of the difficult points so elaborately discussed by the judges in that case would have been found capable of easier solution, if attention had been more strictly confined to the question whether an insurable interest existed at the time of the loss (see the seventh edition of Arnould, p. 307).

As regards the proviso to the first sub-clause, I submit with all deference to those who framed or approved of it, that it is by no means an accurate statement of the law. It was no doubt intended to express the rule of law established by *Sutherland* v. *Pratt*,

11 M. & W. 296. That case was decided on demurrer, and the pleadings merely raised the question whether it was a good plea to an action brought to recover an average loss of goods on a policy 'lost or not lost' that the plaintiff had not acquired any interest in the property until the average loss had occurred. The Court held that it was not. Baron Parke, who delivered the judgment, however, took care to point out that on the pleadings the assured must be assumed to have purchased or acquired the goods as sound, undamaged goods, and that if he had not done so but had purchased or acquired them as damaged goods there would have been a good defence, on the ground that he had not sustained any loss by the perils of the seas. Assuming, then, that the plaintiff purchased the goods as sound goods, the average loss in respect of which the action was brought caused damage to him, and as an insurance 'lost or not lost' is a contract of indemnity against all losses past or future occurring during the insured voyage, it followed, said the learned judge, that the plaintiff was entitled to recover in respect of the average loss. That this, and nothing else, was the *ratio decidendi* in *Sutherland* v. *Pratt* will be evident on a careful perusal of Baron Parke's judgment (see especially pp. 311 and 312 of 11 M. & W.).

It will be further noticed that the proviso in question excepts the case of the assured being aware of the loss at the time of effecting the insurance, but it is evident that, if this was the case, he was guilty of concealment which would make the policy altogether voidable. It seems, therefore, unnecessary, if not misleading, to state that he could not recover in respect of the past loss, the truth being that he could not do so either in respect of past or future losses.

For these reasons I venture to suggest that the 1st sub-clause of the 6th clause should be amended in the following manner:—

The assured must have an insurable interest at the time of the loss, but need not have such an interest at the time of his effecting the contract of insurance.

Provided that where property is insured 'lost or not lost' the insurance shall be deemed to be a contract of indemnity against past losses as well as future losses occurring during the risk covered by the policy.

These are almost the very words used by Baron Parke, and they indicate that only in the particular case where the assured has purchased or acquired the property as existing and undamaged can he recover in respect of a loss occurring before his interest has accrued. In fact the proviso can in practice scarcely ever apply to any other case than that of goods bought whilst at sea.

III. I pass now to the consideration of the clauses 17 to 22 relating to disclosure and misrepresentation. These provisions are on the whole framed with great skill, so as to express in very concise language the principles from which most of the law on the subject may be deduced.

First, as regards clauses 17, 18, and 19, as to Disclosure.

In the well-known cases of *Fitzherbert* v. *Mather*, 1 T. R. 12, *Gladstone* v. *King*, 1 M. & S. 35, and *Proudfoot* v. *Montefiore*, L. R. 2 Q. B. 511, the assured was held to be disentitled to recover, on the ground that his agent had failed to inform him of the loss or damage which had occurred to the insured property, and the insurance had consequently been effected without the underwriter being informed of such loss or damage.

The principle laid down or applied in these cases has been elaborately examined and discussed in the judgments of Story J. in *Ruggles* v. *General Interest Insurance Company*, 4 Mason 74, and of Lord Esher in *Blackburn* v. *Vigors*, 17 Q. B. D. 561. Those eminent judges reject the principle altogether and maintain that it is only by a concealment on the part of the assured or the agent who effects the insurance that the policy is vitiated. It seems, however, scarcely open to doubt, especially after the judgments in the House of Lords in *Blackburn* v. *Vigors*, 12 App. Cas. 531, that in certain cases the underwriters will be discharged from liability on the ground of the non-disclosure of material circumstances, although these were unknown both to the insured and to the agent through whom the insurance was effected.

The law, as it at present stands, is stated in the following passage at p. 661 of the last excellent edition of Arnould on Marine Insurance, by Messrs. De Hart & Simey:—

> There are certain persons employed by shipowners and owners of cargo, such as masters and trading agents, whose duty it is to keep their employers informed of all matters affecting the property which it is sought to insure. If one of these agents has withheld information of a material fact from his principal which he might in the ordinary course of things have communicated to the latter at the time when the insurance is effected, the contract can be avoided by the underwriter on account of the non-disclosure of this fact, which, if the agent had done his duty, the principal would have been able to disclose.

It appears from the powerful arguments urged by Story J. and Lord Esher in the cases already cited and from the judgment of Cockburn L. C. J. in *Proudfoot* v. *Montefiore*, as well as from the opinions delivered in the House of Lords in *Blackburn* v. *Vigors*,

that the principle or rule of law enunciated in the above passage is founded on the peculiar nature of the contract of marine insurance.

The risk which the underwriter in consideration of the premium takes upon himself generally depends to some extent upon facts which are known, or ought to be known, to the assured, and it is for this reason that the insurer is entitled (to use the words of Cockburn L. C. J.):—

To assume as the basis of the contract between him and the assured that the latter will communicate to him every material fact of which the assured has or in the ordinary course of business ought to have knowledge, and that the latter will take the necessary measures by the employment of competent and honest agents to obtain through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance fails to disclose it.

It is substantially this view which the Bill adopts. The 18th clause does not define the particular agents who are bound to communicate material information to the assured, but provides that the insurer must be informed of every circumstance which is known, or in the ordinary course of business ought to be known, to the assured. This general language, it will be observed, leaves ample scope for interpretation. Is it to be construed by the light of the above-cited passage in the judgment of Cockburn L. C. J.?

Is the policy voidable only where the non-communication to the assured is owing to some breach of duty on the part of the agent?

Must the agent be the agent of the assured, and may the agents be persons other than masters, ship-agents, or trading agents? These and other similar questions seem to be left open for judicial decision.

IV. There are a few other points to be noticed relating to non-disclosure of material facts and the effect of such non-disclosure.

(*a*) In the above-mentioned case of *Gladstone* v. *King* and in *Stribley* v. *The Imperial Marine Insurance Company*, 1 Q. B. D. 507, it was held that where the agent of the assured failed to inform him of a loss having accrued to the insured property, and had done so innocently and not for the purpose of enabling his principal to effect an insurance, this did not entitle the underwriter to avoid the policy, but only discharged him from liability in respect of the particular loss which had not been disclosed. This peculiar and exceptional doctrine was, however, disapproved of by Lord Hals-

bury and Lord Watson in *Blackburn* v. *Vigors*, and it seems excluded by the provision at the end of the 1st sub-clause of the 18th clause that 'if the assured fails to make such disclosure the insurer may avoid the contract.'

(*b*) In sub-clause 3 of the 18th clause it is provided that it is not necessary to disclose any circumstances as to which information is waived by the insurer; but it is not stated under what circumstances such a waiver is to be implied. It therefore leaves open certain difficult questions which arise in cases of insurances on goods generally, e. g. as to whether the assured is bound to inform the underwriter that the goods are contraband of war, or are goods of an especially dangerous character, or peculiarly liable to damage by perils of the seas.

(*c*) The 19th clause is as follows:—

19. Subject to the provisions of the preceding section as to circumstances which need not be disclosed, where an insurance is effected for the assured by an agent the agent must disclose to the insurer.

(*a*) Every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, *or to have been communicated to him.*

It seems at first sight strange that the words I have put in italics should be found in this clause, while they are absent from the 18th clause. Are they not unnecessary and apt to mislead? They may be intended to indicate the point decided in *Blackburn* v. *Haslam*, 21 Q. B. D. 144, namely, that the concealment of a material fact within the knowledge of any agent through whose agency, *whether mediately or directly*, the insurance has been effected vitiates the policy. This would, however, appear to be included in the statement that the agent is deemed to know every circumstance which in the ordinary course of business ought to be known by him. At any rate, if any more definite statement be thought necessary, it should be contained in a clause more distinctly embodying the decision in *Blackburn* v. *Haslam*—a clause to the following effect:—

The agent who effects the insurance is deemed to know every material circumstance within the knowledge of any agent who is directly or indirectly employed to procure the insurance.

Secondly, as regards clauses 20 and 21, relating to Representations. Clause 20, after dealing generally with representations, by its 3rd sub-clause divides them into representations as to matters of fact, and representations as to matters of expectation or belief. It therefore does not include what have been called by Marshall, Duer, and Arnould 'promissory representations,' that is to say,

representations that a certain fact or state of facts shall exist at some future time. If such a representation relates to facts over which the assured can have no control, it will generally be construed to be merely a statement of his expectation or belief, and will thus fall within the 5th sub-clause, which provides that a representation as to a matter of expectation or belief is true, if it be made in good faith. But when it amounts to an undertaking that a certain fact or state of facts will exist, it has been held in one or two English cases (especially in *Dennistown* v. *Lillie*, 3 Bligh 202) that the policy is voidable if the undertaking be not fulfilled. (See Arnould, seventh edition, pp. 625 et seq., where the subject is fully discussed.) It is probable, therefore, that the exclusion of so-called promissory representations from the Bill involves an alteration of the existing law. If it does, in my opinion the alteration is right, inasmuch as it will do away with a distinction between the law governing marine insurance and the law governing ordinary contracts, without unjustly prejudicing the position of the insurer. A so-called promissory representation is a statement not as to an existing fact, but as to a future fact, and it is now well settled by the judgments in *Jorden* v. *Money*, 5 H. L. C. 183, *Maddison* v. *Alderson*, 8 App. Cas. 467, that a representation of a future fact can only have legal effect as a statement of belief or expectation, or as a contract or promise. It is to be observed that a promissory representation may amount to a collateral stipulation made in consideration of the granting of the policy, for the breach of which stipulation an action can be maintained, and it may be that, if the loss is occasioned by such breach, this may constitute a good defence to a claim for that loss. But the stipulation is only a contract or a promise; it does not amount to a warranty, the mere breach of which would entitle the insurer to avoid the policy, and if it is the intention of the insurer that it should have this effect, it is only right that he should be required to incorporate it into the contract.

There is still another matter to notice as to the clauses 20 and 21 relating to misrepresentation. There is no provision in the Bill referring to the important and difficult question as to the effect of a representation made to the leading underwriter on a policy. It has been held in several cases, and it is the opinion of Duer J., that such a representation should be deemed to be a representation to the succeeding underwriters on the policy. But the correctness of this view has been much doubted by Lord Ellenborough and other judges of great eminence, and the framers of the Bill have, in my opinion, acted wisely in not attempting to fix the law on this subject, and in leaving it open for further consideration by the Court of Appeal or the House of Lords.

V. The next clause to which I desire to direct attention is clause 30, relating to Warranties. The 1st sub-clause provides that non-compliance with a warranty is excused when compliance is rendered unlawful by any subsequent law. I have already explained in the LAW QUARTERLY REVIEW, vol. xi. p. 118, the reasons why, in my opinion, this statement of the law is erroneous. These reasons are also set forth in the last edition of Arnould at p. 731, and I will only add that my view on this point seems strongly confirmed by the decision in *Hore* v. *Whitmore*, 2 Cowper 184. I venture to suggest that the latter part of clause 35, sub-clause (1), should be omitted so as to leave the point open for argument and judicial decision, especially as the solution of the question does not depend upon the law of marine insurance, but upon the general law applicable to conditions which become illegal or impossible.

VI. I will now pass to the 40th clause of the Bill. It relates to the implied warranty of seaworthiness in voyage policies. The 3rd sub-clause explains the meaning and extent of that warranty in the particular case where the voyage insured consists of stages during which the ship will be exposed to different kinds or degrees of peril of such a nature that she will require different kinds of preparation or equipment. The sub-clause is as follows:—

40. (3) Where the policy contemplates a voyage in different stages, during which the subject-matter insured will be exposed to different degrees or kinds of peril of such a nature that the ship will require different kinds of preparation or equipment, the ship must be seaworthy at the commencement of each stage, and it is sufficient if at the commencement of each stage she is seaworthy for the purpose of that stage.

As to this sub-clause, which embodies the rule of law established by the admirable judgment of Willes J. in *Bouillon* v. *Lupton*, 33 L. J. C. P. 37, it is to be observed that the cases it embraces have this common characteristic, that from the nature of the voyage insured it is impossible for the ship to be made at the outset seaworthy for the whole voyage. Now this characteristic is by no means confined to the cases described in the sub-clause, but is common to other cases which have become of very great practical importance, for instance, where it is impossible, on account of the duration of the voyage insured, to provide the ship with sufficient coal or stores for the whole voyage. In such cases it has been decided in *The Vortigern*, reported in the Court of Appeal in [1899] P. 140, that the warranty of seaworthiness is satisfied if the ship is seaworthy at the commencement of each of the stages into which the voyage may be properly considered as divided for that purpose. These cases are certainly not covered by the sub-clause as it stands,

and as they frequently occur and are of great mercantile importance, it seems that they should be provided for in the Bill, unless the correctness of the above decision is doubted, and it is intended to reserve the point for consideration by the House of Lords. The provision might be either by means of a separate sub-clause or by modifying the sub-clause in question. I believe that a careful consideration of the judgments in *Bouillon* v. *Lupton* and in *The Vortigern*, will show that a provision to the following effect correctly states the law which is the result of those judgments, and covers *all* cases in which it is impossible to make the ship, on starting, seaworthy for the whole voyage.

Where it is impossible by reason of the nature or duration of the voyage insured to make the ship at the commencement of the voyage seaworthy for the whole of it as regards preparation or equipment, the ship must, at the commencement of each of the stages into which the voyage may be properly considered as divided, *be seaworthy* for *those stages* respectively, and it is sufficient if at the commencement of each stage she is seaworthy for that stage. What are the stages into which the voyage insured is to be considered as divided must be determined by usage or by what is reasonable, having regard to the terms of the policy and the nature of the contemplated voyage.

VII. The next clause to which I wish to refer is the 43rd clause. It provides that where the subject-matter is insured by a voyage policy at and from a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that if the adventure be not so commenced the insurer may avoid the contract.

In order to appreciate the effect of this provision it must be remembered that it is now firmly established by *Hick* v. *Raymond* [1893] A. C. 32, and by *Carlton SS. Company* v. *Castle Mail Packets Company* [1898] A. C. 486, 490, that in the case of all contracts the condition of reasonable time means that the party upon whom it is incumbent to comply with the condition duly fulfils his obligation notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has not acted negligently or unreasonably. Read by the light of these cases, the 43rd clause in effect overrules the case of *De Wolf* v. *The Archangel Maritime Bank and Insurance Company*, L. R. 9 Q. B. 451. There it was decided that in a policy 'at and from' a port the policy does not attach, unless the vessel be there within such a time that the risk is not materially varied, although the delay is occasioned by the perils of the seas, and not by the act or default of the assured or his agents. The

correctness of this decision has, however, been much doubted, and there seems good reason why it should be disregarded in the Bill. It need scarcely be added that if the assured at the time of effecting the policy knows of any exceptional circumstance which would delay the arrival of the ship at the port, and thereby materially vary the risk, the non-communication of such a material circumstance would vitiate the policy.

VIII. I will now proceed to the three clauses in the Bill which are headed 'The Premium.' The 53rd and 54th clause, sub-clause (1), and the 55th clause are as follows:—

53. Unless otherwise agreed, the duty of the assured or his agent to pay the premium, and the duty of the insurer to issue the policy to the assured or his agent, are concurrent conditions, and the insurer is not bound to issue the policy until payment or tender of the premium.

54. (1) Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses, or in respect of returnable premium.

55. Where a marine policy effected on behalf of the assured by a broker acknowledges the receipt of the premium, such acknowledgment is, in the absence of fraud, conclusive as between the insurer and the insured but not as between the insurer and broker.

These clauses are very perplexing.

First. As regards the 53rd clause.

Where the policy is effected at Lloyd's the policy is prepared by the broker and is never in the possession of the underwriter, and where it is effected with a company through a broker it is not the duty of the assured but that of the broker to pay the premium to the insurer. Whether the assured is in any case whatever bound to pay the premium before he can require delivery of the policy must evidently depend upon the agreement made before the policy is issued, assuming such a contract to be capable of being enforced.

For these reasons the clause seems useless and embarrassing.

Secondly. As regards the 55th clause it overrules or disregards the decision of the Court of Appeal in the *Universo Insurance Company of Milan* v. *The Merchants Marine Insurance Company* [1897] 2 Q. B. 93, where it was held that the broker and not the assured was the debtor for the premium to the underwriter, even in the case where the receipt of it is acknowledged in the policy.

For these reasons I venture to suggest that instead of clauses 53, 54 (1), and 55 there should be substituted one clause to the following effect:—

Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the premium is conclusively presumed both to be payable to the insurer by the broker and not by the assured, and the insurer is directly responsible to the assured for the amount which may be payable in respect of losses or in respect of returnable premium.

I may add that cases of fraud need not be provided for; they are, according to the general scheme of the Bill, to be governed by the ordinary principles of Common Law.

I proceed now to consider the clauses 57 to 62, relating to 'Loss and Abandonment.'

As regards clause 56, its 2nd sub-clause provides amongst other things 'that the insurer is not liable for any loss attributable to the misconduct of the assured.'

On reading carefully the judgments in the leading cases of *Thompson* v. *Hopper*, 1 Ell. Bl. & Ell. 1033, and *Trinder* v. *The Thames and Mersey Insurance Company* [1893] 2 Q. B. 114, it will, I think, appear advisable to substitute for 'misconduct of the assured' the words 'wilful act or illegal conduct of the assured.'

Misconduct may seem to include negligence, but it is clear from the above-mentioned judgments that the negligence of the assured does not disentitle him to recover, and that it is only a wilful act or illegal conduct on his part which has this effect.

I come now to clauses 57 to 62, relating to the difficult subject of actual and constructive total losses.

These clauses seem to be an unmethodical collection of legal propositions, inferior both in point of arrangement and accuracy to the corresponding clauses which are set out in Mr. Chalmers' Digest of Marine Insurance Law, and which probably were contained in an earlier form of The Marine Insurance Bill.

That the arrangement of the clauses is most imperfect will be apparent on a cursory perusal; but it may be useful to direct attention especially to sub-clause 5 of clause 57, to sub-clause 3 of clause 58, and to clause 60. They are obviously out of their proper place.

I will now point out in what respects the clauses are, in my opinion, inaccurate or incomplete.

In the first place, as the Bill treats of marine insurances generally, and is not confined to those on ship goods or freight, I think clause 58 (1) ought to be extended in the following manner: '*Where the adventure which is the subject of the insurance is wholly and absolutely frustrated* or where the property insured is destroyed or irreparably damaged or where the assured is irretrievably deprived thereof, there is an actual total loss.'

Moreover, as regards the 2nd sub-clause of clause 58, it provides that goods cease to exist in specie when they no longer answer to the denomination under which they are insured.

This definition is obviously imperfect, because it does not apply to the very frequent case in which the goods are not at all described or denominated in the contract of insurance.

I venture to suggest that no definition is necessary, inasmuch as the meaning of goods ceasing to exist in specie is perfectly well known, but that, if any definition be considered necessary or expedient, it should be to the following effect: 'Goods cease to exist in specie when they are so damaged as no longer to answer to their usual commercial denomination.'

Passing now to the 1st sub-clause of clause 61, it will be found that this sub-clause, for the reason already stated, is not sufficiently extensive. It can, however, by a slight alteration be made to correspond with the above-suggested amendment of an actual total loss. I suggest the sub-clause should be as follows:—

Subject to any express provision in the policy there is a constructive total loss where the adventure which is the subject of the policy is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because such actual total loss could be avoided only by an expenditure exceeding that which it would be reasonable to incur for that purpose.

As regards the 3rd sub-division of clause 61 there are two observations to be made.

It states that there is a constructive total loss where the assured is deprived of the possession of his ship or goods by a peril insured against, and it is *unlikely* that he can recover the ship or goods as the case may be.

This seems to me to be a somewhat inaccurate statement of the law, inasmuch as there is a constructive total loss if it is *uncertain*, though not unlikely, that the property can be recovered. On looking at the important judgments in *Wilson* v. *Jones*, L.R. 2 Ex. 139, it will be found that one of the main points in that case was decided on the strength of the principle enumerated by Willes J. in the following words at L.R. 2 Ex. 150: 'A vessel is totally lost to the insured by capture by the enemy, although the presence of ships of war of its own nation makes it more probable that it will be recaptured than that it will be taken into a hostile port. It is a total loss at the time. However subsequent events might affect the result, the loss was presumably and conventionally total at the period when it occurred.'

There are also many other cases which lead to the same conclusion,

that an effectual deprivation of possession, if it is uncertain whether the property will be recovered, constitutes a total loss.

Of course, if the property is recovered before action brought, the total loss is adeemed, but until adeemed the loss is total.

I therefore suggest that the above clause should be amended in the following manner: 'In particular there is a constructive total loss when the assured is deprived of the possession of his ship or goods by a peril insured against, and it is uncertain whether he can recover the ship or goods as the case may be.'

As regards the 3rd sub-division of the same clause it is to be observed that the expression 'cost of repairing the damage' is not very accurate. What is really meant is:—the cost of putting the goods into a condition fit for being reshipped or forwarded.

But the matter which especially calls for notice is that the provision contained in that 3rd sub-division has the effect of overruling the express decision of the Exchequer Chamber in *Farnwouth* v. *Hyde*, L. R. 2 C. P. 204, where it was held that in ascertaining whether there is a total loss of goods it is wrong to take into account the whole cost of forwarding them to their destination, and that it is necessary to deduct the original freight payable to the shipowner. This decision has, however, been strongly impugned by some very eminent average adjusters. The arguments on both sides of the question are set forth very fully and with great force in the seventh edition of Arnould from p. 1299 to p. 1307. On the whole, the view adopted in the Bill is founded on less technical reasons and seems more in accordance with sound principle and the understanding of merchants and underwriters. The provision in the Bill may therefore be considered a wise amendment of the existing law.

As regards the 4th sub-division of the same clause, it states that there is a constructive total loss of freight 'where the ship or goods are so damaged or affected by a peril insured against, that an actual total loss of the freight can only be prevented by an expenditure exceeding in amount the freight which it would be incurred to earn.'

This provision (the last words of which are, it may be noticed on passing, rather clumsy) is, unless I am mistaken, contrary to the well-established law on the subject.

In order to show this, let me consider separately the two cases embraced by this provision.

It says that there is a constructive total loss of freight where the ship is so damaged or affected by a peril insured against that an actual total loss of the freight can only be prevented by an expenditure exceeding in amount the freight which would be earned.

Now this is quite inconsistent with the leading case of *Moss* v. *Smith*, 9 C.B. 94, where it was distinctly established by the masterly judgments of Maule J., Cresswell J., and Wilde C. J., that there is no constructive total loss of freight unless there is a constructive total loss of ship, *although the expense of repairing* her so as to *enable her to earn the freight would exceed* the amount of *such freight*, because in such case the freight would be lost not by the perils insured against but by the fact of the assured choosing not to repair his ship.

In the second place, let me take the other case embraced by the provision. It states that there is a total loss of freight 'where the goods are so damaged or affected by a peril insured against, that an actual total loss of the freight can only be prevented by an expenditure exceeding in amount the freight that would be earned.'

This proposition is evidently untrue, if the ship can be repaired so as to carry on the goods to their destination. In fact, it is only true in the particular case illustrated by *Michael* v. *Gillespie*, 2 C.B.N.S. 627, in which there was both a total loss of the ship and a constructive total loss of the goods.

It is finally to be observed that on reading the judgments in *Kidston* v. *Empire Marine Insurance Company*, L.R. 1 C.P. 535, *Potter* v. *Rankin*, L.R. 6 H.L. 83, and *Trinder, Anderson and Company* v. *Thames and Mersey Insurance Company* [1898] 2 Q.B. 114, it will be found to be an extremely doubtful question whether in any or in what cases there can be a *constructive* as distinguished from an *actual* total loss of freight.

For these reasons it seems advisable to *omit altogether* the 4th sub-division, and to leave it to judicial decision to determine in accordance with the general definition previously given of a constructive total loss whether in any particular case there is a constructive total loss of freight.

On the whole, I venture to suggest that the clauses 57 to 62 would be improved by the following rearrangement and modifications:—

57. (1) A loss may be either total or partial. Any loss other than a total loss as hereinafter defined is a partial loss.

[This is the same as 57 (1) of the Bill.]

(2) A total loss may be either an actual total loss or a constructive total loss.

[This is the same as 57 (2) of the Bill.]

(3) In the case of an actual total loss no notice of abandonment need be given.

[This is the same as 58 (3) of the Bill.]

(4) Unless a different intention appears from the terms of the policy an insurance against total loss includes a constructive as well as an actual total loss.

[This is the same as 57 (3) of the Bill.]

(5) Where the assured brings an action for a total loss, and the evidence proves only a partial loss, he may, unless the policy otherwise provides, recover for a partial loss.

[This is the same as 57 (4) of the Bill.]

58. (1) There is an actual total loss where the adventure which is the subject of the insurance is absolutely and wholly frustrated by any of the perils insured against, or where the subject-matter insured is irreparably damaged, or where the assured is irretrievably deprived thereof.

[This is the same as 58 (1), slightly modified for reasons already stated.]

58. (2) Where the ship concerned in the adventure is missing, and after the lapse of a reasonable time no news of her has been received, an actual total loss of the ship may be presumed.

[This is the same as clause 59 of the Bill.]

58. (3) As regards goods they are deemed to be irreparably damaged where they are so damaged as to cease to exist in specie, or so damaged that they cannot be rendered capable of arriving at their destination in specie.

(Goods cease to exist in specie when they are so damaged as no longer to answer commercially to their usual denomination.)

[This is substantially the same as clause 58 (2) of the Bill. As to the expediency of retaining the words in brackets see supra.]

59. Subject to any express provision in the policy there is a constructive total loss where the adventure which is the subject of the insurance is reasonably abandoned, because it appears that an actual total loss is unavoidable or that such total loss can be avoided only by an expenditure exceeding that which it would be reasonable to incur for that purpose.

[This is the same as clause 61 (1), except as slightly modified for reasons already stated.]

60. (1) In particular there is a constructive total loss where the assured is deprived of the possession of his ship or goods by a peril insured against, and it is uncertain whether he can recover the ship or goods, as the case may be, or whether the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered.

(2) In the case of damage to a ship, where she is *so* damaged by a peril insured against that the cost of repairing the damage would

exceed the value of the ship when repaired. In estimating the cost of repairs the expense of future salvage operations and any future general average contribution to which the ship would be liable, if repaired, must be taken into account.

(3) In the case of damage to goods, where the cost of putting the goods into a condition fit for being forwarded and of forwarding the goods to their destination would exceed their value on arrival.

[These clauses are the same as clause 61 (*a*), only slightly modified, and with the 4th sub-division omitted for reasons already stated.]

61. This clause will be the same as clause 60 of the Bill.

62. This clause will be the same as clause 61 of the Bill.

As regards clauses 63 to 80, treating of notice of abandonment, partial loss, salvage, general average, particular average charges, and measure of indemnity, they state the existing law on those difficult and complicated subjects with an accuracy and clearness which, in my opinion, could not be surpassed.

The remaining clauses of the Bill do not require any notice or comment.

I will now conclude by making one or two observations with reference to the rules in the Schedule as to the construction of a Lloyd's policy.

It is stated in the Schedule, as an introduction to the rules, that 'the following are the rules referred to by the Act for the construction of a policy in the above or other like form where the context does not otherwise require.'

It seems to me that the following words should be added: 'But these rules are themselves subject to the provisions of this Act.'

Unless, for instance, a proviso to this effect be added, the rules in the Schedule marked 3 (*b*) and 3 (*c*) would be imperfect, on account of their not containing the condition prescribed by the 43rd clause of the Bill; and rule 7 would be incomplete on account of its being less comprehensive than clause 56 (*c*) of the Bill.

Rule 11 says that the term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner or, as the case may be, to the charterer. This rule has certainly the advantage of being short and simple, but that it fails altogether to express the existing law on the subject will be apparent on a perusal of pp. 950 to 969 of Arnould. Perhaps, however, it was considered that the law on this subject is not ripe or fit for codification.

I have now concluded my criticism of the Bill. It will be seen, I think, that the great majority of its clauses are framed with great skill and accuracy, and that the Bill, if properly amended, will contain a useful statement of the principles of law which are peculiar to and which properly belong to the subject of Marine Insurance.

ARTHUR COHEN.

CLUB TRUSTEES' RIGHT TO INDEMNITY: A CRITICISM OF *WISE* v. *PERPETUAL TRUSTEE CO., LTD.*

IT is thought to be well established as a general principle of English law—or at least of the policy of English law—that no man shall enjoy the advantages of property without incurring its liabilities. This wholesome principle has been applied, not only as between legal or equitable owners and those who have claims against them as creditors or otherwise, but also as between trustee and cestui-que-trust. It is held that, where one holds property on trust for another as beneficial owner, the cestui-que-trust, where he is *sui juris* and has the entire ownership in himself, is bound to indemnify the trustee against all expenses incurred by the latter in consequence of his legal ownership of the property; and that this liability arises, not from any express or implied contract between the parties or by reason of the trustee having accepted the trust at the other's request, but simply as an incident of the cestui-que-trust's equitable ownership of the property; the principle being that he who takes the benefit must bear the burden[1]. This was so decided by the Judicial Committee of the Privy Council in the case of *Hardoon* v. *Belilios*[2]. In that case one had held shares, not fully paid up, on trust for another, and the cestui-que-trust had assigned his beneficial interest in the shares to a third person; and it was considered that the assignee was bound, on the principle above stated, to indemnify the trustee against calls on the shares, notwithstanding that there was no privity of contract or agreement between them.

This decision certainly appears to be in accordance with the true spirit of English law, and would no doubt be followed by the Courts having jurisdiction in this country. But a very singular exception to the rule so laid down has been lately admitted by the same Judicial Committee in the case of *Wise* v. *Perpetual Trustee Co., Ltd.*[3] It was there held that the trustees of the property of an ordinary club are not entitled to claim indemnity from the members against liabilities arising from their legal ownership of the club property; the reason alleged being

[1] *Hardoon* v. *Belilios* [1901] A. C. 118, 123, 125, 127.
[2] [1901] A. C. 118.
[3] [1903] A. C. 139, 72 L. J. P. C. 31, on appeal from the Supreme Court of New South Wales.

that there is an implied condition in the terms of membership of a club, that no member shall incur any liability beyond his entrance fee and annual subscriptions. It appears to the writer, however, that there are grounds on which the Court might well have arrived at a different conclusion, and he desires to state what these are, in the hope that, if the same point should arise for decision in the English Courts, the whole question may be thoroughly reconsidered.

In *Wise* v. *Perpetual Trustee Co., Ltd.* a lease of a house at a heavy rent and onerous covenants was taken by four members of a club, acting in pursuance of resolutions passed at a general meeting of the club, for the purpose of using the premises as the club-house. There seems to have been a question whether the resolutions in question were duly passed so as to bind the whole body of members[1]: but the premises were in fact used as the club-house by all; and the Court considered that, at least as regards the appellant, who had joined the club before the lease was granted, the relation of cestui-que-trust and trustees was constituted between him and the lessees. The club remained in possession of the demised premises for about three years. It was then dissolved, and the lessees underlet the property. But after three years more the underlessee became insolvent, and the lessees had to retake possession. They underlet again from time to time, *giving to the club the benefit of the rentals*; but they finally became liable to pay about £2,350 on the lessees' covenants in their lease. One only of the lessees was able to meet this claim, and the respondents, who were his executors, paid the money, and brought an action in equity against certain members of the club selected to represent them all, claiming that the members were *jointly and severally* liable to indemnify them. By the decree made in this cause, the action was dismissed with costs as against members elected after the date of the lease; but it was declared that all those who were members at the date of the lease and assented to or subsequently ratified the action of the trustees in taking the lease, were jointly and severally bound to indemnify them; and an inquiry was ordered what persons were liable to contribute on the basis of this decree. The appellant, who was not otherwise made a party to the proceedings, was included in the list of these contributories. He applied by summons to be struck out of the list; but his summons was dismissed by the chief judge in Equity, and an appeal by him to the full Court was also dismissed. He appealed to the

[1] The resolutions were originally passed at a meeting at which too few members were present to bind the whole body; but the minutes of this meeting were read and confirmed at a subsequent general meeting. See [1903] A. C. 143.

Privy Council against these orders; but no appeal was brought from the *decree*. The Judicial Committee, after stating the facts of the case and recognizing that the relation of trustee and cestui-que-trust had been created, and that it followed from this that the lessees as trustees were entitled to be indemnified out of any property of the club to which their lien as trustees extended, gave judgment for the appellant in these words:—

'In *Hardoon* v. *Belilios*, [1901] A.C. 118, this board had to consider the right of trustees to be indemnified by their *cestuis que trustent* against liabilities incurred by the trustees by holding trust property. The right of trustees to such indemnity was recognized as well established in the simple case of a trustee and an adult *cestui que trust*. But, as was then pointed out, this principle by no means applies to all trusts and it cannot be applied to cases in which the nature of the transaction excludes it.

Clubs are associations of a peculiar nature. They are societies the members of which are perpetually changing; they are not partnerships; they are not associations for gain; and the feature which distinguishes them from other societies is that no member as such becomes liable to pay to the funds of the society or to any one else any money beyond the subscriptions required by the rules of the club to be paid so long as he remains a member. It is upon this fundamental condition, not usually expressed, but understood by every one, that clubs are formed; and this distinguishing feature has been often judicially recognized. It has been so recognized in actions by creditors and in winding-up proceedings: see *Flemyng* v. *Hector*, 2 M. & W. 172; *In re St. James's Club*, 2 De G. M. & G. 383.

Apart from an observation of Lord St. Leonards in the last case, and which observation is in favour of the appellant, the only reported case in which a court has had to consider the application to a club of this right to indemnity is *Minnitt* v. *Lord Talbot*, 7 L. R. Ir. 407. In that case some members of a club who had guaranteed the repayment of money borrowed for the club sought indemnity, not only out of the property of the club, but from the members personally. The court which had already given effect to their lien (see 1 L. R. Ir. 143) afterwards made an additional order and inquiry similar to those made in this case. The grounds upon which this addition to the original decree was made do not appear; nor does it appear what were the grounds on which any member was held to have incurred liability nor indeed whether any member had incurred such liability. This case does not therefore assist their lordships on the present occasion.

The question now to be decided may be regarded as not yet covered by authority; and a choice must be made between either ignoring the essential features of a club or holding that the general rule established in *Hardoon* v. *Belilios* is inapplicable to such a body of persons. Their lordships feel no difficulty in making this choice.

The trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trustent* have become such, shall be completely ignored.

The appellant in this case is not in their lordships' opinion under any legal or equitable obligation to pay or contribute anything towards the indemnity of the plaintiffs; but he has offered to do so, and the plaintiffs are not satisfied with his offer. Their endeavour to obtain more is to be regretted and cannot succeed. This may seem hard on the trustees; but they have only themselves to blame for their own imprudence in not seeing to their own safety. A decision in their favour would not only be hard on the members of the club, but would be inconsistent with the terms on which they became members.'

It is submitted that there was really no occasion to distinguish the case from that of *Hardoon* v. *Belilios*; and that if the principle of that case had been applied, the Court might have arrived at a far more just solution of the question before them. For it must be confessed, with the greatest respect to the distinguished members[1] of the Judicial Committee who were present when the case was heard, that the judgment delivered does appear unjust. It strikes even a dweller in Lincoln's Inn, long accustomed to look out upon the rigours of Equity in regard to trustees, as dealing out to them an exceeding hard measure. And how must it appear to laymen, or even to the brethren abiding on the other side of Fleet Street[2]—to men whose minds are innocent of that enmity towards trustees, which is a part of the inheritance of the children of Chancery? Surely to them the decision must seem to be of a monstrous iniquity! The members of the club took all the benefit of the lease; they had the actual use and enjoyment of the club-house. The wretched trustees, as a matter of fact, undertook the liabilities of tenants for the use of the members, and chiefly in order to screen the members from legal responsibility to the landlord; they were strictly liable to account to the members for the profits and otherwise in respect of any advantage attached to their legal ownership. Yet they must themselves bear the liabilities incident to their position, without any claim on the members for indemnity! And they must further submit, on trying the question of indemnity, to be told that 'the trustees of a club are the last persons to demand that the fundamental conditions on which their *cestuis que trustent* have become such shall be completely ignored,' and that 'they have only themselves to blame for their own imprudence in not seeing to their own safety!'

[1] Lord Macnaghten, Lord Lindley, Sir Ford North, Sir Arthur Wilson, and Sir John Bonser.

[2] *Toto divisis orbe Britannis*—to appropriate Paul Bourget's adaptation.

The principle of the case of *Hardoon* v. *Belilios* is that, where the benefit is, there shall the burden lie[1]. Let us consider exactly what is the nature of the interest of the member of an ordinary club in the club property; and then see whether a certain liability to indemnify the club trustees ought not justly to be incident thereto. We will afterwards consider what ground there is for stating that one of the terms of membership of a club is an implied condition that a member shall not be liable to pay anything at all beyond his entrance fee and annual subscription.

Now the terms of membership of a club of course depend mainly on the rules, and these differ in various societies; but for the purposes of this argument we may take the characteristics of an 'ordinary' club to be these:—A certain number of men associate themselves together for a particular purpose, as the promotion of fellowship between members of certain universities, or, it may be, simply to enjoy the advantages of a club-house. These are the original members. Rules are drawn up as the basis of such association; and it is provided or, if not, implied that every member on payment of his entrance fee and first subscription shall be entitled to the advantages of the club and bound to observe the rules. These usually provide for the election of new members, frequently by ballot, at which a certain number of votes must be cast and a certain number of blackballs shall exclude; for payment in advance of an entrance fee and annual subscription of specified amounts; for vesting the club property in trustees, and for entrusting the concerns of the club to a committee of management; and for holding general meetings, at which resolutions affecting the interests of the club are to be passed. The rules, however, usually contain no provision defining the nature of the interest which each member shall have in the club property[2]; and are silent with respect to any liability which he may incur beyond payment of his entrance fee and subscription. But the position of a member of a club in these respects has to a certain extent been judicially defined.

In the first place the members are bound together by contract, each agreeing with the others, in consideration of the advantages to which he is admitted, to observe the rules. This is plainly so in the case of the original members. In the case of every member subsequently elected, the fact of his election is an offer made to him on behalf of all the existing members, and on his acceptance of this offer by payment of his entrance fee and first subscription,

[1] Above, p. 386.

[2] The club, of which the affairs were considered in *Wise* v. *Perpetual Trustee Co., Ltd.*, made new rules after the lease had been granted; and in these rules the nature of a member's interest in the club property was defined in terms agreeing with those implied by law. See [1903] A. C. 144.

a new contract of mutual benefit and obligation is concluded between him and the other members [1]. He acquires a proprietary interest in the club property, which he is entitled to protect, if need be, by injunction [2]; they gain the benefit of his entrance fee and subscriptions; and he and each of them undertakes to observe the rules. Then, as regards the nature of a member's interest in the club property. This is very peculiar. We are of course not contemplating the case of a proprietary club, but only considering a members' club, where the club property, such as the club-house, furniture, and books, and sometimes investments of money in the nature of a reserve fund, are vested in trustees at law. These trustees are of course not the beneficial owners; they hold in equity in trust for the whole body of members of the club. Collectively, the members enjoy in equity the absolute ownership of the club property; collectively too, they are in equity joint tenants thereof, that is to say, they do not each enjoy a distinct share therein, but hold all together the whole property, and the interests of any members who die pass to the survivors. Thus the members are entitled at any time, with the consent of all, to divide the club property between them [3]. And if all the members but one were to die suddenly, he would be absolute owner of all the property of the club, and could dispose of the same for his own benefit as he might please. And neither the heirs or executors of the deceased members, nor the men put down on the list of candidates, nor any one else could prevent his doing so. This must necessarily be so, for it is impossible so to constitute a club that the club property shall be held in trust, not only for the existing members, but also for all persons who shall at any future time be elected members. Such a provision would be void as contravening the rule against perpetuities. And where the rules are silent as to the nature of the members' interest in the club property, of course no provision can be implied, which would be void if it were expressed. Only actual members of the club therefore can have any interest in the club property, the original members having acquired such interest by virtue of their original association together, and each member subsequently elected having become entitled to the same by virtue of the contract made between him and the other members on his election. Thus it is that the entire equitable and beneficial ownership of the club property is in all the members for the time being, collectively and jointly. But the interest of each individual member in the club property is far from being that of an ordinary joint tenant. A joint tenant,

[1] See Hawkins J., *Re New University Club*, 18 Q. B. D. 720, 726.
[2] See *Baird* v. *Wells*, 44 Ch. D. 661.
[3] Per Stirling J., *Baird* v. *Wells*, 44 Ch. D. 661, 675.

whether he holds at law or in equity, enjoys the right of severing the joint tenancy at his will; he is also entitled to partition. But the nature of a member's separate interest in the club property has been judicially defined to be only a personal right of admission to the club-house and to the use of the club property as such, while the club continues to exist[1]. That is to say, it is an implied term of the agreement between the members, that each member shall not have the full right of ownership comprised in joint tenancy, or exercise the rights of severance and partition ordinarily incident thereto, but shall be confined to the mere use of the club property for club purposes[2].

We see then that the interest of a member in the club property is of a duplicate nature. As one of the whole body of members, he has the whole equitable ownership in himself, as much as any other joint tenant has[3]; and he enjoys the right of succession incident to joint tenancy even more completely, for he is not liable to be deprived of it by severance or partition. He can claim a share if the club property should be divided by mutual consent; and should he be the last survivor, all will be his. But he has agreed that, so long as another member lives[4], he shall be restricted to the personal use of the club property for club purposes: though in this respect he has a true proprietary right, which he is entitled to assert if improperly ejected, or threatened with ejection[5].

Now if this be the nature of a member's interest in the club property why should he not incur a liability, commensurate with his interest, to indemnify the trustees of the club against all liabilities incident to their legal ownership of the club property? It is submitted that justice would be exactly meted out, if the principle of *Hardoon* v. *Belilios* were followed, and the burden were laid on those who enjoy the benefit. A member of a club has not, individually, the complete ownership of the club property; but the entire equitable ownership is in all the members collectively. Why then should they not incur a joint, but not a several, liability to indemnify the trustees? In this respect the appellant in *Wise* v. *Perpetual Trustee Co., Ltd.* appears to have possessed a sounder legal instinct than his

[1] Per Lord St. Leonards L. C., *Re St. James's Club*, 2 De G. M. & G. 383, 387.

[2] This implied term of the contract between the members is of course a restriction on the equitable rights of ownership, which they would otherwise enjoy. But, as has been shown above, the trusts of the club property, including this restriction, are imposed during the lives of the existing members only; so that this restriction does not offend the rule against perpetuities, and is valid.

[3] The reader may be reminded that every joint tenant is seised *per mye et per tout.*

[4] This agreement is, as we have seen, originally made for the lives of the original members, and so does not offend the rule against perpetuities. On each new member's election, a new contract is made with him, and so his life is in effect added to those, for which the restriction is to be observed.

[5] See *Baird* v. *Wells*, ubi sup.

judges; for his counsel stated[1] that he had always been willing to share with all the other members of the club the liabilities under the lease, but he objected to take upon himself an individual liability not shared by most of the members. This (to adopt Lord Coke's expression) 'seemeth great reason.' And it is respectfully submitted that the view so propounded by the appellant is in accordance, not only with common sense, but also with legal principle. If, as decided in *Hardoon* v. *Belilios*[2], liability to indemnify a trustee is a simple incident of the cestui-que-trust's equitable ownership, and is undoubtedly consequent thereon, where the cestui-que-trust is *sui juris* and has the entire ownership, does it not follow that, where the entire equitable ownership is in a body of men, jointly and collectively, and they are all *sui juris*, they should incur a correlative obligation to indemnify their trustees? And it may be observed that, if such a joint obligation were established, it would in practice be an effectual protection to club trustees. No doubt a joint liability may often be extremely hard to enforce at law, where a large number of men are liable, on account of the necessity of suing them all together. But the trustees of a club are almost invariably themselves members of the club. They would therefore be in the position of men who have discharged a liability jointly incumbent on themselves and others, and could sue the other members, or any of them, in equity for contribution; and in this way each member's share of the liability would be exactly and justly ascertained.

It is proper to state that the view here propounded does not appear to have been submitted to the Judicial Committee in argument. It seems that the appellant had offered to compensate the respondents on the footing of his being liable to pay an equal share with the other members of the club; but this offer had been rejected[3]. The respondents therefore were only interested in contending for the benefit of a several liability on the part of the members to indemnify them. And the only question directly before the Judicial Committee was whether the appellant should be included in a list of contributors saddled with a joint *and several* liability. They held that he should not, and so indirectly reversed the decree which imposed this liability[4]. But they went on, as we have seen[5], to pronounce that the appellant had incurred no liability at all towards the trustees. And we now come to the reason alleged for this decision, namely, that there is an implied condition that a member of a club shall incur no liability at all beyond his entrance fee and subscription. It is respectfully sub-

[1] [1903] A. C. 141. [2] Above, p. 386. [3] See above, pp. 387–9.
[4] See above, p. 387. [5] See above, p. 389.

mitted that the authorities cited by the Court by no means warrant this conclusion.

As we have seen [1], the scheme for carrying on an ordinary members' club is this:—the management of the business of the club is entrusted to a committee, and the members undertake to pay *in advance* an annual subscription of a certain sum. It is obvious that in the beginning, on the original institution of the club, the amount so fixed must be a mere estimate; for the club has not yet begun to be carried on and the expenses cannot be accurately foretold. The object of requiring the subscription by each member of a certain sum of money in advance is to provide the committee with sufficient ready money to meet the current expenses. The committee are in fact the stewards of the club for the purposes of carrying on the establishment contemplated; it is their duty to hire the necessary servants and to get in proper supplies of provisions, wine, &c.: but being furnished with ready money estimated to be sufficient for all these purposes, they are not empowered to pledge the members' credit. This was established in the leading case of *Flemyng* v. *Hector* [2], cited above [3], and deciding that, where a members' club is constituted on this basis, the committee have no power or authority to pledge the credit of the club, and if the committee do incur debts on account of the club, the members of the club are not liable as principals upon the contracts so made by the committee. And it has further held that, where the committee are not authorized to pledge the credit of the members, the members are not liable to contribute to indemnify the committee against any debts contracted by them for club purposes, but without the members' authority [4]. But that is all that is established by these cases; and it is submitted that they give no support to the wide proposition asserted in the Privy Council [5]. They did no more than apply to the relation of club and committee the well established law of master and servant. If a master provide his servant with ready money to buy goods, the servant has no authority to procure them on his master's credit; and if he incur a debt on his master's account, which he was not authorized to contract for him, he has no legal claim to be recouped the amount owing. So it is with a club and its committee. But that is a very different thing from an agreement between the members of a club that they shall enjoy all the advantages of the club property, but shall not be liable to pay anything more towards the cost of those advantages than the amount of their subscriptions; for this is in truth the condition suggested in the Judicial Com-

[1] Above, p. 390. [2] 2 M. & W. 172. [3] P. 388.
[4] *Re St. James's Club*, cited above, pp. 388, 392. [5] Above, p. 388.

mittee's judgment. The fallacy of the supposition, that the agreement between the members of a club is of this nature, is apparent on considering the remarks of Lord Abinger C.B. in *Flemyng* v. *Hector*[1], the case principally relied on by the Judicial Committee. He said that, if the subscriptions were insufficient to meet the expenses, the committee ought to have called the club together and asked for a further subscription and said, It was not the intention of the club that we should make ourselves liable—the intention of the club was to supply us with money beforehand. This shows quite plainly how that learned judge regarded the agreement between members of a club. He obviously considered that the intention of the contracting parties, in specifying the amount to be annually payable by each of them, was not to prescribe a fixed and unalterable limit to the amount of each member's subscription, but was merely to determine the amount which he should *for the time being* be liable to contribute in advance every year towards the club expenses. And he distinctly suggested that the parties must be taken to have contemplated that, if the amount so raised should be insufficient, any further funds which might be necessary should be raised in the same way, namely, by increase of the subscription, the intention of the parties being that the committee should have no authority to contract debts and pledge the members' credit for their payment, but should, if more funds were wanted, call the club together and ask to be supplied with them. It seems that he well understood the principle that property cannot be enjoyed without incurring its liabilities, and clearly recognized that members of a club must raise further funds, if the subscriptions prove insufficient, and that their liability in this respect is altogether independent of the question, what authority they have given to the committee as their stewards. Besides this, if the members of a club agree that each shall contribute a certain sum by way of annual subscription to meet the club expenses, how can that modify any liability incumbent on them as the owners or the equitable owners of property? By that very agreement they contemplate the assumption by themselves of the equitable ownership of the club property, and recognize that such ownership cannot be enjoyed without pecuniary liabilities; why else provide for meeting expenses? But how can their agreement in this respect have any greater force than a contract, for example, between partners regulating the proportions in which they shall bear the partnership debts? The club assume the equitable ownership of the club property; every original member and every member

[1] 2 M. & W. 172, 183.

subsequently elected intends to share, and does share, in the advantages of that property; they can make what rules they like as between themselves: but how can they divest themselves by any internal agreement of a liability incumbent on them collectively as owners and incurred by them as a united body of men towards other persons? Would the point be arguable if the trustees were strangers to the club?

But, it may be answered, club trustees are not usually persons external to the whole body of the club; they are generally members. It is submitted, however, that their acceptance of the trusteeship is no real part of the constitution of the club, but is an independent transaction. The rules may provide generally for vesting the club property in trustees or even name certain persons as the first trustees; but the actual acceptance of the trust is an entirely separate business, and the parties to this transaction are the trustees in their individual capacity on the one hand and the whole body of members on the other. And, as is customary in such cases, these are to enjoy the whole benefit of the transaction to the great detriment of the trustees, who incur all the obligations heaped up by courts of equity on those who assume this character. Can there then in such circumstances be implied a valid agreement that the trustees shall forego such claim to indemnity as they would otherwise have? If such an agreement were expressly made between a trustee and a single cestui-que-trust being *sui juris*, would it be valid? If not made by deed, where would be the consideration for the trustee's promise to release his right? Nay, would such an agreement, if made by deed, be in accord with the policy of the law, which, as we have seen, is opposed to the enjoyment of the advantages without the liabilities of property? The writer is not aware of any authority exactly answering these questions; but he submits that such an agreement ought to be held void as opposed to the policy of the law. But even if this view should be too favourable to trustees to meet with approval in Equity, it is confidently submitted that, as between trustees and a single cestui-que-trust of full capacity, an agreement depriving the trustees of their right to indemnity would never be implied. How then can it be implied as between trustees and several cestui-que-trusts entitled jointly to the entire equitable ownership of the trust property? And how can the case be altered by the facts that the number of the beneficiaries is large, and that, as between themselves, they are bound by the rules of a club?

It will have been observed that the principles for which the writer is contending, are opposed to those applied by the Courts of New South Wales as well as to the rule laid down in the Privy

Council. The Colonial Courts appear to have proceeded on the ground that those members, who actually authorized the taking of the lease, were fixed with a joint and several liability to indemnify because of their so acting as principals in the transaction; and, as we have seen [1], these Courts exonerated members elected after the lease had been granted from any such liability. It is submitted, however, that this view is not consistent with the rule in *Hardoon* v. *Belilios* [2], that the liability to indemnify is a simple incident of the equitable ownership; and that, as the members subsequently elected were admitted on joining to a share in the ownership of the club property [3], they should also rightly incur a commensurate liability.

If the rule laid down in *Wise* v. *Perpetual Trustee Co., Ltd.* be good law, what strange consequences might follow? Suppose trustees hold property for a club and heavy rates or taxes be imposed on the legal owners of the property, are the trustees to pay and the members to go scot-free? Suppose the trustees, without their own actual fault, but by the negligence or misadventure of the committee's servants, were to incur some liability, as the owners of the club property, on the principle of *Rylands* v. *Fletcher* [4]; for instance, through the escape of sewage or electricity on to the adjoining land. Are the trustees to be liable in damages, while the members' pockets are untouched? These examples show what grave injustice may be suffered if the rule in *Wise* v. *Perpetual Trustee Co., Ltd.* is to prevail and the trustees of club property are to be excluded from the benefit of the sound principle established in *Hardoon* v. *Belilios*.

Supposing, however, that this principle were held in English Courts to govern the relation between the trustees of club property and the members in the manner suggested above, there is one point in the constitution of an ordinary club, which may be thought likely to create some difficulty in the practical application of the doctrine. It is usually provided in the rules of a club that every member shall be at liberty to retire from the club on giving notice of his intention to do so, and that, if he give such notice before the end of the year, he shall not be liable to pay the next year's subscription. It is clear that a member, who has paid up all subscriptions due from him and given such a notice, incurs no further liability *to his fellow members*; the contract between him and them, so far as it was to be performed by him, has been duly performed and is terminated. For example, if the subscription be raised by a resolution passed in

[1] Above, p. 387. [2] Above, p. 386. [3] Above, pp. 390, 391.
[4] L. R. 3 H. L. 330. See also *Ballard* v. *Tomlinson*, 29 Ch. D. 115; *National Telephone Co.* v. *Baker* [1893] 2 Ch. 186.

general meeting and binding all the members of the club, a member, who objects to pay the increased subscription, is thus enabled to retire without incurring the liability to make any further contribution towards the club expenses. It appears, too, that a member so retiring ceases *ipso facto* to have any further part in the ownership of the club property. And as the liberty of so retiring was one of the terms of the contract by which he was admitted to the advantages and undertook the liabilities of membership, it appears that the separate interest in the club property, which each member acquires on joining[1], is in truth a right of personal use of the club property determinable at his own will on giving due notice of retirement. But this does not prevent the entire equitable ownership of the club property from residing in all the members for the time being, jointly and collectively; they are certainly entitled to this as against the trustees, who have indeed a lien for their expenses, but have no other beneficial interest[2]. And each member has in law the potentiality of acquiring the whole beneficial ownership himself by surviving all the other members[3]; although in practice this may be unlikely to occur. As then the liberty of retiring from the club does not affect the members' collective joint ownership of the trust property, there appears to be no reason why it should prevent them from incurring the joint liability to indemnify the club trustees, which, as the writer contends, ought on principle to be an incident of such ownership. But if the liability to indemnify the trustees be regarded simply as an incident of the members' equitable ownership, and not as the consequence of an agreement between the members and the trustees, whereby the latter undertook at the request of the former to assume for their benefit the legal ownership of an onerous property, it appears that the liability ought not, on principle, to exceed the beneficial interest actually enjoyed, and should therefore not extend to claims incurred after a member's interest in the club property has been duly terminated. But when is a claim incurred in the case of property, such as leaseholds, held at a rent and on onerous covenants, or shares not fully paid up? When the lease or the shares is or are taken, or when some rent is due and unpaid or covenant broken, or a call is made? Here again the case of *Hardoon* v. *Belilios* may help us. The trustee in that case sought to be indemnified by the assignee of his original cestui-que-trust against calls made, and obtained relief on the ground that the liability to indemnify was an incident of the assignee's equitable ownership[1]. But it does not appear that the original cestui-que-

[1] Above, pp. 391, 392. [2] Above, pp. 387-9, 391. [3] Above, pp. 391, 392.

trust was at the same time also liable to indemnify the trustee on the same ground. This shows that the liability to indemnify a trustee, regarded as an incident of the cestui-que-trust's equitable ownership, is a liability of the equitable owner for the time being. It seems analogous to the liability, depending on privity of estate and not of contract, which is incurred by the assignee of a lease; and should therefore cease, as regards future obligation, though not as regards past breach of obligation, upon assignment over. It is submitted that, with this guide, there could be no practical difficulty in working out the principle here contended for as between the trustees of a club and the members. Where the members' liability to indemnify has ripened into a definite pecuniary claim (as in the case of leasehold property by rent being in arrear or a covenant broken), it is submitted that it should not be competent for a member, by retiring, to divest himself of his share in the liability so incurred. But there appears to be no reason why a member should not cease, on retirement, to be affected by the general liability to indemnify property incident to the equitable ownership of the club property, so long as no definite claim thereunder had accrued before the date of his retirement. For example, it is submitted that, if the club-house were leasehold, and the rent and covenants duly paid, performed and observed at the date of a member's retirement, he should not be liable to indemnify the trustees against any future failure to pay the rent or keep the covenants.

But it may be objected that, if the theory here propounded were applied to facts like those of the case of *Wise* v. *Perpetual Trustee Co., Ltd.*, the practical result would be exactly the same as that reached in the Judicial Committee's judgment. In that case the club is said to have been dissolved[2]; and this apparently took place before the rent under the lease fell into arrear or the covenants were broken; for the club premises were immediately afterwards underlet to a company, and the difficulties of the club trustees did not begin until this company went into liquidation. Now if each member of a club be at liberty to retire[3], all may resign, and the club may be so dissolved; and if this took place before the rent was in arrear or the covenants broken, the members would, on the principle suggested by the writer, incur no liability to indemnify the trustees for any future failure to pay the rent or keep the covenants. But this, it is submitted, involves no more injustice to the trustees than must necessarily be involved in the application of the rule in *Hardoon* v. *Belilios*. The cestui-que-trust's

[1] Above, p. 386. [2] Above, p. 387. [3] Above, p. 397.

liability to indemnify his trustee must, in so far as it is regarded as a mere incident of the cestui-que-trust's equitable ownership, be transferred by every assignment of that ownership. The single cestui-que-trust must therefore be at liberty, like the assignee of a lease, to escape from liabilities only incumbent on him because of a privity analogous to privity of estate [1], by assigning over his beneficial ownership to a pauper. The trustee must take this risk; and so in the case of a club he must take the risk of all the members' retirement. But it must be noted that, on the writer's theory of the rights of club trustees, the crowning injustice apparent in *Wise* v. *Perpetual Trustee Co., Ltd.* would not be perpetrated. If the members of a club all retire, the trustees of a club must, it is submitted, be released *ipso facto* from their trust, and must thenceforth be free to hold the club property for their own benefit. What strikes the critic as being so peculiarly iniquitous about the decision in *Wise's* case is that the trustees were treated as being still invested with all the obligations of trustees for the club *after its dissolution* (for they gave to the club the benefit of the profits they obtained) [2]; while at the same time they were left to discharge out of their own pockets the expenses incumbent on them by reason of their legal ownership of the lease. It may be urged that, if the members of a club are to retain the equitable ownership of the club property after they have all resigned, they should thenceforth at least be saddled with the liabilities regularly incident to that ownership. On the principle for which the writer contends, if the members had escaped further liability on the dissolution of the club, the trustees would have been at liberty, after the resignation of all the members, to dispose of the demised premises for their own benefit. Very likely this might have made no substantial difference to them in the particular case. They probably did the best they could with the property, and applied the profits in diminution of their liabilities. But in other circumstances it might make a great difference to the trustees to hold the club property entirely for their own use. Besides, if the practical consequences of the Judicial Committee's ruling be in this particular case the same as that of the writer's theory, they would not be the same in other circumstances. Whenever an actual claim to be indemnified had arisen before the retirement of any member or all the members, then he or they could not escape from this liability by resignation. It is respectfully submitted that the Judicial Committee cut the knot, which they ought to have unravelled; and that, if justice required that the members should be free from all liability in the circum-

[1] Above, p. 399.

[2] Above, p. 387.

stances of the particular case, the Court might have arrived at that conclusion without treating the case of the members of a club as an exception from a sound and well-established principle[1].

T. CYPRIAN WILLIAMS.

[1] It should be explained that the writer's argument is not intended to touch the question whether, where one requests another to hold onerous property on trust for him, there is not to be implied an agreement by him to indemnify the other against all liabilities consequent upon the legal ownership. The cestui-que-trust could not of course shuffle off the liability *arising from such an agreement* by assigning over his interest in the trust property; cf. above, pp. 399, 400. Whether an agreement of this kind is to be implied appears to depend on the circumstances of the case; and the writer has no fault to find with the decision that such an agreement is not to be implied as between the trustees of club property and the members; see above, p. 397. But the principle of the case of *Hardoon* v. *Belilios* is that there is a liability on the part of the cestui-que-trust to indemnify the trustee, which is independent of any express or implied agreement of this kind and is simply an incident of cestui-que-trust's equitable ownership. And the writer's protest is made against the decision that the case of the trustees of club property forms an exception to this principle.

THE ORGANIZATION OF JUSTICE IN FRANCE[1].

II.

The Ministère Public.

THIS is one of the most peculiar and characteristic features of the French organization of justice. Even in criminal matters the public prosecutor plays a very small part in the English system compared with the French. But the *ministère public* means much more than having a public prosecutor of crimes. It is an institution of French origin. Belgium and Holland, which have retained most of the French legal procedure from the time when they were subject to French rule, have a *ministère public* upon the French model. Germany and Italy have imitated the French system, but have not gone so far[2]. In Germany the *Staatsanwaltschaft* is by no means so powerful as the *ministère public* in France, and is almost exclusively concerned with crime. In England and America there is nothing in the least like the *ministère public*. In Scotland there is an elaborate and admirable system of public prosecution. And by a modern statute, the Lord Advocate, who is the chief public prosecutor, is entitled to intervene and state defences in actions of divorce or of nullity of marriage[3]. This is because in such actions, especially, there is always a risk of the parties being in collusion, and desiring to snatch a judgment which shall set them free from each other by concealing or misrepresenting the facts. It is in the interests of public order and good morals that the intervention of the Lord Advocate is permitted. In practice, however, the section has been almost a dead letter.

So in England, the King's Proctor has certain rights of intervention in similar proceedings. But these examples of an intervention so limited and exceptional show how faint is the recognition with us of a principle which in France has long been regarded as vital.

This is that the government is interested in seeing that the law is correctly laid down, that judgments are duly executed, and that the judges perform their duties satisfactorily. In criminal cases, and in certain civil cases in which the state has a special interest,

[1] The references D. P. are to the reports published under the name Dalloz, Recueil Périodique.

[2] See v. Holtzendorff, Rechtsencyclopädie, s. v.

[3] Conjugal Rights (Scotland) Amendment Act, 1861 (24 & 25 Vict. c. 86), s. 8.

its officer—representing the *ministère public*—ought to appear as prosecutor or plaintiff to see that no injury is done to the state or to good government. And even in the disputes of private citizens the government, through its accredited officer, is entitled, though not bound, to intervene. The institution was not known to the Roman law, nor to the early Germanic law, both of which had only private prosecution[1]. Attempts have been made in France to trace the *ministère public* to the officials of the later Roman Empire called *defensores civitatum*. But it is now generally admitted that it cannot be traced further back than the fourteenth century. The first mention of *procureurs du roi* appears to be in an *ordonnance* of Philippe le Bel of 1302. In the origin they were fiscal rather than judicial officers. A portion of all fines levied in the several courts belonged to the crown, and the *gens du roi* had to see that it was paid over. Before the establishment of permanent tribunals, the itinerant judge combined the rôles of judge and prosecutor. He collected the evidence, and then decided if it was sufficient to convict the accused. When permanent courts were set up in the fourteenth century, the judge was relieved of the duty of prosecution, and it was assigned to the royal procurators. These officials gradually acquired more and more importance as the champions of the crown, and of the royal domain against the encroachments of the feudal lords on the one hand and the Church on the other. In the conflict waged for centuries between the Kings of France and the Popes respecting the liberties of the Gallican Church, the *procureurs du roi* were always conspicuous[2]. As king's men they were very unpopular with the radicals or republicans of the Revolution, and an attempt was made by the Constituent Assembly to weaken them by assigning an important part of their duties to a new class of officials called the *accusateurs publics*, who were elected by the people. But this scheme did not work well, and the *ministère public* was organized very much in its present shape in the year 1799.

The *ministère public* forms a regular hierarchy. At the head of the whole system is the *garde des sceaux* or Minister of Justice, who has power to issue orders and exercise discipline over every member of the *ministère public*. Through the *Chancellerie*, as his department is still called, all promotions come, and in the last resort the *garde des sceaux* may request the President of the Republic to dismiss from office a refractory subordinate.

Below him in every ordinary court in France—the Court of Cassation, the Courts of Appeal, the Courts of First Instance—is the

[1] See the article by M. Coumoul in Nouv. Rev. Hist. 1881, pp. 292 seq.
[2] Dalloz, Rep. Ministère Public, No. 5.

parquet. This is the usual term for the group of officials who form the *ministère public* in that court. Formerly they had seats at the foot of the bench in a space enclosed by a bar. In the Court of Cassation the *parquet* consists of the *procureur général de la République*; of six *avocats généraux*, two for each chamber; and of a *secrétaire général.* Beyond a general right of supervision, the *procureur général* does not have very much to do with the *parquet* of the lower courts. The Court of Cassation is in many ways rather a separate institution than a part of the regular organization. In every Court of Appeal the *parquet* consists of the *procureur général de la République près la Cour d'Appel*, generally called simply the *procureur général*, and of two officials—an *avocat général* and a *substitut du procureur général*—for each chamber of the Court.

In the old *parlements* which preceded the *Cours d'Appel*, the *procureur général* was not so distinctly the head of the *parquet* as he is now. Under the old régime he controlled the administrative work, but took no part in the pleading, and the *avocats généraux* were almost independent of him. Now the *procureur général* is admitted to be the official head, and the *avocats généraux* are his deputies, just as are the *substituts*, from whom they differ only in degree. But the independence of the individual members of the *parquet* is protected in several rather curious ways. In important cases the duty of the *avocat général* or of the *substitut* who has charge of the case, is to consult the *procureur général* as to the line to be taken. If they cannot agree to this, the subject is brought before a meeting of all the members of the *parquet.* The *procureur général* must give way if the majority is against him, and the view which has prevailed will be that officially presented to the court. But the *procureur général* has the right to state to the court his personal opinion in addition.

Moreover, it is an important rule that an official of the *parquet* is never bound to urge a view which is contrary to his conscience. So in criminal cases the prosecutor may, after stating the case for the prosecution, abandon the accusation, and ask for the acquittal of the accused; or the *procureur* who has been called upon officially to make a claim for the state, or for a branch of the state such as a *département*, may formally present the claim, but move that it be rejected.

According to the old saying in the *ministère public*, 'la plume est serve mais la parole est libre.'

The *procureur général près la Cour d'Appel* is the most important wheel in the official machine. He is the head of the *ministère public* within the jurisdiction of the *Cour d'Appel.* He can direct and control all the subordinate officials of the *ministère public*, not

only of the Court of Appeal, but of all the Courts of First Instance within the wide district subject to the Court of Appeal. Their duty is to consult him and to take instructions from him.

In the Court of First Instance the *parquet* consists of the *Procureur de la République*, and generally of a number of substitutes varying from one to five. In Paris there are thirty *substituts*, and since 1883 there are some small courts in which the *Procureur de la République* has no *substituts*, and forms the *parquet* by himself[1]. In the commercial courts or the *Conseils de Prud'hommes* there is no *parquet*. Nor is there any attached to the *juge de paix* as far as his civil work goes. In criminal proceedings before the *juge de paix* the duties of prosecutor are discharged by the *commissaire de police*. The *parquet* is frequently called the *magistrature debout*, or standing magistracy, as opposed to the judges who are the *magistrature assise*, or sitting magistracy. They do not enjoy the same security of tenure as the judges. To ensure proper subordination to the government which they represent, it was thought necessary that they should be *amovibles*. But they do not, like our government lawyers, go out of office when there is a change of government. They represent the state, but not the particular ministry which happens to be in office. They are not, as a matter of fact, often removed from office. The hope of promotion is the strongest inducement to them to keep on good terms with the government of the day.

The duties of the *ministère public* may be thus stated: they are partly administrative and partly judicial. The chief administrative duties are—

(1) To report any abuses in the administration of justice, or any misconduct on the part of a judge;

(2) To prepare statistical reports of the business of the courts;

(3) To supervise the registers of civil status;

(4) To inspect lunatic asylums; to investigate the causes of insolvencies, and to prosecute fraudulent bankrupts;

(5) To supervise the administration of vacant successions;

(6) To see that the ministerial officials of the courts properly discharge their duties.

Their judicial duties vary with the nature of the action.

In certain cases the *ministère public* is a party. He acts *par voie d'action*. He is then said to be *partie principale*. But in most civil cases the *ministère public*, if he takes action at all, does so merely by intervening in a case between private parties. He is then said to act *par voie de réquisition*, and is called *partie jointe*.

[1] See Tableau B. in D. P. 83, 4. 70.

He acts as a party in all criminal prosecutions, and the responsibility of raising all such prosecutions rests upon him. His first and most important duty is that of public prosecutor. With this I do not here attempt to deal. The French criminal procedure with its secret *instruction* would require a long explanation[1].

The chief civil cases in which the *ministère public* sues as a party are these:

(1) He may bring an action for the nullity of a marriage contracted between parties to whose marriage there was an absolute impediment, or where the marriage was bad from defect of form or from want of competence on the part of the official who performed the ceremony.

(2) He may demand the interdiction of a dangerous lunatic.

(3) He may sue for the cancelling of a patent obtained by fraudulent statements, or of a patent accorded to an invention contrary to public order, good morals, or a provision of law[2].

There are a few other cases, but not many, in which he may raise an action.

As to the much more numerous cases in which the *ministère public* can act only by intervening, there is an important distinction. In certain classes of cases he is bound to give the court his views—to furnish his *conclusions*, as it is called. If a judgment is pronounced in a case of this kind without the *ministère public* having been heard, it may be annulled. The papers in these cases have to be lodged with the *ministère public*, and for this reason the cases are known as *causes communicables*. The principal cases in which this communication is required by law are—

(1) Cases affecting the judicial organization itself, e. g. recusations of judges.

(2) Affecting civil status, e. g. adoption, separation, interdiction.

(3) Affecting persons incapable, or of restricted capacity, e. g. minors, interdicted persons, married women acting without the husband's authority, persons acting with a curator.

(4) Affecting the patrimonial interests of the state, of the commune, or of public institutions legally recognized, e.g. churches, barracks, military schools, harbours, schools, prisons, &c.

(5) Affecting persons presumed to be absentees.

I have not given a complete enumeration. The list will be sufficient to show the character of the cases in which it is essential that the *ministère public* should form conclusions. But in any other case he may demand communication and may speak. In most cases where no public interest is affected, he will not exercise this

[1] See Dalloz, Rep. Ministère Public, Nos. 239 seq.
[2] See Garsonnet, t. 1, § 195.

right. If present and called upon by the court, he will say he leaves the matter to the wisdom of the court (*s'en rapporter*). But in the Court of Cassation it is a fixed principle that the sound interpretation of the law is a matter of public interest, and in that court no case can be decided without hearing the *ministère public*. It is a fixed rule that the highest official of the *parquet* shall have the same salary as the highest judge in the court to which he is attached [1].

There are one or two general remarks to be made upon the organization I have described.

(1) The judicial work is unequally distributed. The Court of Appeal of Paris was found by a committee which reported in 1878 to have immensely more work than any other Court of Appeal in France. That of Bordeaux which came next had no more cases than a single chamber of the Court of Paris. Ten of the less occupied Courts of Appeal had each of them not more to do than a single chamber of the Court of Bordeaux. The division into arrondissements and cantons goes back to the Revolution, and these districts vary immensely in population and business. Indeed the surprising thing is that an organization created more than a century ago should still hold the field. But in most countries the change of population in that period has been far greater than in France. Proposals have often been made to suppress some of the courts which have least to do. But this is difficult. (1) It would increase the expense of money and time to litigants if the court were further removed from them; (2) the *avoués* whose practice was confined to the courts suppressed would have to be compensated, and this would amount to a large sum; (3) the local opposition to the loss of one of the old courts would be very strong. Most of the *Cours d'Appel* succeeded the old *Parlements* or the *Conseils souverains*. They are among the most venerable landmarks of the country. To take away from ancient cities like Grenoble, or Aix, or Dijon, their *Cour d'Appel* would shock the natural susceptibilities of Frenchmen in whom provincial sentiment is by no means dead [2].

And even the Court of First Instance is the chief glory of many an old town in France. The difficulty of altering these historical arrangements is almost insuperable. But something has been done in the way of reducing the number of judges and of officials of the *ministère public* in the courts where there is the least business.

[1] I have, for shortness, spoken of the *ministère public* as 'he,' meaning, of course, the appropriate official.

[2] See, for the history of the Parlements, Esmein, Histoire du Droit Français, 3rd ed., pp. 379 seq.

Still it cannot be denied that there are many places in which the judges and procureurs are not very fully occupied. This is the more unfortunate as it is the younger and more active men who have the least to do. A judge of First Instance in a little country town is, I should imagine, rather apt to contract habits of indolence if he is allowed to remain there many years.

The magistrature, including under that name both the judges and the *ministère public*, is a special career like the army. Under our system, judges and crown-lawyers are merely old advocates promoted; and the crown-lawyers—a mere handful with us—hold office usually only during the administration of the political party to which they belong. A young Frenchman who wishes to be a judge becomes a *licencié en droit*, or better still takes his *doctorat*. He spends two years at the bar of a *cour d'appel* making his *stage*, as it is called. During this period he has to perform certain duties not very onerous, under the inspection of the Council of the Bar. Then if he is twenty-five years old, he is eligible for appointment as a *juge suppléant* or *juge titulaire* of a Court of First Instance. His appointment depends almost entirely on the influence he is able to bring to bear upon the Minister of Justice. In most cases he will be thirty or thirty-one years of age before he gets the position of a paid judge, with a salary of £120[1]. The magistrature in France tends very much to become hereditary. Just as in England certain families have for generations sent their sons into the army, while other families have specially affected the navy or the Indian Civil Service, so in France in many families the magistrature is the traditional object of ambition. Such families have usually senior members high up in the service who can secure appointment for a promising son or nephew. A young man without influence has considerable difficulty in being nominated as a judge. He may establish himself as an advocate in some small court, and try to gain the confidence of the president and procureur, or perhaps of the député. By their recommendation he may ultimately get an appointment. Moreover, promotion from the lower to the higher ranks is also largely a matter of influence, though here no doubt a young man of exceptional merit may advance his own fortunes unless he is buried in a remote corner where he has no means of showing his capacity. And it has always to be remembered that the salaries of the subordinate officials are so small as barely to enable them to exist. Consequently the young men who choose the judicial career will as a rule be men who have some private fortune, or whose fathers are able to make them an allowance.

[1] Le Roux, Nos Fils, p. 140.

They look forward to marrying a lady with a considerable *dot*. A magistrate has, in virtue of his position, exceptional advantages in this way. Well-to-do fathers with marriageable daughters are apt to give great weight to the claims as a pretendant of a magistrate or of an officer. The French predilection for any position which, though not very lucrative, is dignified and secure, tells strongly in that direction. The magistrature is therefore on the whole a career for the rich or well-to-do who do not expect to support themselves entirely by its emoluments. This class is in France so large in proportion that recruits are always sufficiently numerous. In a country like Canada where most young men have to make their own way, and where the pursuit of the *dot*, though not unknown, is difficult and uncertain, a judicial system on the French model would be very unsuitable.

The branches of the legal profession.—Avoués.

The branches of the legal profession in France are not the same as those in England or America.

The various operations which in England are divided between the solicitor and the barrister, and in Scotland between the law-agent and the advocate, are in France divided among three classes of professional men: viz. the *avoué*, the *avocat*, and the *notaire*. In America the duties of all three are commonly discharged by one person. In the Province of Quebec the same person performs the work done in France by the *avoué* and the *avocat* together. But the business of the notary is in that Province still kept distinct. In Germany and in Italy the division is like that in Quebec: the lawyers are both barristers and solicitors, and the notaries form a separate profession. But in Germany the notaries are less important than they are in France. Speaking broadly, the French *avoué* is a solicitor, but a solicitor who does no conveyancing. He is a court solicitor. His proper and almost exclusive business is to prepare the client's case till it is ready to be pleaded. He advises the client who consults him, and if litigation is decided upon he directs the service of the necessary writs, prepares all the pleadings, makes motions incidental to the preliminary procedure in the action, and in short does everything that has to be done until the case is in complete shape for trial. As the current phrase goes, *il fait la cuisine*, he cooks the case. The *avoué* is never allowed to plead the case on the merits. That would be to trespass upon the ground of the *avocat*. But to this general rule there is an exception. In some of the smaller towns in which there are courts, it may happen that there are no *avocats*, or not enough for the business to be done. In that case the Court of Appeal directs that in this

particular place the *avoués* shall be allowed to plead. A list is published annually by each Court of Appeal of the courts within its *ressort* in which *avoués* may plead. It is not competent to allow it in the town of the Court of Appeal itself. In criminal matters, however, the *avoués* of the place where the *Cour d'Assises* is held, or where the *tribunal correctionnel* sits, can plead concurrently with the *avocats*. In addition, the *avoué* takes charge of sales under authority of the court; e. g. sales of property of minors, or belonging to a vacant succession. A certain number of *avoués* are attached to every court of First Instance and to every court of Appeal in France. The number was originally fixed according to the population and amount of business. It cannot be increased except by the government. No *avoué* can practise except within the jurisdiction of the court to which he is attached[1]. As the limited number of *avoués* who belong to any place have a monopoly of the business there, no one can begin to practise as an *avoué* except in place of an *avoué* who has died or has retired. A regular system exists by which the retiring *avoué*, or the heirs of a deceased *avoué*, sell the practice to a successor. The successor must of course possess the necessary professional qualifications and be approved of by the government. The agreement must be fully disclosed, and the government may insist on the price being reduced[2]. It has been decided in many cases that when secret agreements have been made under which the successor was to pay a higher price, or submit to more onerous conditions than appeared in the documents submitted for approval, such secret agreements are null, and money paid in respect of them can be recovered. The maxim *in pari causa turpitudinis potior est causa possidentis* does not prevent repetition. It is not sound as a maxim of French law[3]. An *avoué* who by his skill and probity has acquired a large business, is able to sell his practice for a large sum. In Paris as much as a million francs has been given for an *étude d'avoué*. In the provinces the price varies from almost nothing to a hundred thousand francs. According to the rules at present in force, a fair price is considered to be a sum which at 15 per cent. would yield the income produced by the practice[4]. The *avoués* in each court elect a chamber of discipline which looks after the interests of the body, gives certificates to candidates who are applying for a vacant *étude*—i. e. practice—tries to settle professional disputes among the *avoués*, and exercises

[1] See Req. 21 juin 1886; D. P. 88, 1. 54.

[2] See Caen, Nov. 26, 1895; D. P. 96, 2. 437, Req. 18 mars 1895; D. P. 95. 1. 346; Req. 6 févr. 1894; D. P. 94, 1. 285.

[3] See Orléans, 21 juill. 1893; D. P. 94, 2. 342; Nancy, 27 janv. 1894; D. P. 95, 2. 93, Req. 18 mars 1895; D. P. 95, 1. 346. Garsonnet, t. 1, § 238.

[4] Agen, 15 janv. 1889; D. P. 90, 2. 45.

discipline over the body; and if necessary may recommend that an *avoué* be suspended from exercising his profession. In the last resort a fraudulent or disreputable *avoué* may be deprived of his office by the *garde des sceaux*. This *destitution* has to be carried through according to a special procedure. The value of the *étude* is fixed by inquiry conducted by the *procureur général*, and the person nominated by the government as the successor of the *avoué* who has been deprived of his office must pay the amount so fixed to the creditors of his predecessor. The government has the right to increase the number of *avoués* if the existing number appears insufficient, owing to the increase of the population. And in the converse case of the number being too great, it may reduce the number. Reduction, if made at all, is always made by refusing to fill up vacancies. Arrangements for indemnity form part of the scheme. The *avoués* newly created pay for their offices, and the price is divided among the *avoués* whose practice will be diminished by the greater competition. Similarly when offices are suppressed, the *avoués* who profit by the suppression pay an indemnity to the heirs of the *avoué* whose place is not filled up [1].

After the territory in Alsace and Lorraine was ceded to Germany, the French government voted a considerable sum to indemnify the *avoués* of the arrondissement of Belfort, whose district had been diminished [2].

In civil actions private litigants are obliged by law to employ an *avoué*. The parties are not allowed to appear for themselves. Domat says that this rule, which is a very old one in France, is to prevent the judges from being the witnesses of the passions of the litigants. An *avoué* is bound to take up any case in which his aid is demanded. He is allowed to excuse himself only in two cases, (1) if the claim is obviously one reproved by the law, and (2) if he is already engaged by the other party. In the court of the *juge de paix* or in the commercial courts it is not compulsory to employ an *avoué*. The parties may speak for themselves, or they may employ any mandatary to speak for them. As a matter of fact, in the commercial courts of any importance a separate class of agents has grown up who discharge the functions both of *avoué* and advocate. They are called *agréés*. The employment of an *agréé* is optional, and he is not an officer of the courts as an *avoué* is. His fees are not subject to a tariff, and the losing party does not pay the fees of his adversary's *agréé* [3]. In the court of the *juge de paix* the parties often appear for themselves. The judge asks them questions, and forms his opinion. There are, however, men calling themselves

[1] See Cons. d'État, 22 mai 1896; D. P. 97, 3. 47.
[2] Garsonnet, t. 1, § 239. [3] Ibid., t. 1, § 284.

hommes d'affaires who make a business of frequenting the court of the *juge de paix* and offering their services to litigants. Some of these men are not very scrupulous, and are inclined to fleece the simple and inexperienced.

In the *Cour de Cassation* there are no *avoués*. The advocates attached to that court discharge the duties of the *avoué* as well as those proper to the advocate.

The Notaries.

The notaries are organized in much the same way as the *avoués*. As with them, the number is limited, the range of action is territorial, and there is the right of presenting a successor; i. e. in effect of selling the practice. The number is fixed at not less than two and not more than five for each canton. There are in France three classes of notaries, viz.

(1) Notaries of the Court of Appeal, who can practise anywhere within the jurisdiction of the court to which they are appointed.

(2) Notaries of the Courts of First Instance who are confined to the arrondissement.

(3) Notaries of the *justice de paix*, who are confined to the canton.

A notary is a public official whose primary duty is to prepare and preserve deeds of which he is the legal custodian. These deeds properly executed are conclusive evidence between the parties to them. They are called *actes authentiques*, and evidence cannot be adduced to contradict them. But it is possible to have such a deed annulled by special process of law. Certain classes of deeds are required to be executed before a notary: such are deeds of gift, marriage contracts, inventories, mortgages, and deeds creating a *société anonyme*.

But besides the matters for which the intervention of the notary is obligatory, there are many others in which he is usually employed.

A Frenchman may make a holograph will[1]. But many wills are made in authentic form. Similarly, deeds of sale, leases, and many other documents are generally made by a notary. The notary is a confidential adviser, familiar with the history and the difficulties of his clients. He corresponds more than either the *avoué* or the *avocat* to the English family solicitor. He is consulted by his clients upon questions relating to their private affairs; he advises them as to the advantages of suggested marriages for themselves or their children; as to their wills; as to the purchase and sale of real property; as to investments; and in fact acts generally as a confidential business adviser. It was formerly very common for

[1] C. N. 969.

people to leave their money with their notary upon his undertaking to pay them a certain rate of interest: the client in many cases had no knowledge of the manner in which his capital was invested. It is not surprising that so great temptation led some notaries into dishonest courses. An attempt has been made to remedy this evil. By a law of 1890 a notary is prohibited from taking charge of a client's money, except to invest it in some way specified by the client, and in other ways the notary is placed under severe restrictions [1].

The Advocates.

The advocates in France perform the same duties as those discharged by the barristers in England or the advocates in Scotland. But there is one striking difference. The English bar is essentially a London bar. Until recent years there were no resident barristers in practice even in the largest provincial towns. There is now a local bar in a few towns, but the number of their members is quite inconsiderable compared with the London bar. And the local bars, e. g. in Liverpool or Manchester, are composed of men who have received their professional training in London, and in many cases desire to return there when they have built up a practice. In Scotland it is unknown for an advocate to reside and practise anywhere but in Edinburgh.

In France there are really a great number of bars. Every Court of Appeal has a considerable bar, and advocates in smaller number reside and practise in all the larger towns where there is a Court of First Instance. The bar of Paris, though by far the largest and most important, is still only one among many. The bars, e. g. of Bordeaux, of Lyons, and of Marseilles, are to all intents and purposes separate institutions from the bar of Paris. The members of a provincial bar in many cases receive their whole training in the province, and it rarely happens that one of them goes to establish himself in Paris. Mr. Bodley says 'the Bar is the one example of a decentralized institution in France [2].' In England the converse is almost true. The Bar is almost the only institution which is centralized.

This difference has an important effect upon politics. In England a barrister who enters the House of Commons is able to continue his practice, and in fact often expects to gain in professional position by his political life. The practising lawyers, however, who have seats in the English House are never very numerous. In France, on the other hand, a great many lawyers become Deputies. In the Chambers of 1893 and 1898 out of about six

[1] See Planiol, Traité élémentaire, vol. ii. s. 145.

[2] France, p. 388.

hundred Deputies there were one hundred and fifty lawyers, of whom one hundred were advocates. Nearly all these were from the provinces. The *avoués* and the notaries who come to Paris from the provinces are of course absolutely precluded from practice during the session from the territorial nature of their office. The advocates might conceivably get work at the Paris bar. But this is extremely rare. Mr. Waldeck-Rousseau was a member of the bar of Rennes when he was elected Deputy for that city at thirty-three years of age [1]. He afterwards became a leader of the Parisian bar. But ninety-nine out of a hundred lawyers who enter the French Chamber have to abandon their practices. As they are seldom men of much fortune, they have to look to politics for a livelihood. The professional politicians who in recent years have become the curse of France are largely recruited from the lawyers.

The advocates are not officials like the *avoués* and the notaries. They are not appointed by the government; there is not a limit placed upon their number; and they have not the right of nominating a successor, or, in other words, of selling their practice. Every bar has its council, elected according to statutory rules. But where there are fewer than six advocates the court acts as council of the bar.

An advocate is not like an *avoué* limited by the boundaries of a particular district. He can practise in any court in France, including the commercial courts and the *Conseils de prud'hommes*. He is, however, excluded from pleading before the *Cour de Cassation* or the *Conseil d'État*. He is not obliged to take a case which is offered him; and indeed it is his duty to refuse to plead in a civil case, of the justice of which he is not convinced. His fees are arranged between himself and his client, and are not subject to taxation. But he is strictly forbidden to stipulate that his fee shall be a proportion of the benefit gained by his client if successful. The *pactum de quota litis* has always been regarded as illegal. (Req. 22 août, 1853; D. P. 54, 1. 345; Garsonnet, t. 1, § 256). He has by law an action to recover his fees. But the etiquette of the profession, which is strictly followed, especially in Paris, does not allow him to sue for them, or even to exert any pressure by retaining documents, &c. which belong to his client. Nor may he stipulate for payment of his fees in advance [2].

To become an advocate it is necessary to be a licentiate in law of a University Faculty. And the more able and ambitious men are not content with this, but take the doctor's degree, which is by no means easy to obtain. The candidate then applies to the council of

[1] Bodley, p. 388.

[2] Garsonnet, t. 1, § 271.

the bar of one of the *Cours d'Appel* to be admitted to make his *stage*. This lasts for three years. During that time the candidate generally works in the chambers of a practising advocate, or in the office of an *avoué*, and performs such exercises as may be prescribed for *stagiaires* by the council. He then applies to the council of the bar at which he desires to practise for admission as a full-fledged advocate. This is called the *inscription au tableau*. It cannot be demanded as of right, even by a candidate who has fulfilled all the conditions prescribed. The council of each bar claims the right to exclude a candidate whom it does not regard as suitable. '*L'ordre est maître de son tableau.*' And the council may exclude classes of persons not disqualified by the general law. E. g. the bar of Paris used to refuse to admit a candidate who had formerly practised as an *agréé* before a commercial court, or one who had been a *huissier*. Nor will it admit a man who has not a house of his own, unless he is living with his parents or some very near relation. That bar also insists on the future advocate having spent some time in the office of an *avoué* to study procedure.

The question if a candidate whose claim to admission has been rejected can appeal to the court, has been keenly disputed. The decisions have been very inconsistent, but the latest cases are in favour of the right of appeal [1].

The council of each bar exercises wide powers of discipline over the advocates within its jurisdiction. It may warn an offender, may suspend him from practice for a limited time, and, in the last resort, may remove him from the list. He must have an opportunity of defending himself, and in the case of suspension or striking off the roll (*radiation*), there is a right of appeal to the court.

Any kind of canvassing for business by an advocate is promptly and severely dealt with. An advocate is not allowed to use letter-heads giving his name and profession. He may not put his name on a plate on his front door. An advocate was brought before the council of his bar merely for putting his name, with no indication of his profession, on a plate above a letter-box outside the house in which he lived. On appeal to the court, it was held that in the special circumstances he might be excused. The house was divided into flats, and there was no *concierge*. The advocate merely wanted to make sure that his letters should reach him (Aix, 17 mai 1894; D. P. 94, 2. 469).

The advocates before the Court of Cassation and the *Conseil d'État* stand in a different position from other advocates. These two courts have one bar between them. They are officials appointed

[1] Dijon, 31 janv. 1894; D. P. 95, 2. 27. Rennes, 29 janv. 1895; D. P. 95, 2. 268. See other cases cited by Garsonnet, t. 1, § 269.

by government, and combine the duties of *avocat* and *avoué*. Their number is limited to sixty, and they may nominate their successors. An ordinary advocate cannot appear before the *Cour de Cassation* or the *Conseil d'État*. An *avocat à la Cour de Cassation* has the right to appear in other courts, but can only do so by receiving special authority from the council of his bar, and practically it seldom happens that an *avocat* who is attached to these two exceptional tribunals pleads before any other court.

'Devilling,' or the employment by an advocate of young advocates to help him in preparing his work, is common in France. They generally receive no remuneration. The 'devil' is called a *satellite*. Sometimes a leading counsel will have a devil who is himself an advocate of some years' experience, and is capable of acting on an emergency as the substitute of his chief. Such a man is called a *grand satellite*. A small number of advocates in Paris, as in all great cities, are able to make large incomes. But they hardly compare with those reached by a few leaders of the Bar in England or America. It has been estimated that in Paris about ten pleaders make more than £4,000, and about fifty make between £2,000 and £800 a year[1].

F. P. Walton,
McGill University, Montreal.

[1] Le Roux, Nos Fils, p. 143.

FEE-FARM RENTS PURCHASED FROM THE CROWN.

NUMEROUS properties all over the country are held subject to fee-farm rents payable formerly to the Crown, now to private owners. In numberless cases extortionate demands are made, and very frequently the excess is paid without demur. Long immunity has apparently rendered the collectors careless of the penalties to which they are liable. The object of this article is to make plain to the purchaser of any land subject to such a rent the path by which he may avoid the payment of exorbitant claims.

When a demand is made for a fee-farm rent formerly owned by the Crown the following practical points should be attended to:—

(1) Get from the person demanding the rent the date of, and name of purchaser in the enrolled conveyance by which the rent was first conveyed to a private owner, and with this reference search at the Record Office in Chancery Lane and see that the particular rent is mentioned in the conveyance.

(2) Pay no acquittance, alienation fee, or other fee or fine to which no title can be shown by the enrolled deed or by Act of Parliament.

(3) Deduct land tax at 4*s.* in the £1 on all rents of 10*s.* or upwards, notwithstanding the reduction of land tax to a maximum of 1*s.* in the £1 by the Finance Act, 1896, and whether the property be actually charged with land tax or not.

(4) Deduct income tax. (See below as to the amount of income tax to be deducted on rents of 10*s.* or upwards.)

The value of attention to the above points can best be shown by instances from actual practice:—

WHITEACRE RENT.

(Land free of land tax.)

Amount Claimed.	£	*s.*	*d.*
Fee-farm rent	5	0	0
Acquittance	0	1	3
Alienation fee	0	13	4
	5	14	7

	£	*s.*	*d.*			
Less land tax	0	5	0			
Less income tax	0	5	1	0	10	1
				£5	4	6

Amount ultimately accepted by Rent Owner.

	£	s.	d.
Fee-farm rent	5	0	0
Less statutory deduction for land tax (£ 1 0 0)			
Less income tax (0 5 10)	1	5	10
	£3	14	2

BLACKACRE RENT.

(Actual land tax 1*s.* in the £1.)

Amount claimed.

	£	s.	d.
Fee-farm rent	2	0	0
Acquittance	0	1	2
	2	1	2
Less land tax (0 2 0)			
Less income tax (0 2 0)	0	4	0
	£1	17	2

Amount accepted by Rent Owner.

	£	s.	d.
Fee-farm rent	2	0	0
Less statutory deduction for land tax (0 8 0)			
Less income tax (0 2 3)	0	10	3
	£1	9	9

(1) *Title of Rent Owner.* By virtue of 22 Car. II. c. 6, 'An Act for advancing the sale of fee-farm rents and other[1] rents,' and 22 & 23 Car. II. c. 24, 'An Act for vesting certain fee-farm rents and other small rents in trustees,' a conveyance of a Crown fee-farm rent by Francis Lord Hawley, Sir Charles Harbord, Sir William Haward, Sir John Talbot, Sir Robert Steward and William Harbord enrolled in any of the four courts at Westminster within six months after

[1] 'Fee-farm rents, rents service, rents seck, or dry rents, chauntry rents, rents reserved, guild rents, pensions, vicontiel rents, assart rents, rents for purprestures arented, rents certain, or divers other rents' (s. 2).

Amongst the rents 'except and always reserved and foreprized out of such letters patents' are 'all rents or sums of money due and payable to his Majesty his heirs and successors for or in respect of any fire hearths or stoves.' The rents were sold 'the better to enable his Majesty to pay such debts owing at interest whereof his Majesty shall find reason to hasten the discharge.'

the date thereof vests the rent in the purchaser and enables him to sue for and recover the rent as His Majesty might have done. The rents sold by the Crown under the earlier Act were conveyed to the Hawley trustees by letters patent; and in the case of such rents the letters patent make an additional document for examination. The later Act, after reciting that if the remaining 'small rents should be conveyed by letters patents to trustees for sale thereof, the said letters patents would be of extraordinary length and require a multitude of recitals of many small sums which beside the charge in writing would also be an occasion of great hindrance and delay to his Majesty's service,' vests the remaining rents in the Hawley trustees without grant by letters patent, and enacts that the showing of printed copies of the two Acts and of the enrolled conveyance is sufficient evidence of purchaser's title in any court. There is nothing to render enrolment necessary in the case of subsequent conveyances. The Patent Rolls and Close Rolls of Charles II are now at the Record Office, Chancery Lane.

The conveyances by the Hawley trustees generally give no description of the land except the parish in which it is situate. Whether a particular parcel of land be the land really charged is, consequently, a question that always lies open to dispute. But in the absence of evidence of distinct fraud (as if, for example, only one rent in a given parish has been sold by the Crown and it should be found that two distinct rents of the same amount are charged by the purchaser from the Crown upon different parcels of land in the parish), while the rent owner may be put to considerable trouble in getting up his evidence he is almost certain to win upon such an issue. And in many cases the collector's records will show payment of the rent by known predecessors in title for a century or two, which may be taken as sufficiently satisfactory evidence.

By 10 Anne c. 18 the description of any fee-farm or other rent in the conveyance made by the Hawley trustees is to be a sufficient description of the rent in any deed or pleading.

By 26 Geo. III. c. 87, repealing with regard to unsold rents the two above-mentioned Acts of Charles II, Commissioners of Woods, Forests, and Land Revenues with power to act for three years were appointed in place of trustees under the Acts of Charles II to sell the fee-farm and other rents of the Crown. This Act of George III was repealed by the Statute Law Revision Act of 1871.

(2) *Acquittance, &c.* A separate amount for acquittance (i.e. receipt) is frequently demanded with a fee-farm rent. The only basis for this demand usually turns out to be a general clause at the end of the enrolled deed including 'all perquisites for the receiving,

acquitting, and discharging the same.' Under such a clause the collector can only claim the rights of a Crown receiver under 33 Hen. VIII. c. 39, which rights, under the modern method of demanding fee-farm rents by post, appear to be valueless.

By 33 Hen. VIII. c. 39 if the payer of any yearly rent due to the Crown produces one acquittance for the rent or rents due from him, the receiver shall take no fee for signing acquittance, upon penalty of 40*s*. If the payer does not bring acquittance with him, the receiver shall not take above 4*d*. for an acquittance prepared by the receiver for all sums paid at one time—penalty 20*s*. (s. 65). The auditor shall twenty days before audit proclaim in four several markets or other places when and where he will keep his several audits in the same shire, under penalty of £5 (s. 69).

Presumably therefore when the collector demands the rent by post he is entitled to no fee for acquittance. In no case, even should he proclaim and hold an audit in the county, is he entitled to more than 4*d*.; and of even this sum he is deprived if the rent payer draws up a receipt.

Demand is sometimes made for an alienation fee or other fees or fines for which not the slightest vestige of legal support is produced. These should not be paid.

(3) *Land Tax.* By the Land Tax Act, 1797 (38 Geo. III. c. 5), ss. 30, 31, the receiver of a fee-farm rent of 10*s*. or upwards due to the Crown, or to a purchaser from the Crown under the two Acts of Charles II, and not before March 25, 1693, payable to any College, Hospital, or other person exempted by ss. 25–29, must allow 4*s*. in the £1 to the rent payer—penalties £20 and £100. See also s. 5.

By the Land Tax Redemption Act, 1802 (42 Geo. III. c. 116), s. 127, where a person has redeemed the land tax on lands subject to a fee-farm rent or other annual rent for which he would have been entitled to abate a proportion of the rate under the Act of 1797 he may continue to abate it. And see *Moody* v. *Wells* (*Dean & Chapter*), 1 H. & N. 40, 25 L. J. Ex. 273.

By the Finance Act, 1896 (59 & 60 Vict. c. 28), s. 31, land tax in excess of 1*s*. in the £1 is remitted, and ss. 180 and 181 of the Land Tax Redemption Act, 1802, are to be construed as if the rate of 1*s*. in the £1 on the annual value of the land were substituted for the rate of 4*s*. therein mentioned, but no mention is made of ss. 30, 31 of th Act of 1797 or s. 127 of the Act of 1802 above quoted.

Consequently these sections remain unaffected, and the full 4*s*. in the £1 may still be deducted in the case of rents of 10*s*. and upwards. This view is adopted by the Board of Inland Revenue.

The writer is informed that counsel's opinion has been taken on the point several times, and that the concurrence of opinion is to the same effect. Since 1896 collectors have frequently claimed that rent payers are only entitled to deduct the amount actually paid for land tax; the sum payable for a fee-farm rent of 10*s.* or upwards being thus increased by 3*s.* or more in the £1. The usual method of some collectors is to press for the larger amount and get it where they can, but to drop the claim when it is resisted. No rent owner has yet been willing to let the point be taken into court.

(4) *Income or Property Tax.* The statutory deduction of 4*s.* in the £1 for land tax on rents of 10*s.* and upwards, whatever be the amount of land tax actually paid or even though the property be free of land tax, has an important bearing upon and somewhat complicates the calculation of the amount on which the deduction of income tax is to be reckoned.

By the Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 60, Sched. A, No. IV, Tenth Rule, the landowner is entitled to deduct income tax out of a fee-farm rent, 'the just proportion of the sums allowed by the Commissioners in the cases authorized by this Act being first deducted.'

The amount of land tax which the Commissioners are authorized to allow is the amount *charged* under the Land Tax Act, 1797 (Income Tax Act, 1842, s. 60, Sched. A, No. V, Fifth Rule). The Income Tax Acts contain no provision taking into account the statutory deduction of 4*s.* for land tax on fee-farm rents of 10*s.* and upwards. Consequently from rents of 10*s.* and upwards the landowner deducts 4*s.* in the £1 land tax from his payment as pointed out above, but in calculating the amount on which income tax is reckoned he deducts only the amount of land tax actually charged in the parish. Leaving out of consideration everything but income tax and land tax, take for example a fee-farm rent of £5 in a parish where land tax is 1*s.* in the £1. The landowner deducts land tax at 4*s.* in the £1, making his payment £5, less £1, i.e. £4. The amount to be further deducted for income tax he calculates however, not on the £4, but on £4 15*s.* (£5 amount of the rent, less 5*s.*, the amount of land tax actually charged).

And where the property is free of land tax, the rent payer still retains from his payment the statutory 4*s.* in the £1 land tax and takes no account at all of land tax in calculating the amount on which the deduction of income tax is reckoned, e. g. on a £5 fee-farm rent issuing out of property free of land tax he pays £4, less income tax on £5. This point was submitted to the Board of Inland Revenue, whose attention was drawn to the statutory provisions above set out. The secretary replied, 'The matter is not one

which immediately concerns the Revenue, and the Board have no power to express an opinion which would in any way be binding on the parties interested. The Board have, however, no objection to stating that in their opinion income tax is legally deductible in the circumstances mentioned from the full amount of the fee-farm rent.'

Redemption. See Conveyancing Act, 1881, s. 45, Settled Land Act, 1882, s. 48 (1), and Board of Agriculture Act, 1889, s. 2 (1) (b).

T. BENNETT.

A JUDGE'S LIFE IN INDIA.

'THE judicial service, Sir, is a degraded service: old So-and-So said so, and he is the Judicial Commissioner of Oudh:' so spake a friend of mine. 'Isn't it a confession of failure, old man?' inquired another; to whom I could only reply that I was going to try the service for six months, and had received a promise in black and white from the local Government that when the time for permanent promotion came my own wishes should be consulted. After all, it is not strange that the executive branch of the Civil Service should look down upon the judicial. There are divers cogent reasons which appear to them to account for the vast superiority of their own over the less favoured branch. A man on the executive side may aspire to the Viceroy's Council or to the Lieutenant-Governorship of a province or to a Chief Commissionership, all of these being appointments superior in pay and in public estimation to any appointment on the judicial side. Even if he be not translated to Simla, but remain all his days in his own province, the Chief Secretary to the local Government almost invariably becomes a C.S.I., and his junior secretaries are generally dubbed C.I.E., whereas no such distinction awaits a judge of the High Court of Judicature. But the chief reason why the executive side looks down on the judicial is because it knows nothing of it. At the time when every civilian is called upon to make his choice between the two services, he has had ample experience of executive work and none at all of the higher judicial work. He knows the delights of cold weather camping, of riding from one end of his district to the other, of doing his work in the cool tents under the mango trees, of shooting big game or small in the morning and evening, and of marching from one picturesque scene to another. These are the joys which endear India to the average Englishman. He knows that the District Judge has none of these delights, that he gets but a single week of camping in the whole cold weather, and often not that; and hence he puts his name down for the executive side, as nineteen out of twenty of his fellows do likewise. He has probably had one or two village quarrels to settle, and has acquired a certain good esteem of his own *savoir faire*. He knows that if a quarrel can be settled out of hand, it prevents much trouble and possible litigation in the future: and hence he gets the notion

that the best way of settling all disputes is by personal intervention at the scene of the quarrel. This he regards as being the quintessence of executive work. And there is much to be said for the system of personal rule. It is the oldest system in the land. Akbar himself laid down that it was the immediate duty of a monarch to hear complaints and to administer justice; and the Mughal Emperors delighted in camping round their domains. But Akbar saw that everything could not be settled by personal discretion, and that a rule of law was desirable. He accordingly published his regulations for the prosperity of his kingdom, with the remark that 'those who are versed in ancient history wonder how kings of former times governed without such a wise rule of conduct.' With the advent of the English rule the further extension of the 'rule of law' was inevitable. There is still ample room for the personal element, in the making of appointments, in the spending of public money, and in other ways; but in the settlement of disputes the rule of law reigns supreme: and the rule of law connotes a judicial system. The Kazis under Akbar were directed to examine each witness separately and to record his evidence. This separate examination of witnesses and the record of evidence is the essence of the judicial system. When the Assistant Collector rides out to a village and makes a local inquiry, if he records the evidence of each witness he is acting as a judicial officer; but if he simply sits in the middle of a crowd, listens to what everybody says, records nothing but frames his own opinion, he is not acting as a judicial officer. The great difficulty in such cases is to know whether you have, as a matter of fact, really heard the people who know best as to the matter in dispute. Every one has his opinion, and the loudest-mouthed is not always the best informed. It is extremely hard in such an inquiry to test the means of information which each witness possesses. The judicial method is to ascertain in the first place who are likely to be best acquainted with the facts, to summon to headquarters every one supposed to possess any original information, and to subject every witness to examination and to cross-examination, recording his evidence. Delays may occur in procuring the attendance of the witnesses; there are many hours of dreary work to be done in examining the witnesses and in framing the record, but the result ensures the nearest possible approximation to truth. 'It is very difficult,' says Akbar, 'to come at the truth without painful search and minute inquiry. Considering the depravity of human nature, the officer ought not to place much reliance on depositions and solemn asseverations. Divesting himself of partiality and avarice, let him distinguish the oppressed from the oppressor; and when he has discovered the

truth, let him act accordingly.' The art of cross-examination, the greatest safeguard of truth, was probably unknown in Akbar's time; and nowhere is it possible that witnesses shall be so efficiently cross-examined as at the headquarters of a district where all the legal talent of the district is assembled. The judicial system is now enforced in all criminal cases, in all civil suits, and in the great majority of revenue cases. Settlement, which is generally held to be the highest form of revenue work proper, involves the judicial determination of cases of great intricacy. The multifarious disputes between landlord and tenant are determined judicially, although by courts of revenue. Questions of title are specially reserved for the civil courts. So far therefore as litigation is concerned, of whatever quality it may be, and by whatsoever officers it is done, the system pursued is the ordinary judicial system.

The executive head of an Indian district is the Collector or Deputy Commissioner; the judicial head of the district is the District Judge. The Collector or Deputy Commissioner is also the District Magistrate; but he is by law empowered to transfer from his own file any magisterial case to any first class magistrate subordinate to himself, so that the amount of original magisterial work which the District Magistrate performs is thus reduced to a minimum. The Collector also does very little original revenue case work. A man on the executive side therefore, as he rises in the service to the head of a district, gradually gets less and less purely judicial work to perform: though he remains responsible for the inspection and superintendence of all his subordinate magisterial and revenue officers. With the District Judge the case is far otherwise. As District Judge indeed he does very little original civil work, his civil work being mainly appellate; but as Sessions Judge he tries all the criminal cases which are committed to the Court of Session for trial. In probate, succession, and registration cases too he has a constant supply of original work; and this means that the District Judge is kept hard at his desk through the working hours of every day, either himself recording evidence, or listening to the arguments of pleaders in appeal cases. From this arduous work the Collector and Magistrate is almost entirely free: he hears a minimum of criminal cases and does a minimum of appellate work. To set against this freedom he has an overabundance of other work. He is at the head of the police of his district and is responsible for the public peace; and this, in the case of large fairs, when he has to assist and to work with the sanitary authorities, is no slight responsibility. He is at the head of the different departments, the excise, stamps, opium, ferries, drugs, and the like, for which the district forms the administrative

unit under Government; each of these is presided over by a separate provincial chief; and the Collector is the slave of them all. He presides in person over the district council and over one or more municipal councils: and he is held by the Government to be responsible for all the vagaries of all the councillors. The number of reports which he is required to write and submit, *de omnibus rebus et quibusdam aliis*, is legion. He is expected to know everything connected with his district and to do anything. A Collector's work is like a woman's work: it is never done. At any hour of the day or night he may be called upon to act. The District Judge, on the other hand, goes to his office at 10.30 in the morning, he retires for half an hour for lunch, he leaves at 4 in the afternoon: the rest of the day he can, as a rule, dispose of at his own sweet will. When he first becomes a judge he is surprised at the falling-off in the number of native visitors, whose calls have hitherto formed so serious an item in his day's work. It is an ancient tradition in India that the District Officer lives with all the doors of his house open, and scarcely a morning passes without some natives who are entitled to visit him, and occasionally others also, calling to have a talk with the Collector. Formerly the practice was extremely healthy, and it still enables the District Officer to extract valuable information as to native feeling and as to what is happening in his district. The drawback of these visits is that they are seldom disinterested: the visitor usually has some *motif* of his own which he seeks to stealthily instil into the mind of his auditor. The power of the District Judge in matters of taxation and the expenditure of money being nil, there is nothing to be got from a visit to him, and his visitors are chiefly the old-fashioned native gentlemen of the district, who keep up the habit as necessary to their own prestige. They have no axes of their own to grind, and their talk assumes a different hue. They talk to him of what is happening as one gentleman would talk to another, without any *arrière pensée*. The welcome diminution in the number of callers and the changed style of their conversation are among the first boons which strike the new judge. His limited range of responsibility is another. He is now responsible only for his own office and the others subordinate to it: they are all under his hand and he knows exactly what is going on in each. The diminution in his hours of work is also welcome: he can take his ride in the morning or his drive in the evening free from molestation. Very rarely he has to visit a site concerning which litigation is pending; once in the year he has to inspect the offices of his subordinate judge, his munsiffs, and his sub-registrars: practically he has nothing to do out of office hours. He serves only one master, the

High Court of Judicature; and the High Court treat him as a gentleman and dubs him their learned brother in their correspondence. He feels that his is essentially gentlemanly work: he has the entire district well within his grasp and can answer any question without having to call for office notes and memoranda. After a time also the nature of his work becomes dear to him: he learns to love its completeness and finality. When a magistrate hears a criminal case, he takes the evidence of the witnesses who are in attendance and then adjourns the hearing for further evidence; when the case for the prosecution is thus finished, the case for the defence is opened and the names of the witnesses are ascertained, and a further adjournment is granted for their attendance. A press of other work may occasion a further adjournment: cases in a magistrate's court often run on for six weeks before the judgment can be pronounced. In the court of the Sessions Judge all the witnesses on both sides are in attendance at the date fixed for hearing, and the entire case is heard from beginning to end without adjournment, the pleaders sum up on each side, and judgment is given. In appeals in the court of the District Judge, the evidence taken by the Court of First Instance is read, the pleaders are heard on the evidence, and judgment is pronounced. I doubt whether any man before he becomes a judge fully appreciates the value of cross-examination as a means for the detection of fraud and the elucidation of truth. When the credit of every witness has been thoroughly tested, then and not till then is the exact value of his evidence known. The pleaders in magistrates' courts are too frequently an ignorant and pettifogging race, fond of quibbles, and reckless of truth; those in the court of the District Judge are of superior calibre, many of them have taken degrees in law, and all of them have passed a most searching examination before being allowed to practise. They can afford to avoid risky cases or sullying their hands with dirt. They see at once the essential points, put their arguments and authorities succinctly before the judge, and waste no more time over a case than is absolutely necessary. In this way the judge has the satisfaction, when he decides an appeal or a Sessions case, of feeling that he has heard everything that can legitimately be said on both sides, of knowing that the whole has been fairly and squarely put before him, and that each party has done its best to prove its point. The Hindus have often been blamed for the love of litigation, but it is their sense of the reality of English justice which endears our rule to them. A native knows that nowadays it is useless to attempt to bribe a judicial officer, European or native, of any repute: the most sensible way in which he can lay out his money is to get the

best legal assistance available. The money which used to go in bribes now goes to enrich the lawyers: the result is a substantial increase of justice: and the ability to secure justice is dear to the native heart. This is the secret of the native's love for the Civil Court. He knows that there he will meet the most upright of his fellow-countrymen, and will have the best chance of obtaining his deserts. The *personnel* of the native judiciary is rising in character, and it has already risen enormously. There are one or two black sheep still among the older men, but they are well known and are gradually dropping out of the ranks. The younger race of munsiffs are men who, besides being graduates of law, would scorn to act dishonourably. The treat of having men of this class to work with is one of the delights of the new judge. He feels that their work is clean and free from all suspicion: that whether right or wrong in their view of the law their judgments are honest and honourable.

The more serious work of the District Judge lies in the intricacies of the law of real property and of inheritance: in India as in England this is the most interesting portion of the civil law. Hindu law is based ultimately upon Sanskrit texts: but these have been so overlaid by findings of the Indian High Courts and of the Judicial Committee of the Privy Council that a reference to the original texts is rarely requisite. The leading principles of the law are found in the ancient authorities, but their application to the varied circumstances of everyday life has been worked out in countless rulings. It is one of the charms of the District Judge's life to apply the old saws to modern instances, to feel that he is adapting the correct principle of law to the particular circumstances of the case then before him, to ensure that where the case is not already manifestly provided for in the books it shall be determined in strict development of ancient precedent. This intellectual pleasure, which endears his work to the District Judge, is almost wholly unknown to the merely executive officer. It is this growth of the rule of law in every department which is the striking feature of modern life in India. The ancient maxim was to send a good man to a place and to worry him as little as possible with instructions, to entrust the good government of the country to his own personal sense of duty: but nowadays it is impossible to act on the old line. Our codes, penal, civil, and criminal, have overlaid the land: and the officer who should set up his own personal notion against a provision of the code would soon be upset on appeal. The rule of law is in consonance with native ideas of justice and is understood and loved by Hindu and Muhammadan alike. There is still room for the exercise of the personal element in many phases

of executive life; but on all sides its limits are being gradually contracted. The welfare of the future is bound up with the growth and advancement of the judicial system. To be a worthy unit in that mighty system is the be-all and the end-all of the judge's life in India.

EUSTACE J. KITTS.
(Sometime Judge in the North-Western Province of India.)

THE COST OF A LAW SUIT.

'THERE is one thing more expensive than winning a law suit, and that is losing one.' This scathing indictment of the administration of justice is a maxim that most men of business treasure as pure gold. A law suit with its 'glorious uncertainty' is an eventuality to be avoided, if it can be avoided, even at the cost of giving up some practically certain right. The uncertainty of the decision is a matter that must always be reckoned with in cases where there is a genuine dispute. The law may be made more certain than it is at present, but the determination of facts will always give rise to controversies, and in a civilized country an action at law is the proper way to settle such disputes. But in undertaking a law suit there is one uncertainty that probably outweighs all others, and that is the uncertainty of the cost. 'Which of you, intending to build a tower, sitteth not down first, and counteth the cost?' A golden rule, but one nearly impossible to observe in law suits under the present conditions, for neither lawyer nor client can say with certainty what a particular action will cost, whether it be lost or whether it be won. To suggest some remedies for this state of affairs is the object of the present paper.

The method whereby most professional men are remunerated is according to a scale of charges that varies with the amount of money involved in the particular business; or, in other words, according to the *responsibility* incurred. Architects, surveyors, auctioneers, house agents, and stockbrokers are all paid upon this principle, and so are solicitors for the greater part of their conveyancing business. But as to litigation another method obtains. It does not matter whether the work is responsible or not, the payment is made according to a system of six and eightpences and three and fourpences; that is to say, the solicitor is bound to make out a long detailed bill, charging each attendance at *6s. 8d.*, each letter at *3s. 4d.*, and so on for other items. The uncertainty produced by this system we have already remarked upon, but that is only one of the objections to it. A few others are the following:—

1. No distinction is made between an important matter and an unimportant one. An attendance that may have been little more

than a matter of form is charged for at the same rate as one at which great responsibility was cast upon the solicitor, and at which he may have had to exercise considerable powers of diplomacy for the safeguarding of his client's interests. There is therefore no relation between the amount recovered or claimed in an action and the costs. In extreme cases the costs in a case in which £100 is recovered may exceed those in one in which £10,000 is recovered. There is no relation between the two.

2. Should the solicitor be inclined to pursue such a course of action, it would be to his pecuniary advantage to write as many letters, and to make as many separate attendances, as he could. If these are made in furtherance of the action, it is very difficult for a taxing master to say that they are unnecessary, and the result may well be that a man who pursues the honoured British method of 'muddling through' will be better paid than the man of ability who sees at once what the real point at issue is, and devotes his energies to winning his client's battle upon that essential issue. Such a possibility can be characterized as not merely undesirable but positively immoral. It is nothing more or less than putting a premium upon inefficiency.

3. Another fertile source of injustice to the litigant is the distinction between party and party and solicitor and client costs. Party and party costs are those that the successful party who obtains a judgment with costs can recover from the other side; solicitor and client costs those that he cannot so recover, although the matters to which they relate may have been actually necessary to enable him to win his case. For instance, all costs incurred in attempting to settle an action are in no case party and party costs. In a word, the solicitor and client costs are the penalty that a successful litigant has to pay for the establishment of his right. It should be remarked, however, that this distinction does not exist in the County Court, but only in the High Court. The County Court litigant is in the happy position of being able to recover all the costs that he has to pay from the unsuccessful party, while the person who, because his claim is for a larger sum than £50, has to bring his action in the High Court is without this advantage.

We suggest as a remedy for these anomalies that the principle well-nigh universal in other professional business should be extended to litigation, viz. that there should be a fixed sliding scale of costs in all actions in which a definite sum of money is claimed, the scale varying in proportion to the amount. To this it would only be necessary to add counsel's fees, court fees, travelling expenses, and other necessary out-of-pocket expenditure.

The establishment of such a rule is not so revolutionary a

proposal as it appears to be at first sight. With regard to the High Court it would no doubt tear up the existing system root and branch; but in the County Court a similar rule now exists for actions of £10 and under. So too in bankruptcy, there is a fixed sliding scale for debtors' petitions; and, except for the stolid conservatism that opposes all change, there appears to be no adequate reason why the principle should be confined to these two instances. It means that the solicitor should be remunerated according to the responsibility that he undertakes, and not according to the actual amount of work performed. The fat and the lean would have to be taken together, and the higher remuneration given in cases in which large amounts are involved would have to be accepted as a compensation for the small profit in small cases. The fixed scale in conveyancing matters has now been in operation since 1881, and, except in a few old-fashioned offices, is universally adopted. It may be, and frequently is the case, that a poor man's garden plot sold for £50 raises more important questions of law, and needs more careful consideration, than the title to an hotel sold for £10,000. Yet in spite of cases like this, the scale works smoothly, and there are few, we imagine, who would advocate its abolition and a return to the old system of detailed bills.

Of course the right of the solicitor to make a special bargain with his client should be reserved. Cases will occur in which the amount actually involved is small, but the principle at stake is of great importance, as in 'test cases' tried to establish a principle that may govern hundreds of others. In such like instances the solicitor may find that the proposed scale charge would be an utterly inadequate remuneration for the work and responsibility involved. We anticipate, however, that in cases of this kind he would have little difficulty in making a satisfactory arrangement with nine clients out of ten when the facts are fairly placed before them. To meet these cases too, the judge should retain his present power of ordering at the trial that the costs should be given upon a higher scale, and knowing exactly what the effect of his order will be, he will have little difficulty in making one to meet the justice of the case.

But just as there are certain transactions, such as leases of mines and minerals, that it has been found convenient to exclude from the operation of the conveyancing scale, so there will be certain actions, and certain matters in ordinary actions, which call for special treatment. An instance is, taking the evidence of witnesses too old or ill to attend the Court before a commission; another, the service of a writ outside the jurisdiction of the Court.

The greatest difficulty, however, is the treatment of actions in the Chancery Division. Many of these, such as suits for the administration of estates, dissolution of partnership, taking of accounts, partition on sale of property, winding up of companies, and so forth, do not involve questions of the payment of a definite sum of money at all, while 'friendly' actions are of frequent occurrence in that division of the Court.

Chancery proceedings are not, after a century of reform, such types of delay and extortion as they were when they obtained and deserved the terrible indictments of Sidney Smith and Dickens; but even now the delays and expenses are unnecessary and vexatious, and need radical reform. Until these reforms in procedure are carried out, it is perhaps hopeless to advocate reform in the matter of costs; but as far as administration and partition actions are concerned, we suggest that a fixed scale should be devised to vary in accordance with the value of the property involved. On the whole it would be better to proceed tentatively, and to make the scale apply in the first instance only to actions in which definite sums are claimed. If it were found to work satisfactorily in these cases it could afterwards be extended.

Another question that arises at once is the method in which actions that are settled before trial are to be dealt with. In practice the difficulty is not great, because the terms of settlement always provide who is to pay the costs, and it would be a very easy matter to state in adddition whether the whole or only a part of the scale costs should be payable, or if it were so agreed, that the costs should be payable upon a different scale to that applicable in the usual course to the particular action. If the terms of settlement contained the very usual provision that each side was to pay their own costs, solicitors would probably have little difficulty in agreeing with their clients that they should be paid a certain proportion of the scale fee, according to the stage of the proceedings at which the settlement was arrived at. In the absence of agreement a workable rule might be arrived at in this manner: that if the case were settled before a defence was delivered one-third of the scale fee should be allowed; if after delivery of defence but before giving notice of trial, one-half; after notice of trial given but before delivery of briefs to counsel, three-fourths; and after delivery of briefs the full fee. These proportions and times could easily be altered until a thoroughly satisfactory scale had been found.

The conspicuous advantage that the system here advocated would bring in its train in the practical abolition of taxation and the long item bills of solicitors—a nuisance alike to the solicitor

who has to make them out, and to the client who has to go through them—need not be enlarged upon. It would also, we think, benefit the legal profession in largely increasing the amount of litigious work. The courts of law are the proper places for the decision of disputes, and if litigants could only know exactly what an action would cost them at the worst, they could easily decide whether it was worth their while to fight it or not. Actions settled upon disadvantageous terms simply on account of the uncertainty of the costs, would be things of the past, and with them would disappear the brooding sense of wrong that such a settlement always leaves behind it.

H. J. RANDALL.

THE DOCTRINE OF *RES GESTAE* IN THE LAW OF EVIDENCE.

IT cannot be said that the Law of Evidence occupies a very conspicuous place in the interests or studies of the average lawyer. Lord Denman's characterization of the subject as 'that neglected product of time and accident' seems unfortunately quite as true to-day as it was over half a century ago; and probably the majority of juniors in conducting a case scarcely put their ambitions in this direction much higher than the hope of muddling successfully through somehow. It is all the more welcome, therefore, to find a writer in the April number of the LAW QUARTERLY REVIEW attacking one of the thorny problems of evidential law with much courage and at no inconsiderable length.

As, however, Mr. Sibley's article does not seem to me to supply an altogether adequate exposition of this difficult topic, I have ventured in the present paper to offer a few observations and criticisms towards a fuller elucidation of the doctrine. Interesting, indeed, as Mr. Sibley's contribution is, one cannot help a feeling of disappointment that, before entering the lists, he should not have delved a little deeper into the literature of his subject, have made himself acquainted, for example, with the valuable and exhaustive series of articles by the late Prof. Thayer in vols. xiv and xv of the American Law Review, with Dr. Wharton's views in his two treatises on Civil and Criminal Evidence respectively, with the acute criticisms in the 16th edition of Greenleaf by Prof. Wigmore, on whose shoulders the mantle of Prof. Thayer seems in some measure to have fallen, or even, last and least, with the 3rd edition of my own work on Evidence, in which over twenty pages are occupied with a detailed account of this subject and a digest of all the English cases. Had he done so he would have found that most of the difficulties he encountered, as well as several to which he does not advert, had already received a very full examination in those quarters.

The doctrine that declarations accompanying an act are receivable in evidence, or at least the phrase *res gestae* as connoting this, is of somewhat earlier origin than Mr. Sibley supposes.

The doctrine itself, indeed, antedated the phrase about a century, having first been recognized in the case of *Thompson* v. *Trevanion*,

Skinner, 402 (1693), where, in an action for assault on the plaintiff's wife, Holt C. J. allowed what the wife said, 'immediate upon the hurt received and before she had time to devise anything for her own advantage,' to be given in evidence. In *Aveson* v. *Kinnaird*, 6 East 188 (1805), Lord Ellenborough, referring to this case, added that Holt C. J. had allowed the evidence 'as part of the *res gestae*'; but there is nothing in Skinner to justify this, though possibly Lord Ellenborough was alluding merely to the doctrine itself and not to the phrase expressing it. In *Ambrose* v. *Clendon*, cases temp. Hardwicke, 267 (1736), the doctrine as distinct from the phrase is again mentioned. There a witness in proving an act of bankruptcy was relating what the bankrupt had said at different times about his bad circumstances and fears of being arrested, when Lord Hardwicke ruled that, 'It is not usual to allow such evidence unless where it is concomitant with facts, as what the bankrupt says when he is removing his books or his goods, &c.; but not else.'

Coming now to the terms *res gesta*, *res gestae* themselves, these are frequently found in the Roman Law, but no clue to their evidential meaning can be derived from this source, since their user there was quite untechnical. In English law the first mention which Mr. Sibley has found is that in *Aveson* v. *Kinnaird*, *supra* (1805). Prof. Thayer, however, cites several earlier instances. Thus, in Horne Tooke's trial, 25 How. St. Tr. 440 (1794), Garrow, for the prosecution, referring to a certain letter, observed, 'That letter your lordships have received ... probably upon the ground that as it is an answer to an act charged against the accused, it is fit to be received as part of the *res gesta*.' Again, in *Hoare* v. *Allen*, 3 Esp. 276 (1801), an action for seduction of the plaintiff's wife, a statement by the wife on leaving her husband having been tendered by Erskine not to prove her real intention but the plaintiff's belief as to her intention, Lord Kenyon received it, though with doubt, because on a motion for a new trial, 'some of the judges had thought that this was a part of the *res gesta* and ought to be admitted.' So, in *Robson* v. *Kemp*, 4 Esp. 233 (1802), Lord Ellenborough, in rejecting the declaration of a bankrupt made after the alleged act of bankruptcy, remarked, 'Where the declaration of the bankrupt is part of the *res gesta* it may be evidence.' The earliest legal treatise in which the phrase occurs appears to be 2 Evans's Pothier (1806), p. 217, where the editor states that, 'in cases of fraud or *bona fides*, an adequate judgment can, in general, only be formed by having a perfect view of the whole transaction which, of course, includes the conversation which forms a part of it; and according to the phrase usually applied to this subject, the language which is used on any occasion forms part of the *res gesta*.' So, a few years later, in the 1st ed. of Phillipps on

Evidence (1814), vol. i. p. 202, it is said: 'Hearsay is often admitted in evidence as part of the *res gesta*, the meaning of which seems to be that where it is necessary to inquire into the nature of a particular act and the intention of the person who did the act, proof of what the person said at the time of doing it is admissible evidence for the purpose of showing its true character.'

In all these citations, it is to be observed, the singular form, *res gesta*, alone is used. And there is no doubt that a great deal of what has not inaptly been termed 'the convenient obscurity' of the phrase might have been avoided had this early and singular form been adhered to. It is the notion conveyed thereby, viz., that of a whole (some single act or transaction) in relation to its constituent or quasi-constituent parts, which, as Prof. Thayer points out, seems to be the true evidential conception. 'The principle of admission is that the declarations are *pars rei gestae*' (*Rouch* v. *G. W. Ry. Co.* 1 Q. B. 51, 60, per Lord Denman C. J.).

The plural form first occurs in *Aveson* v. *Kinnaird*, *supra* (1805), where Lord Ellenborough uses it in the same sense as in the earlier examples. Later on, however, this form becomes more common, and as a result uncertainty and confusion creep in,—how great may be seen from the seven different significations of the phrase which Prof. Thayer has been able to cull from the various text-books and decisions. Without enumerating the whole of these meanings, the four most commonly found may be mentioned here. (1) A conception which applies the term *res gestae* to the main fact in relation to its constituent or accompanying incidents, as in Lord Ellenborough's statement in *Aveson* v. *Kinnaird*, *supra*; (2) one which applies it to the details which go to constitute or accompany the main fact and not to the latter itself (this is a very common usage); (3) one that applies it to the 'surrounding circumstances' of some central fact called, in contradistinction, the 'principal fact' (this use is first found in Starkie, 1st ed., vol. i. p. 39); (4) one which applies it to the total whole comprising both the central fact and the entire bulk of surrounding circumstances.

Since, however, these diverse applications are never consciously discriminated, it is not surprising to find that two or more are often confounded in the same definition. Thus, Starkie, after stating (p. 39) that 'all the surrounding facts of a transaction, or as they are usually termed the *res gestae*,' adds (p. 49), 'where declarations . . . are admitted . . . as part of the *res gestae*, or transaction.' Here conceptions (3) and (1) are obviously confused. So, in the pamphlet of Cockburn C. J. on the *Bedingfield* case (p. 20), 'while these particulars . . . *constitute* the *res gestae*, in other words will be constituent parts of the *offence charged* . . . (others)

form properly no part of the *res gestae*, in other words of the things constituting, or in point of time co-existent or co-extensive with, the offence.' Here, as Prof. Thayer remarks, no less than three different conceptions occur in the same sentence, viz., that of the *res gestae* as meaning a total, made of constituent parts; as meaning the constituent parts that make up a total; and as including things that do not constitute a total, but are co-existent and co-extensive with a total constituted by something else. So again, Mr. Taylor, partly adopting the language of Greenleaf, remarks (s. 588): 'The principal points of attention are whether the circumstances and declarations offered in proof were so connected with the main fact . . . as to illustrate its character, to further its object, *or* to form in conjunction with it one continuous transaction.' Here conceptions (3) and (4) seem to be commingled. Mr. Taylor, however, gives no explicit definition of the term *res gestae*, and that which Mr. Sibley erroneously attributes to him is really the language of Mr. Pitt-Lewis in the 9th ed., s. 583. This language is misleading, since here, as well as frequently elsewhere throughout the book, it purports to give the authority of Taylor for statements which it is very doubtful if he would have sanctioned. It is a great pity indeed that the work of this editor was not distinguished by brackets, or otherwise, for in its present form it compels a constant reference to the 8th ed. in order to ascertain Mr. Taylor's own views. Mr. Pitt-Lewis remarks, 'Perhaps the best general idea of what is meant by *res gestae* is that the expression includes everything that may fairly be considered an incident of the event under consideration.' Here the conception seems to be that the incidents are the *res gestae*, although a few lines earlier it had been said that 'these surrounding circumstances may always be shown to the jury along with the principal fact, as it constitutes part of the *res gestae*, in other words of the transaction if looked at in its entirety and as a whole'; here, apparently, it is the transaction itself that is the *res gestae*.

The above are fair examples of the uncertainty and confusion which the use of the plural form has entailed. It will be convenient now, in order further to clear the ground, to advert to two minor misconceptions which Mr. Sibley's article in some measure tends to countenance. (*a*) Mr. Sibley seems to be under the impression that the exclusion of declarations under the present head has some relation to the incompetency of the declarants to testify as witnesses. At least I gather this to be his meaning from the following sentences: 'The rejection of the declarations of a defendant in equity was justifiable before 1851, on the general principle that derivative or second-hand proofs are not receivable as evidence *in causa*. But

the objection to receiving such evidence disappeared after that date, when a defendant in equity could offer responsible testimony. The same applies to criminal proceedings after 1898.' And he quotes a remark of Cockburn C. J. in his Bedingfield pamphlet, that 'Possibly when the inability of an accused person to give evidence in his own favour shall have been removed, a restriction on the admissibility of statements made against him in his absence may be advantageously removed also.' But the two topics are in reality wholly distinct; and the rule admitting statements as part of an act has been neither enlarged nor in the least degree affected by the statutes empowering parties to actions and prisoners to testify. Indeed, in *Thompson* v. *Trevanion*, *supra*, declarations by a wife were admitted as evidence for her husband under this head, though she would have been incompetent to testify as a witness; and in *Aveson* v. *Kinnaird*, *supra*, her declarations were received against him after her death, though, at the time, the rule was to exclude statements by the wife against her husband (Tay. s. 580). So, in the *Aylesford* case, 11 App. Cas. 1, declarations by a mother bastardizing her child were allowed to be proved as part of the *res gestae*, though she could not have testified to the same effect on oath. (*b*) Mr. Sibley's article also tends to revive the old confusion of *complaints* in cases of rape, and of *admissions by agents*, with the *res gestae* principle, topics which it might have been hoped the criticisms of Prof. Thayer and others had finally discriminated. It cannot be too often repeated that the admission of complaints in rape and similar offences is exceptional, that it is a mere historical survival and can only be understood as such. Logically, perhaps, there is no reason why complaints should not be receivable in 'all crimes of violence,' as asserted by Mr. Taylor (pamphlet on the *Bedingfield* case, p. 16), or in 'all criminal cases,' as stated by Mr. Justice Stephen (Dig., art. 8), or even, as has occasionally been held, in appropriate civil cases. But the law has not proceeded logically, but historically, as Prof. Thayer and Mr. Justice O. W. Holmes have been careful to point out, and as, indeed, has been recognized in our own case of *R.* v. *Lillyman* [1896] 2 Q. B. 167. Speaking of complaints in cases of rape Mr. Justice Holmes remarks, 'All agree that it is an exception to the ordinary rules of evidence to allow a witness to be corroborated by proof that he has said the same thing elsewhere when not under oath, except possibly by way of rebuttal under extraordinary circumstances. But there is the exception, almost as well settled as the rule, and courts and lawyers finding the law to be established proceed to account for it by consulting their wits. We are told,' &c. . . . But, 'if we look into history no further than Hale's Pleas of the Crown, where we first

find the doctrine, we get the real reason and the simple truth. In an appeal of rape, the first step was for the woman to raise hue and cry. Lord Hale, after stating that fact, goes on to say that, upon an indictment for the same offence, the woman can testify and that her testimony will be corroborated if she made fresh complaint and pursued the offender. That is the hue and cry over again . . . The authority of Lord Hale has caused his dictum to survive as law in the particular case, while the principle upon which it would have to be justified has been destroyed' (12 Harv. Law Rev. 453). In a previous case the same judge, after giving the history of this exception more in detail, observed, 'Such evidence is not admitted as part of the *res gestae*, or as evidence of the truth of the things alleged, or solely to disprove consent, but for the more general purpose of confirming the testimony of the ravished woman . . . It follows that it cannot be rejected because it was no part of the *res gestae*, or because under our Statute the child was too young to consent' (*Com.* v. *Cleary*, 172 Mass. pp. 176–7). The principle of the rape cases is, then, entirely distinct from that of *res gestae*, although were the complaint made during or immediately after the act, it might be tendered upon that ground as well (*R.* v. *Osborne*, Car. & M. 622). It seems settled, also, that complaints are admissible only in cases of rape and kindred offences against females (*Beatty* v. *Cullingworth*, 60 J. P. 740, per Hawkins J.; affirmed, C. A., Times, Jan. 14, 1897), and not to the wider extent claimed above.

The use of the term *res gestae* in agency cases is also misleading, and I cannot do better than quote Prof. Thayer on this point: 'When the inquiry is whether the utterance of an agent or co-conspirator is receivable against a party and it is said in the case of an agent that it must be made in and about the business on which the agent is employed and while actually engaged in that business; and of a co-conspirator that he must have made his declaration while engaged in the common enterprise and regarding that,—it is common to express this idea by saying that the declaration must be made as part of the *res gestae*; and if not so made it is deemed to be *res inter alios gesta*. Now . . . to hold that a thing is *res inter alios gesta* is to hold that it cannot be used in evidence against a party on a particular ground, viz., the ground of his being responsible for it; but this is only reducing it to the level of an act or declaration proceeding from a stranger and the question of evidence still remaining unsettled whether, being such, it is admissible. To say, on the other hand, that I am responsible for a given declaration by my agent or co-conspirator is to say that the declaration shall be dealt with as if it were my own; but the question of evidence still remains unsettled whether, being my own,

it is admissible in evidence and for what purpose and with what effect . . . This is not a rule of evidence, but of the substantive law of agency or conspiracy, and when it is said that the agent's or conspirator's declaration must have been made . . . as part of the *res gesta*,—the Latin phrase adds nothing. It is used as a compact expression for the business as regards which the law for certain purposes identifies the two conspirators or the principal and agent. In such cases, evidently, the declaration may have been made about a past fact as well as a present one, so long as it comes up to the above requirements' (15 Amer. Law Rev. 80–81). Finally it should be added that Greenleaf's extension of the term to declarations concerning pedigree (s. 123) is quite untenable, since it is not necessary that such declarations should accompany an act, while it is essential that the declarants themselves should be deceased.

Coming now to the main doctrine and its qualifications, I have attempted to indicate the classes of fact falling under this head as follows: 'Acts, declarations and incidents which *constitute* or *accompany and explain* the fact or transaction in issue are admissible, for or against either party, as forming parts of the *res gesta*' (Law of Evid., 3rd ed., 47). As examples of facts *constituting* a *res gesta* may be cited the defamatory words relied on in a slander or libel action—acts or omissions alleged to amount to negligence—a cheque sent and receipt returned showing payment by the plaintiff to a third person on account of the defendant, which have been received as mercantile facts constituting payment, although the cheque was not produced, nor shown to have been cashed before the issue of the writ, and the receipt, though produced, would *per se* have been no evidence of its contents against the defendant (*Carmarthen Ry. Co.* v. *Manchester Ry. Co.* L. R. 8 C. P. 685)—or, in a case in which the main fact can only be established by proving a series of similar facts,—evidence, on a charge of common cheating, that the defendants falsely represented themselves to be men of property on several occasions and to different persons (*R.* v. *Roberts*, 1 Camp. 399). But there are many incidents which, though not strictly constituting a fact in issue, may fairly be regarded as forming a part of it in the sense that they *accompany* and tend to *explain* such fact. Thus on a charge of murder by an explosion, evidence that other persons were killed or injured at the same time has been admitted to show the character of the explosive (*R.* v. *Bernard*, 1 F. & F. 240; *R.* v. *McGrath*, 14 Cox C. C. 598). A good example of incidents which would be admissible as parts of the *res gesta* in a collision case is afforded by O. XIX, r. 28 prescribing the particulars to be given in the preliminary act, i. e. the names of the colliding vessels; the time and place of the collision;

the state of the wind, weather and tide at the time; the course, speed and lights of both vessels, and when each was first seen by the other; the measures taken to avoid the collision; and the parts of the two vessels struck. In an American case the absence of street-lamps at a crossing has been held to be part of the *res gesta* (*Jefferson* v. *Chapman*, 127 Ill. 438). Questions of evidence, however, usually arise with regard to *declarations*, since with other incidents there is less danger of the jury being misled. With regard to these the following points should be noticed:—

(1) The declarations are not admissible simply because they accompany a fact—the fact itself must be either in issue or relevant to the issue (*Wright* v. *Tatham*, 5 Cl. & F. p. 689, per Coleridge J.; *Hyde* v. *Palmer*, 32 L. J. Q. B. 126; *Gresham Hotel* v. *Manning*, I. R. 1 C. L. 125). The term *res gesta* is, no doubt, more often used in connexion with the main fact, because questions mostly arise with regard to that, but it is equally applicable to any relevant fact. Thus, on a charge of burglary, where a witness for the prosecution had concealed the occurrence for several days, evidence that he had directed his wife 'not to tell it, as he was out late at night with the horses and would not be safe,' was admitted to explain the concealment, although that fact was not in issue (*R.* v. *Gandfield*, 2 Cox C. C. 43; cp. *R.* v. *Edwards*, 12 Cox C. C. 230). It is in this sense probably that the often-quoted remark of Parke B. in *Wright* v. *Tatham*, 7 A. & E. p. 355, 'Acts by whomsoever done are *res gestae* if relevant to the matter in issue,' is to be explained. Baron Parke did not say, and could hardly have meant, that all relevant acts in a case are 'a part' of the main fact; judging from the argument addressed to him, what he appears to have meant was merely that any relevant act is a *res gesta* with respect to, and so as to let in evidence of, its accompanying declarations.

These declarations, however, must relate to, and can only be used to explain, the fact they accompany and not previous or subsequent facts; e. g. where the question was whether an article patented by *A* in 1849 had been *publicly* sold by *B* before that date, and it was shown that *B* had in fact sold the article in 1846 and again in 1850, evidence tendered by *A* that, at the time of the sale in 1850, *B* had said 'This is a new article which I do not want publicly known,' was rejected to show that the sale in 1846 was also not public, since the sale in 1850 was irrelevant and therefore the accompanying declaration was inadmissible, and the declaration itself did not accompany and relate to the 1846 sale (*Hyde* v. *Palmer*, 32 L. J. Q. B. 126). So a remark by the conductor of a tram-car, just after a collision, that 'the driver has already been reported, for he has been off the line five or six times to-day,' was

rejected not only because the *res* was over, but because the declaration related to the past acts of the driver (*Agassiz* v. *London Tramway Co.* 21 W. R. 199). Where the act is a *continuous* one, however, declarations made at any time during its currency may, as will be seen below, be receivable.

(2) It must be remembered that not every declaration which accompanies and purports to explain a fact is admissible. Thus declarations which are obviously concocted to serve a purpose will be rejected (*Thompson* v. *Trevanion*, Skinner, 402; *R.* v. *Abraham*, 2 C. & K. 550; Wharton, Civil Evid. s. 265; Wigmore's Greenleaf, 16th ed., s. 162 *g*). So, in *R.* v. *Bliss*, 7 A. & E. 550, where the question was whether a certain road was public or private, a statement made by a deceased occupier of adjoining land whilst planting a tree, that 'he did it to show where the boundary had been when he was a boy,' was excluded, per Williams J. because 'the declaration had no connexion with the act'; per Patteson J. because 'whether the declaration accompanied the act, as explanatory of it, was equivocal'; and per Denman C. J. because 'a declaration that the party planted the tree with a particular object is inadmissible' (this objection applies, of course, only to declarations concerning public rights). In America, also, it has been held that where the act itself is free from ambiguity (*Nutting* v. *Page*, 4 Gray (Mass.) 584) or the declaration is inconsistent with it (*State* v. *Shelly*, 8 Clarke (Iowa) 477), the declaration will be excluded.

(3) Generally speaking, the declarations to be admissible must be *substantially contemporaneous* with the fact they accompany, i. e. made either during, or immediately before or after, its occurrence, but not at such an interval of time as to allow of fabrication or to reduce them to the mere narrative of a past event. As examples of *prior* declarations *R.* v. *Petcherini*, 7 Cox C. C. 79, may be referred to, where, on a charge against a priest of blasphemously burning certain bibles, sermons preached by him some days before, on occasions unconnected with the burning, were rejected. So, on a charge of treasonable conduct on a certain day, declarations made by the defendant on the previous day were rejected in explanation of such conduct (*R.* v. *Gordon*, 21 How. St. Tr. 542, 543; and cp. *R.* v. *Cantwell*, 120 Sess. Pap. C. C. C. 939, per Lawrance J.). As examples of *subsequent* declarations may be cited *Thompson* v. *Trevanion*, *supra*, where the statement of the wife was received because it was 'immediate upon the hurt received and before she had time to devise anything to her own advantage.' In *Lees* v. *Marton*, 1 Moo. & R. 210, the question being whether a bankrupt absented himself from home on a certain morning with intent to defeat his creditors, Parke J. rejected a statement in explanation made by him the

same evening. So, in *Agassiz* v. *London Tramway Co.*, *supra*, the conductor's remark, a few moments after a collision, that the driver had 'already been off the line five or six times to-day' was excluded because the transaction was over. In *Smith* v. *Blakey*, L. R. 2 Q. B. 326, 328, the question being as to the terms upon which *A* (deceased), the country agent of *B*, had bought goods from *C*—a letter written immediately after the sale by *A* to *B* stating the terms and enclosing *C*'s invoice and draft for acceptance by *B* was held by Blackburn J. to be no part of the *res gestae*. So, in *R.* v. *Bedingfield*, 14 Cox C. C. 341, a murder trial, Cockburn C.J., after consultation with Manisty and Field JJ., rejected an exclamation made by the deceased woman when rushing, with her throat cut, out of a house which the prisoner had been seen to enter a minute or two before, of 'Oh, Aunt, see what Bedingfield has done to me!' And in *R.* v. *Goddard*, 15 Cox C. C. 7, an almost similar case, Hawkins J. refused to admit as part of the *res gestae* a statement by the deceased ten minutes after the injury. Again, in *R.* v. *Gibson*, 18 Q. B. D. 537, C. C. R., the prosecutor having been injured by a stone alleged to have been thrown by the prisoner, a statement made, immediately after he was struck, by a lady going past, that 'The person who threw the stone went in there,' was held inadmissible. The specific ground of *res gestae* was not in terms argued in this case, but it could not have been considered tenable or the decision would have been the other way. To the above may be added those rape cases in which complaints, made very shortly after the act, have been rejected as part of the *res gestae* (*R.* v. *Osborne*, Car. & M. 622; *R.* v. *Lillyman* [1896] 2 Q. B. 167); and *R.* v. *O'Connell*, 1 Cox C. C. 365, where conversations, held half an hour after a treasonable meeting, were similarly excluded.

The question of contemporaneousness, however, has given rise to much discussion. In *R.* v. *Bedingfield* it has generally been thought that the rule was applied too strictly. On the other hand the *dictum* of Denman C. J. in *Rouch* v. *G. W. Ry. Co.* 1 Q. B. 60, adopted by Mr. Taylor (s. 588), that 'concurrence of time though material is not essential' seems to err in the opposite direction. Two classes of cases, however, require special mention under this head—those in which the fact itself is of a *continuous* nature, and those decided under the *Bankruptcy Acts*.

(*a*) Where the act is continuous, declarations at any time during its currency may, as stated above, properly be received. Thus, on questions of domicil, to show the intention of a prolonged residence, declarations made at any time during such residence, though not connected with any specific intermediate act, have been admitted (*Doucet* v. *Geoghegan*, 9 Ch. Div. 441; cp. *Re Grove*,

40 Ch. Div. 216). And the same rule applies to show whether long user of an easement was of right or by licence (*Bennison* v. *Cartwright*, 5 B. & S. 1). The *Aylesford Peerage* case, 11 App. Cas. 1 (1885), which also properly falls under this head, has, it would seem, been altogether misapprehended by Mr. Sibley. There the question being as to the legitimacy of a child born in wedlock in November 1881, the wife's letters in 1876 and conversation in 1884 were admitted in evidence substantially as part of the *res gestae*. This evidence, however, was tendered not to explain any specific act, but merely to show the adulterous character of a prolonged intimacy between the lady and a certain Lord B. The *res gesta* (or '*res gestae*,' or 'series of *res gestae*,' to quote the expressions used) was the wife's whole course of conduct, and not only were her own letters, conversations and acts constituting or colouring it admissible, but even those of the adulterer also (*Burnaby* v. *Baillie*, 42 Ch. D. 282). To say, therefore, as Mr. Sibley does, that the *Aylesford* case 'overrules' *R.* v. *Lillyman* [1896] 2 Q. B. 167, so far as the latter holds that an *ex post facto* declaration forms no part of the *res gestae*, seems quite unwarrantable. Both cases are right and both perfectly consistent.

(*b*) In one or two of the bankruptcy decisions the requirement of contemporaneousness has, it must be admitted, been interpreted with great laxity; while in others, decisions themselves sound are accompanied by *dicta* so loose that their effect, if correct, would be to render this class of cases altogether exceptional. In approving the stricter rulings, however, Prof. Thayer points out that the loose doctrine of the others runs back to a mere *obiter dictum* in *Bateman* v. *Bailey*, 5 T. R. 512 (1794). In that case, to prove that a debtor had committed an act of bankruptcy by absenting himself from home, with intent to defeat his creditors, from Feb. 5 to the evening of the 6th, a statement made by him on his arrival home had been quite properly admitted; but the Court unfortunately added, 'whatever he says, in short, before his bankruptcy is evidence in explanation of the act done by him.' The 'ill-begotten progeny of this dictum,' as Prof. Thayer styles them, are numerous. Thus, in *Rawson* v. *Haigh*, 2 Bing. 99, a similar case, letters written by the bankrupt during his absence having been admitted by Best C. J. on the sound ground that 'departing the realm is a continuing act and the letters were written during its continuance,' Park J. (who is unfortunately confounded by Mr. Sibley, and sometimes by others, with the greater Parke J. who always condemned this lax doctrine) made use of the often-quoted but confusing remark —'It is impossible to tie down to time the rule as to declarations; we must judge from all the circumstances of the case; we need

not go the length of saying that a declaration made a month after the fact would of itself be admissible; but if, as in the present case, there are connecting circumstances it may, even at that time, form part of the whole *res gestae.*' Prof. Thayer, after observing that 'in some cases it is important to remember the continuous nature of the act, and in others the continuous nature of the intention, whereby intention at one time becomes evidential of intention at another,' adds, in reference to Park J.'s statement, 'probably there is here some confusion between a continuous act and a continuous intention' (Cases on Evid., 2nd ed., 646, 649). Again, in *Rouch* v. *G. W. Ry. Co.* 1 Q. B. 51, where letters written during the debtor's absence had been correctly received on the ground that the absence was a continuous act, Denman C. J. referring to *Bateman* v. *Bailey*, *supra*, and to the statement of Park J. just quoted, gives utterance to the wide doctrine that 'although concurrence of time cannot but be always material to show the connexion (between the declaration and the act) yet it is by no means essential.' None of these *dicta*, it is to be observed, was necessary to the particular decision involved; but there are two cases, *Smith* v. *Cramer*, 1 Bing. N. C. 585 and *Ridley* v. *Gyde*, 9 Bing. 349, which certainly seem to go to the full length of the *dicta*. In the former, to explain an absence from Feb. 16 to March 9, letters written by the debtor on Jan. 16, praying for further time in respect of two bills of exchange, were received; and in the latter, to show that a transfer of his property on Oct. 25 was fraudulent, a conversation held by him with a creditor on Nov. 20 'in resumption of one immediately before the transfer,' was admitted. This decision Prof. Thayer thinks hardly explainable.

The stricter rule in these bankruptcy cases was, however, recognized by Lord Hardwicke who, in *Ambrose* v. *Clendon*, cases temp. Hardw. 267, rejected declarations 'not concomitant with facts'; by Lord Ellenborough in *Robson* v. *Kemp*, 4 Esp. 233, who rejected declarations by a debtor made 'after' the execution of an assignment; by Parke J. in *Lees* v. *Marton*, 1 Moo. & R. 210, who rejected a debtor's declaration in the evening to explain his absence in the morning; by the same judge in *Thomas* v. *Connell*, 4 M. & W. 267, who remarked, 'I have always understood the rule to be that a verbal statement is not receivable unless made at or about the time of an act done . . . as if offered to explain a person's absence from home, and it is made just before or after his departure'; by Lord Denman C. J. in *Peacock* v. *Harris*, 5 A. & E. 449, who rejected a schedule of creditors tendered to explain an assignment made four months before, remarking that 'a contemporaneous declaration may be admissible as part of a transaction; but an act cannot be varied

or qualified by insulated declarations made at a later time'; and by Crampton J. in *R.* v. *Petcherini*, 7 Cox C. C. 79, 83, who referred to the bankruptcy declarations as admissible because made at 'the moment of the act, explaining the act itself, accompanying it and therefore *pars rei gestae*.' The same view is maintained in 2 Evans's Pothier, 217; and by Christian on Bankruptcy, vol. i. 379–80, vol. ii. 447. The whole of the bankruptcy *decisions*, then, with the exception of *Smith* v. *Cramer* and *Ridley* v. *Gyde*, *supra*, favour the rule requiring the declarations to be substantially contemporaneous with the act; while the *dicta* on both sides are at least not unequally balanced.

(4) Various limitations have been stated as to the *persons* whose declarations are receivable. The narrowest is that in *Howe* v. *Malkin*, 27 W. R. 340, where to show that *A*, in building a wall, had not encroached on land owned by *B* in fee, a direction given by *B*'s father (deceased), who was then tenant for life, to *A* as to where the wall should go, was rejected because the declaration and act were not by the same person. But, though such declarations are often the only ones material, the rule is by no means so strictly confined. Thus declarations by a tenant explaining his landlord's omission to claim fallen trees (*Stanley* v. *White*, 14 East, pp. 339–42), or even those by persons not shown to be interested in the property (*Bennison* v. *Cartwright*, 5 B. & S. 1), have been received; as also, in a collision case, an exclamation by the pilot, though this could not have been tendered as an admission by an agent (*The Schwalbe*, Swab. 521). In criminal cases, too, it is every day's practice to receive the declarations of the victim as well as those of the assailant (*R.* v. *Foster*, 6 C. & P. 325; *R.* v. *Lunny*, 6 Cox C. C. 477; *R.* v. *Edwards*, 12 id. 230); and in America evidence has been allowed of the cries of strangers injured during the transaction (*State* v. *Wagner*, 61 Me. 178). So, in cases of conspiracy, riot and the like, the declarations of all concerned in the common object, though not defendants, are receivable. It has indeed been held, that unless a common object be proved, statements by participants, who are neither parties nor agents, are incompetent (*R.* v. *Petcherini*, 7 Cox 79). But this cannot be taken as invariable, for the exclamations of mere onlookers may sometimes be both material and admissible, e. g. the cry of a witness, who was in a room with the deceased when the prisoner passed the window just before shooting, of 'There's the butcher!' (*R.* v. *Fowkes*, Stephen, Dig., art. 3, illus. *a*); or a cry of 'Shame!' by bystanders in a running-down case (*Milne* v. *Leisler*, 7 H. & N. 786, 796, per Pollock C. B.). Mr. Justice Stephen, in his Digest of Evidence, art. 8, limits statements accompanying an act to those made 'by, or to, the party doing the act,' but this should probably be read with art. 3, in which *R.* v. *Fowkes*, *supra*, is cited

in illustration; while Mr. Taylor (s. 684) suggests that statements explanatory of the possession of *land* are inadmissible unless made by deceased persons against their proprietary interests. The contrary, however, was held in *Doe* v. *Rickarby*, 5 Esp. 4; and statements explanatory of the possession of personal property have frequently been received (*Stanley* v. *White*, *supra*; *Hayslep* v. *Gymer*, 1 A. & E. 163; *R.* v. *Abraham*, 2 C. & K. 550).

(5) It is immaterial whether statements tendered as accompanying an act are *oral* or *written*. Thus, a letter enclosing a cheque and specifying the purpose for which it is sent, would be as admissible as an oral statement made by a person when paying for goods (*Bruce* v. *Hurly*, 1 Stark. 23; *Carmarthen Ry. Co.* v. *Manchester Ry. Co.* L. R. 8 C. P. 685). Where, however, oral or written declarations are tendered in explanation of formal instruments, the rule requiring the intention to be gathered from the document itself and not from matter *de hors* generally applies. Still there are certain cases where the *res gesta* principle may legitimately be invoked without infringing this rule, as where contemporaneous declarations are admitted to show the intention with which a particular deed has been executed or destroyed (*Young* v. *Schuler*, 11 Q. B. D. 651; *Perrott* v. *Perrott*, 14 East 423). The rule demanding primary evidence of documents, moreover, is not always enforced in connexion with the *res gesta* principle. Thus, in *Carmarthen Ry. Co.* v. *Manchester Ry. Co.*, *supra*, the cheque sent and receipt obtained were allowed to be proved as constituting payment, though their actual production was considered immaterial. So, printed proclamations, placards and banners, when treated merely as acts done, are provable without the originals being put in (*R.* v. *Hunt*, 3 B. & Ald. 566; *Bruce* v. *Nicolopulo*, 11 Ex. 129).

(6) It has been correctly said that the declarations are no proof of the facts they accompany (Taylor, s. 586); the existence of the latter, indeed, must be established before the declarations will even be admissible. And although receivable to explain, identify, or corroborate, it is doubtful how far they can be used as evidence of the *truth* of any of the facts stated. Dr. Wharton remarks, 'To take a common case, a party assailed may exclaim, at the moment of the assault, "This was in revenge." The exclamation is evidence as part of the transaction, but it is no more proof of an old grudge than would be a statement to the same effect made a month before or after the assault' (Criminal Evid., s. 266). In Mr. Chamberlayne's edition of Best, 1883, s. 495 *n*, such declarations were said to be 'competent evidence of the truth of the matters asserted'; but this statement is withdrawn from the last edition (1893). Prof. Thayer, on the other hand, maintains that the declarations may 'legitimately be

used to prove what they import, and to supply new and otherwise unproved, or insufficiently proved, elements in the *res gesta.*' He cites four cases, viz. *R.* v. *Fowkes*, *supra*; *R.* v. *Bedingfield*, *supra*; *Com.* v. *Hackett*, 2 All. 136; and *Ins. Co.* v. *Moseley*, 8 Wall 397, in the last of which only, however, was the *purpose* for which such evidence may be used considered or decided. Prof. Wigmore (Greenleaf, 16th ed.) examines this matter more closely, and while admitting (s. 108) that there is a large class of acts whose accompanying declarations are original evidence, and not used 'testimonially' (e. g. where it is asked whether *A*'s possession is adverse, his utterance 'This land is mine, for I bought it of *B*' is not used as evidence that it is his, or that he did buy it from *B*, but merely as giving to his occupation an adverse complexion and significance), yet finds (s. 162 *f*) that there is another class which forms a true exception to the hearsay rule and is used 'testimonially,' the typical case being 'a statement or exclamation by an injured person immediately after the injury . . . or by one present at an affray, collision, or any other exciting occasion, as to the circumstances of it as observed by him.' It cannot be said, however, that the small group of American cases which he cites in support of the latter proposition, satisfactorily establish it, although they undoubtedly go some way in that direction. At all events in England, though one or two cases seem also to countenance this view, the great weight of authority is the other way. The only cases I have found favouring it are *R.* v. *Foster*, 6 C. & P. 325, and, perhaps, *Hayslep* v. *Gymer*, 1 A. & E. 162. In the former, on a charge of manslaughter, a witness deposed that he did not see the accident but, immediately after it, hearing the deceased groan, went up to him, when the latter made a statement that he had been knocked down by a cabriolet. This was held admissible to prove that fact. In the latter, where *A* sued *B*, as executor of *C*, for the return of certain notes she had given up to him, a statement made by *A* when handing over the notes to *B* that 'they had been given to her by *C*,' was held slight evidence of *C*'s gift; this, however, was mainly upon the ground that *B*, by not denying *A*'s statement, had admitted its truth. Some of the chief cases *contra* are, *Carmarthen Ry. Co.* v. *Manchester Ry. Co.*, *supra*, where the receipt, although admitted as one of the facts establishing payment, was held to be no evidence of the truth of its contents; *Perkins* v. *Vaughan*, 6 Jur. 1114, where in an action for false imprisonment on a charge of forging a bill of exchange, evidence that the acceptor had refused to pay the bill, stating that his name had been forged by the plaintiff, was held admissible as part of the *res gestae* to show the defendant's good faith, but not to prove the forgery; *Milne* v. *Leisler*, 7 H. & N. 786, where a letter

by *A* to his agent asking him to 'enquire as to the credit of *B* and also of *C* who is making large purchases for *B*,' was admitted as part of the transaction in corroboration of other evidence, but held no proof *per se* that *C*'s purchase was for *B*; *R.* v. *Plumer*, Rus. & Ry. 264, where, on a charge of secreting a letter containing a bill of exchange, the letter, stating that the bill was enclosed, was allowed to be read, although it was held to be no proof that the bill had been enclosed; and the *Aylesford* case, 11 App. Cas. 1, where, as has been seen above, letters from the mother stating that the adulterer was the father of the child, were received as part of her conduct, but not as evidence of the truth of the fact alleged.

If the view I have taken above be correct, it follows that declarations which are part of the *res gesta* are admissible as original evidence and not as exceptions to the hearsay rule, at least where that rule is defined in its usual and narrow sense as excluding only such unsworn statements as are used 'testimonially.' Where defined, however, as it sometimes is, as excluding all unsworn statements for whatever purpose tendered, the above declarations may be regarded as exceptions to the rule, although not receivable as evidence of the truth of the matters stated.

I have now, I think, glanced at the principal points connected with the *res gesta* doctrine, and can only hope that the foregoing observations may contribute in some degree to dissipate the obscurity in which it seems to be shrouded.

SIDNEY L. PHIPSON.

ENGLISH LAW REPORTING[1].

THE English Council of Law Reporting has before now been represented at meetings of the American Bar Association by some of its most distinguished members. I do not think, however, that they said anything about the Law Reports or the English system of reporting; and I believe this is the first time that an editor of the Law Reports has the honour of being your guest. Indeed I am the first editor of the Law Reports as a whole, for until 1895 there were three (originally four) independent editors under the general supervision of the Council. For this reason, and also because anything I say here is bound to be quite different from the lectures I am invited to deliver in October to the Law Schools of certain Universities, it may be appropriate to the occasion to tell you something of the business I have been charged with now for eight years and a half. I need hardly premise that we, the staff of the Law Reports, consider ourselves as exercising an office of trust on behalf of the legal profession not only in England, but in every jurisdiction where the Common Law is received or its authorities quoted. Still less is there any need to imitate the panegyrical and not wholly felicitous prefaces of Coke, or his demonstration that Moses was the first law reporter. Neither shall I dwell on the intimate and necessary connexion of law reporting with the authority of judicial decisions in the Common Law. That, I conceive, is fully understood by all here. I will not speak, again, of the history and merits of the early reporters, for therein your countryman Wallace is our master: it was one of our greatest common lawyers, the late Mr. Justice Willes, who sent me to Wallace more than thirty years ago. Nor yet will I set forth the virtues of a good reporter, so far as they are common ground to us all. You know them well enough; probably there are many here who have practised them; certainly there are more who have stimulated them by the frank exhibition of critical interest. We are here as men of business; let us come to business and consider those points about law reporting in England which may be less familiar here than the general historical or doctrinal aspects of the subject.

[1] An address delivered to the American Bar Association at Hot Springs, Virginia, in August, 1903.

First, our law reporting is unofficial, as it has been ever since the commencement of modern reports. It is more than doubtful whether the Year Books were the work of official reporters. Internal evidence is distinctly unfavourable to the tradition, for it looks like a professional tradition, which Bacon and Plowden accepted. Bacon would be a better witness if he had not used the story to support a scheme of his own for official reporting; and Coke's enormous credulity makes his repetition of it worthless [1]. In any case the later reports which we call authorized were produced by private enterprise, and enjoyed only a personal authority given by the judges of the several courts to the several reporters, which, down to the institution of the Law Reports, and in some cases a few years longer, procured them certain exclusive advantages. In the eighteenth century judges now and then took on themselves to discredit particular books of reports; James Alan Park J. (not to be confounded with Parke, afterwards Lord Wensleydale) said in 1830, 'Lord Kenyon reprimanded me when I was at the Bar for citing Keble [2].' This is perhaps later than any of Wallace's examples. But, according to modern custom, any report vouched for at the time by a member of the Bar may be used in Court for what it is worth, although the citation of an unpublished report is not at all common nowadays. The multitude of independent reports for several Courts, and competing authorized and unauthorized reports in the same Court, gave rise to inconveniences which have often been described, and in 1865, as the result of much professional discussion, meetings of the Bar, and other matters of inducement, all which are fully set forth in Daniel's History of the Law Reports, the Council of Law Reporting and their Reports came into existence. That body is not a Government or official institution. It has no legal privileges and does not claim any monopoly; the freedom of citation which I have just mentioned remains unimpaired. In fact it is a joint committee of the Inns of Court, the Law Society [3] (representing solicitors, who with us, as you know, are a distinct branch of the profession), and, of late years, the Bar Council. One can easily imagine how differently this would have been ordered in any other European country, supposing our system of the eminent and exclusive authority of judicial precedents to have obtained there. If England were a German kingdom, I should undoubtedly be an official

[1] I now think that Mr. Maitland's critical investigation of the Year Books of Edward II, forthcoming in a Selden Society volume, finally makes the legend untenable.

[2] *Adams* v. *Gibney*, 6 Bing. at p. 664, 31 R. R. at p. 521.

[3] The addition of 'Incorporated' is now dropped.

person, probably rather a considerable person, with some such title as *Königlich-Obergerichts-Archivs-Direktor*, and a *Geheimrat* or *Justizrat* to boot. As it is, I am nothing of the kind. My learned colleagues on the staff of the Law Reports and myself are not an official hierarchy. We are not members of the Civil Service. We have no insignia, no precedence, no title to be invited to State functions. The lay public is hardly aware, if aware at all, of our existence. We are even among the few things in the British Empire unknown to Whitaker's Almanack, that compendious and almost universal book of reference.

If these be drawbacks, and I doubt whether most of us would count them such, we have our compensations. Disciplined co-operation is, of course, a necessity; though some learned persons, when the establishment of the Law Reports was under discussion, did not see of what use an editor would be. But our bond is more like that of a college crew than that of a government office. What rules we have, outside matters, like the dates for returning proofs, really belonging to the printing and publishing more than the reporting department, are mostly unwritten. I admit that I set some value on two rules I have made for myself, to give my colleagues as free a hand as possible, and never to write a formal letter when I can help it. My successor will not find much in the way of demi-official archives. We confer freely and confidentially, as occasion requires, with the judges, with the counsel engaged in cases to be reported, and with one another. Any suggestion from the judges is, I need hardly say, most respectfully considered, and observations from the profession at large, whether constructive or critical, are welcome. I have known five minutes' talk with a learned friend, of which there was no written record whatever, lead to a modest but useful typographical improvement. But all this is quite unofficial. We are answerable to the Council who appoint us[1], and to the Council alone; and in the most improbable case of an attempt at formal interference from any other quarter, I should have no hesitation in telling the intermeddler, however exalted his professional or official position might be, to mind his own business, and I should do so with the full assurance of being supported by the Council. In short, we imitate on our small scale that method of proceeding by customary and unwritten understandings, and settling the really important matters, so to speak, out of court, which is the pride of Anglo-Saxon political institutions and the despair of almost all foreign students. There is a growing tendency among our people to

[1] There is one exception to be noted here. The appointment of reporters in the House of Lords is made by the House itself, practically by the Lord Chancellor. The Editor has nothing whatever to do with the appointment of reporters in any branch.

multiply rules and administrative machinery, and demand what is called organization. No one who has had much to do with the English Universities any time the last twenty years can have failed to observe it. Broadly speaking, I think it is a mischievous tendency and ought to be resisted. Some rules are certainly necessary for every society not of a domestic and intimate kind, and combined work must certainly be organized if it is to be effective. But this does not mean that it is reasonable to hamper business with an excess of minute regulations, or to paralyse discretion, fritter away responsibility, and, worst of all, waste the energy of men fit for better things, by imposing a complicated routine on even the simplest affairs. As a matter of fact, the precautions that such routine is supposed to embody are very seldom, if ever, of any honest use. If it is intended to make certain things really difficult, such as changes in the nature of constitutional amendments, there are plenty of known and tried ways of doing this openly. Making everything, great and small, difficult just to the point of cumbrousness and vexation, but not difficult enough to secure a considered and solemn decision of the greater matters, is the worst way of all, though unhappily not uncommon. But I am digressing.

Having thus endeavoured to show you the spirit of the Law Reports, and to prevent misunderstanding of the form, I will speak of our actual constitution and operations. Reference to the Weekly Notes, Digests, and other auxiliary and occasional publications of the Council, is omitted as not likely to be of much interest here. We have to provide reports of cases decided by the following tribunals:—

The House of Lords (including appeals from Scotland).
The Judicial Committee of the Privy Council.
The Chancery Division of the High Court of Justice.
The King's Bench and Probate Divisions of the same Court.

The decisions of the Court of Appeal are attended to (with a minute exception in bankruptcy cases) by reporters attached to the Division from which they come. You may see the number and names of the reporters, and their usual distribution among the Courts, printed on the covers of the current numbers of the Law Reports, and it would be idle to repeat those particulars. What does not appear on the face of the cover is that the Chancery reporters communicate direct with the Editor, the House of Lords and King's Bench reporters with my learned friend Mr. Stone, the Assistant Editor, and the Privy Council reporter with the Editor, enjoying however this peculiar franchise (a relic of former absolute autonomy) that his MS. does not pass through the Editor's hands.

The reasons for these diversities are partly too local, personal, and otherwise accidental to be worth stating, and partly unknown to myself. I do not know, for instance, why there is only one reporter for all the colonial and Indian appeals before the Judicial Committee, and a separate reporter for Scottish and divorce appeals in the House of Lords; still less do I understand the reason of this last conjunction: but so I found it. Probably our want of logic would shock a learned Frenchman somewhat, and our laxity might shock a learned or military German more. Being an illogical folk, we do well enough on the whole with all our anomalies. All the proofs, however, are seen by the Editor, including those of the Indian Appeals, a distinct series of which there are probably not many copies on this side of the Atlantic. As to these last I have a particular little grievance, not remediable except by the Indian Courts themselves. The High Courts of the Indian Presidencies are independent. Each of them has its own fashion, mostly barbarous and antiquated, of transcribing Indian proper names and words of art. Perhaps the extreme case is that of a beautiful Sanskrit compound which becomes 'Chuckerbutty' in the Anglo-Bengalese dialect, suggesting some grotesque personage in Dickens. The practical result is that the same name may be written in three or four different ways in the documents which come before the Judicial Committee, and has to be indexed accordingly as if it were as many different names; and also, though this is of less importance, that many common terms of tenure and agriculture are so written, oftener than not, that a merely English reader is almost sure to mispronounce them. If the Indian Courts would agree to adopt any one tolerable and consistent plan of transliteration, the Indian Appeals would cease to present a ridiculous appearance to every one even slightly acquainted with any of the classical or vernacular languages of India: but I know of no reason to expect any amendment.

As to the matter of the reports, there is no fixed rule for deciding what cases are to be published. Utility to the profession is the only test. We do not necessarily report a judgment because it is written, still less omit to report it because it is delivered offhand. The judges themselves are under no rule as to reserving or writing their judgments, and any hard and fast distinction founded on judgments being written or oral, considered or not considered, would lead to absurd results. The late Sir G. Jessel, one of the strongest judges we ever had, very seldom wrote his judgments. In the Court of Appeal written judgments are naturally more frequent than elsewhere, but there need not even be uniformity in the same case. For the most part separate opinions are

delivered, and one member of the Court may write his judgment while the others do not write theirs. I may mention that even when judgments are wholly written they are still actually read out in Court; I do not know to whom this is of any use; certainly not to the reporters. In this respect our practice is somewhat peculiar. In some jurisdictions the Appellate Courts are bound to put their judgments in writing; in many, I believe, it is the practice to report all written judgments. With us a much greater burden of discretion is thrown on the reporter. An elaborately argued case involving large pecuniary interests, and requiring a very careful judgment, may be of no general professional interest whatever, and turn wholly on special facts. Of this kind are many patent and trade mark cases. On the other hand a very brief and offhand judgment may settle a vexed point of practice or even of law. A wide field seems to be open; but on the whole the trained perception of the reporters, assisted by the keen but quite friendly competition of other publications, is very seldom at fault. I venture to say that, with few and accidental exceptions, that which neither the Law Reports nor the Law Journal (our chief competitor) report is not worth reporting. Occasionally there may be reasons of an extra-judicial kind for reporting a case, not so easily known to the reporter as to the editor. Once I caused a decision of the Court of Appeal to be reported, though it did not add anything to what we already knew at home for settled law, because I happened to know that the case and the points involved in it had excited a good deal of interest in the West Indies; and once or twice I have thought that a case was not to be discarded merely because it had become notorious among the lay public on professionally irrelevant grounds. The responsibility of suppressing a case sent in by the proper reporter is evidently much greater, and I cannot remember ever having done such a thing against the reporter's persistent judgment. Here the reason is plain. In case of doubt, it is safer to report a decision than to leave it aside; and the fact that a skilled person specially charged to form an opinion does think a particular decision reportable is of itself good evidence in its favour. Holding back a case which is to be the subject of an appeal is quite a different matter, and depends on a variety of considerations, as does the further question whether, in a consolidated report, the judgment below shall be set out or only its purport stated. On such points of discretion, which may be rather nice, an experienced reporter's opinion is always valuable and often conclusive.

The reporting of arguments and of oral judgments is doubtless the most skilled and difficult part of an English reporter's task.

Arguments have to be exhibited fully enough to explain the points made, the line of reasoning, and the authorities relied on, but not at superfluous length. You must remember that printed 'briefs' or expositions of counsel's arguments are not in use in England. It is true that the procedure of the House of Lords and the Judicial Committee requires printed cases to be lodged. But these documents are anything but a certain guide to the points which will be really insisted on; they are in a narrative form, concluding with a short statement of reasons, but giving no clue to the authorities. Nothing but careful attention to the argument as it actually takes place, not forgetting judicial interlocutory remarks, will produce an adequate report. In dealing with oral judgments the reporter's aim is to give the spoken word a becoming written form without substantial change of sense. More or less editing may be wanted; some judges are more careful or more concise in their language than others. But the cases are rare indeed in which a mere verbatim note of anything said extempore, however good it may have been to hear, can be accepted as readable English. Our labour is lightened by the favour of the judges, most of whom (in the Chancery Division all) revise their judgments in proof; but I do not think that would justify us in giving them a crude short-hand note to work upon. Further, some things are useful for the judge to say in court which are superfluous for the reader of the report, having the facts and arguments in print before him: so that here there is a good deal of literary as well as legal discretion to be exercised, and moreover it is the editor's duty, without prejudice to any genuine individuality, to secure a certain uniformity and maintain a due standard of language. On the split infinitive, for example, I do my best to wage a war of extermination. Another pest of law reports, derived I think from ill penned statutes and conveyancing forms, is the slovenly misuse of 'such' as a mere demonstrative. As for example: 'The plaintiff's yellow dog, being, as was alleged by the plaintiff, muzzled, bit a dynamite cartridge belonging to the defendant. Such cartridge exploded, and after such explosion it was not found possible to reconstruct either such dog or such muzzle.' This likewise I endeavour to extirpate. But some weeds are very hard to grub up finally.

Addition of special notes by the reporter or the editor, or both, is a matter of occasional convenience for which there can be no dogmatic precept. No one would think nowadays of imitating the disquisitions appended to their text by the very learned Serjeant Manning and some of his predecessors, though one or two of them have become classical. But little pieces of information, not strictly part of the report, are at times apposite and useful. Several times

I have found it desirable, if not absolutely necessary, to correct the singularly bad translations furnished for the use of the Court by persons, I know not whom, generally incapable of writing intelligible English and often capable of misunderstanding the original. One would think that a person rendering a French or German legal document into English ought to have some rudimentary knowledge of the words of art of both systems, but this appears to be considered quite unnecessary. There was a case, not many years ago, where a translator's mistake in French—an elementary mistake too, and not depending on anything technical—might have really embarrassed the Court if Mr. Justice Wills, being an excellent French scholar, had not promptly corrected it. A particular kind of note forming a category by itself is the incidental report of a decision which was relied on in the principal case, and of which the published report or reports are imperfect or inaccurate. Search by counsel or judges in the records of the Court sometimes throws quite a new light on old and scantily reported cases. We have had a very recent example [1].

It may be of some little interest to state the regular course of dealing with a reported case from delivery of the MS. to publication. I take the Chancery Division as being that in which the material is under my own eye at every stage. In the last days of one month and the first of the next the MSS. on hand are sent on to the printers after a summary inspection. The reports on which any question arises at this stage are very few, and it often happens that a reporter's copy is in my custody only for some hours. In favourable circumstances a short case decided near the beginning of a month may be reported within a week, sent to press with the current batch, and published in the very next number. It is not so very long since our present speed would have been thought impossible or hardly decent; but I have not observed that promptitude leads to any falling off in accuracy. Indeed I think the work is likely to be better, if anything, for being put through while the memory of all persons concerned is fresh. About two months, however, is the more usual lapse of time between the date of a decision and that of its appearance in the Law Reports. A longer interval, when it occurs, may be due to the preparation of the report having been unusually laborious, or to unavoidable delay in obtaining the necessary papers from counsel and solicitors, or in the return of proofs by the judges, or to time having been taken to consider whether the case should be reported, or to pressure of matter at certain times of the judicial year compelling

[1] See the corrected report of *Palmer* v. *Young*, 1 Vern. 276, in the note at the end of *Re Biss* [1903] 2 Ch. at p. 65.

the postponement of something. The numbers published immediately before and in the Long Vacation (August, September, October) may be treated, for practical purposes, as one number divided into three for technical rather than professional reasons.

To return to the normal history of a Chancery Division case, the first proof comes from the press in the second week of the month. A duplicate is furnished to the judge, or one to each judge if it is a Court of Appeal case. The corrections of the reporter and the judge are worked in; and here I must repeat that the obligation of the reporters and the profession to the learned judges for the time and care they bestow, purely as a matter of grace, on the revision of their reported judgments, and not unfrequently on valuable hints for the improvement of other parts of the report, is far greater than any one could guess who does not see the work done. Then, for greater certainty, all references and quotations are verified by a sub-editor specially employed for the purpose. About the middle of the month the slips go back to the press, and the final proof in pages comes to the Editor in time to be passed with about a week to spare, from the return of the latest sheets, for the mechanics of striking off and stitching. As a rule there ought to be, and is, next to nothing to correct in the final proof, but sometimes an elucidation of fact, name, or reference turns up at the last moment, or a manifest error is discovered which has contrived so far to escape several pairs of trained eyes. I may observe, as the result of a pretty long experience of press corrections, that the more manifest an error is, the greater chance it has of continuing to escape when it has escaped once. The reason is that even a skilled proof-reader may unconsciously read with his mind's eye what ought to be there instead of what is; and if he does it once, he is as likely as not to do it again. A familiar and annoying example is the accidental transposition of the words 'plaintiff' and 'defendant,' a blunder which I conceive every one of us must have unconsciously committed in his own work at some time or other, and as unconsciously failed to correct.

We do our best to provide a series of checks. First there is the reporter's eye; then the judge's; then the editor's and his clerk's (and my clerk has read proofs for and with me for twenty years); then the sub-editor's; and finally the reader's in the printing office. Yet with all this we cannot wholly avoid errata. Speaking to those who know how special and complex is the typography of the foot-notes in a law report, which may at any time include unfamiliar abbreviations and outlandish words and names, I make no apologies. But I believe that the number of misprints at all likely to mislead any reader to whom the references are significant

is in truth exceedingly small. And so the reports go forth on the first day of the month; I will not say 'on or about,' for we allow ourselves no days of grace unless the first of the month is a *dies non*, and any other kind of accidental delay is a matter for searchings of heart. Strict punctuality is what we aim at and usually attain. Our work is quite unknown to the general public; it is perhaps rather obscure even to a large number of the profession; a great deal of what we publish is, by the nature of current litigation and legislation, merely local and transitory. What is to you here, for example, the statutory definition of a 'new street'? Nevertheless you know and we know that we are about a work the English-speaking world cannot do without. In our modest and ministerial field of operation we are helping to maintain a national and more than national heritage, the ancient and still vital growth of the Common Law.

FREDERICK POLLOCK.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Halbsouveränität. Administrative und politische Autonomie seit dem Pariser Vertrage. Von Dr. jur. M. Boghitchéwitch. Berlin: Julius Springer. 1903. 8vo. xii and 254 pp.

Dr. Boghitchéwitch gives (p. 148) a definition of semi-sovereignty of which any translation into English would have to be more or less a paraphrase, and which, paraphrased in the light of the lengthy explanations which follow it, may stand thus: 'Semi-sovereignty is a legal relation between a sovereign state power, the suzerain, and another state power created by the will of the former, the semi-sovereign state, whereby the exercise of those functions of the former which constitute administrative autonomy as a whole (*in complexu*) is transferred to the latter, while political autonomy may also be transferred to it.' Such last-mentioned transfer is necessary if the semi-sovereign state is to be a person of international law (pp. 166, 167). And the will to create the relation may be expressed in a contract, though even so it is not the will of both parties that decides, but that of the sovereign clothed in the form of a contract (p. 149); we gather that such a contract is practically to be distinguished from others, not by anything in its form, but by the circumstances. It will be observed that semi-sovereignty is not thus defined as a condition of a dependent state, but as an entire relation, of which, on p. 86, it is expressly said that the superior is also a part (*sic*). It will be further observed that, so far as our author's semi-sovereignty presents a condition of the dependent state, it expresses a particular kind of dependence and is not, as with many, a general term for all the modes in which a state may enjoy only some of the powers comprised in sovereignty. The particular condition which he denotes by the name, and that of being subject to a protectorate of international law, by which term he describes a protectorate properly so-called as distinguished from what are often named colonial protectorates, he makes the two species of dependence *stricto sensu*. Opposed to these are the various kinds of dependence *lato sensu*, exemplified in 'protection, occupation, equal alliance, personal union, a federation of states, real union, a federal state, a treaty of guarantee, fragments of a state, &c.,' the enumeration in the title of s. 21, p. 172. Semi-sovereignty, thus understood, concerns the status of the state which is in that condition (it has a *personenrechtliche Wirkung*). Dependence *lato sensu* is merely contractual (*obligatorisch*). A protectorate of international law is contractual, but affects the status (p. 170). Dr. Boghitchéwitch regards his semi-sovereignty as something entirely modern, and only found in the case of the dependent states within the Ottoman empire, the Danubian princi-

palities and Servia at one time and now Bulgaria, although he recognizes that it may arise in other ways than that in which it arose there, as (p. 197) by a sovereign state being cut down to a semi-sovereign one.

Here it becomes necessary to drop all question of semi-sovereignty while we explain our author's views on suzerainty. With regard to the earlier history of that word he adopts, from previous investigators, who are liberally referred to, the derivation of sovereign from *supra*, and of suzerain from *sursum* (p. 87); the original use of *seigneur souverain* and *seigneur suzerain*, indifferently, for lord paramount (pp. 88, 89); the restriction of *souverain*, about the beginning or middle of the sixteenth century, to describe the king (p. 89); the subsequent use of *suzerain*, thus become distinguished from *souverain*, as a substantive without the addition of *seigneur*, to denote an immediate lord, a use therefore in which it was opposed to *vassal*, whereas so long as it was applied adjectively to denote a lord paramount its correlative was *arrière-vassal* (pp. 89, 90); and the absence, before the nineteenth century, of any use of the term *suzeraineté* to express other than strictly feudal relations, although modern editors translate by it the Turkish term found in the old capitulations granted to the Danubian principalities (p. 90). Even in the Russo-Turkish treaty of 1800, which formed the Ionian Islands into a republic placed under the suzerainty of the Sublime Porte, and described as 'vassal of the Sublime Porte, that is to say dependent on it, subject to it (*soumise*) and protected by it'; and in the London Convention of 1827, which laid down that the Greeks should hold of the Sultan as of a *suzerain*, and should pay him an annual *redevance* in consequence; our author considers that only the western feudal meaning was intended, notwithstanding that from their first entry into Europe the Ottomans had established a mode of dependence on them very like the western feudal, the modern use of the term 'suzerainty' in connexion with which has been above noticed. And when, at the peace of 1814, France renounced all her rights of sovereignty, suzerainty and possession over certain countries and districts, he still finds that feudal rights are referred to by the second of those terms (pp. 91–3).

The treaty of Paris in 1856 marks for our author a new era in the use of the word 'suzerainty.' As the result of a careful investigation (pp. 3–18) he concludes that the first condition enjoyed by Moldavia and Wallachia on the advance of the Turks was that of vassal states under the Turkish feudal system, to which stage belong the old capitulations (firmans or hatti-sherifs), of the genuineness of which however, at least in the existing texts, he does not seem to be quite satisfied; that the Turkish rule became stronger and more direct, so that Moldavia and Wallachia were reduced to the condition of provinces, and, in spite of the arguments of the Wallachian nationalists represented by Boeresco, no legal continuity or development connects the system now existing in Rumania with that of the capitulations; that this, coupled with the privileges stipulated for the provinces in the Russo-Turkish treaties from that of Kustchuk-kainardji in 1774, was their last condition before 1856; and that the references to a suzerainty pursuant to the capitulations which occur in Art. 5 of the treaty of Adrianople (1829), and in Art. 1 of the Constantinople conference of February 11, 1856, were intended to give the measure and not the legal basis of the rights contemplated on those occasions. The history of Servia (pp. 23–33) is diversified by insurrections crowned with more or less success, but leads to an analogous conclusion of the absence of any legal link between the Turkish feudal system, which was applied to that country

in 1389, and the state of things existing there in 1856. If these views be accepted, and as the Constantinople conference of February had declared that the organic regulations for Moldavia and Wallachia which flowed from the Russian treaties concerning those provinces had fallen to the ground by the effect of the war in terminating those treaties, the plenipotentiaries who met at Paris had the ground fairly well cleared for new constructions. In our opinion, however, one who looked only at the face of the treaty which they signed would not find that they took that view of their position. They provide that the principalities of Wallachia and Moldavia shall continue to enjoy, under the suzerainty of the Porte and the guarantee of the contracting powers, the privileges and immunities of which they are in possession, and that the principality of Servia shall continue to hold of (*relever de*) the Sublime Porte, conformably to the imperial hatti-sherifs which fix and determine its rights and immunities, which is feudally equivalent to admitting a suzerainty in the case of Servia also, hold or *relever* being the proper feudal language to express the tenure of a vassal. And they specify certain rights which are to be preserved to the three principalities. All this would seem to imply that the situation was and was to remain that of Turkish feudalism, with such (possibly additional) rights of the vassal as are expressly mentioned. But our author says: 'The treaty of Paris does not indeed give expressly any general determination of the conception of suzerainty, and even in the protocols such would be sought for in vain, but it clearly results from the treaty that it does not intend a feudal dependence, but to establish a new conception the essence and content of which are brought out in its other articles. The congress introduced the word 'suzerainty' into international language, and attached consequences to it in making certain particular determinations. It was not the business of the congress to give form to conceptions, but rather to establish a practical *modus vivendi*, or at least a tolerable situation, from which science could afterwards abstract its conceptions' (pp. 93, 94). The reference to international language is explained by the fact that Dr. Boghitchéwitch treats feudal relations as belonging, not to international, but to state or national law, so that the use of the term 'suzerainty' in a sense according to him not feudal is for him a sign that the countries of which it was so used were raised from privileged provinces to states, and its first such use is for him the introduction of a new term into international language. The suzerainty of the Porte over the Danubian principalities and Servia, whatever was the intention about it in 1856, has since been terminated by the independence of those countries; but when, by the treaty of Berlin in 1878, Bulgaria was made an autonomous and tributary principality under the suzerainty of the Sultan, it will probably be questioned by no one that its status was understood to be the same which had been given or secured in 1856 to the principalities then dealt with, whence the continuing importance of the question what that status was.

In support of his opinion that the status under consideration was and is in no way feudal, Dr. Boghitchéwitch examines it with regard to the three feudal characteristics, homage, tribute, and military service. He shows that homage was due to the Sultan in the regular Turkish form from the governors of privileged provinces, and was paid by Prince Milosch of Servia in 1835, but was not paid either by Prince Charles of Rumania or by the Princes Michael and Milan of Servia, and has been paid by Prince Ferdinand of Bulgaria, not in that character, but as governor of Eastern Rumelia. He argues that in Turkish practice tribute was never so much

a sign of dependence as a payment for definite concessions. And he points out that military service has neither been rendered by the principalities under the system of 1856–78 nor demanded from them, and that the defensive alliance which the Porte concluded with Bulgaria in 1886 is scarcely consistent with a liability to it on the part of the latter. He further remarks on the difference in the case of Egypt, a privileged province, the troops of which are an organic part of the Turkish army, being under the Sultan by virtue of the firmans, and which made common cause with Turkey in 1878. On the other hand the absence of a liability to military service does not authorize hostility; fealty is due, though (p. 226) one embracing less than feudal fealty; and the participation of Rumania and Servia against Turkey in the last war was without doubt a breach of right (pp. 95, 99–103). In pp. 95–8 we have an enumeration of the opinions of authors on the status of the principalities.

We will now remind our readers of Dr. Boghitchéwitch's definition of semi-sovereignty, of the place which he gives that condition in his classification of the modes of dependence, and of his actually finding it only in the case of the dependent states within the Ottoman empire under the system of 1856–78. What the historical investigation which we have sketched has led him to find in those instances is a suzerainty interpreted by him in a certain way, to which the term semi-sovereignty is not applied in the documents, but which fits his definition of semi-sovereignty, the 'administrative autonomy as a whole' being transferred to the dependent state, indeed with a large 'political autonomy' as well. But among the numerous combinations possible there may be a territorial entity in only partial enjoyment of 'administrative autonomy,' yet in the enjoyment at the same time of so much 'political autonomy' as to be able to contract on certain subjects with foreign powers as an international person. Such a territorial entity, as compared with Bulgaria, would *a fortiori* be a dependent entity *stricto sensu*, and as an international person it would be a state and not a province. Why then should it not be included in any definition of semi-sovereignty as a particular kind of dependence which it may be thought desirable to give? What place would it have in Dr. Boghitchéwitch's classification of the kinds of dependence? His answer to that question seems to be (p. 207) that his doctrine is only to be understood as correct in principle, and admits of variations and exceptions in particular kinds and cases of semi-sovereignty, which we submit is as much as to say that his definition is not a definition at all. But if we are to have a definition, we may ask why the term 'semi-sovereignty' should be restricted to any particular kind of dependence, instead of being used, as so many use it, for the general description of all such dependence as leaves the inferior a state or person of international law? Or, if the term is to be used distinctively, is it not a strange distinction which classes under semi-sovereignty, along with cases of international significance, cases where, all the autonomy transferred being what our author calls administrative and not political, the inferior is not a person of international law?

These puzzles have their source in the fact that Dr. Boghitchéwitch does not begin by reviewing the situations which are presented in political experience, then consider how they can be most rationally classified, and lastly define his terms to suit the classification so arrived at. He begins by considering his conception (*Begriff*) of something, his definitions are the final expression which he gives to the analysis of his conceptions, and we need not wonder if we find that they are not to be pressed as closely as it is commonly understood that definitions should be. Thus in s. 18 he

gets his conception of semi-sovereignty from his conceptions of a state and of sovereignty, it is only in s. 19 that he puts it into the form of a definition, and only in ss. 20–22 that he examines its difference from other forms of dependence. Of course the learned author would say that we do him injustice in speaking of *his* conceptions: it is *the* conception of a thing of which he is in search. That, however, amounts to assuming the existence of a thing corresponding to a received term, and the possibility of thinking out what that thing is with the least possible assistance from observation. The extremely subjective habit of starting from conceptions results in an approach to mediaeval realism. We shall not dwell at any length on the conceptions to which our author devotes a large space, in the course of which we find the following: 'The difficulty of the whole general problem of connected states' (*Staatenverbindungen*, which must not be taken in the technical sense of federations) 'lies in the construction of the relation of the whole to the parts or of the parts to the whole. The relation shapes itself differently according to the point we start from, even according to our view of the world (*Weltanschauung*), and as we proceed analytically or synthetically, nay, even as we assume the Whole to be an organic unity or a sum of atoms' (p. 125). It will however be well to observe that Dr. Boghitchéwitch carries the identification of conceptions with things, or the confusion between them, so far as, when speaking of the conception of sovereignty, to say of conceptions generally that they are at first ill defined, then gradually become settled in one or other direction till they crystallize as absolute, at last fail to give what is required of them and gradually become again relative, and in their second relativeness have the advantage over their first relativeness that the later stage is built on the foundation of an absolute and clear conception (p. 119). We seem in this to be hearing about the institutions themselves the conceptions of which the learned doctor probably had chiefly in mind, and when he adds that by the process described the conception appears to lose in formal precision but does not lose in 'conceptional sharpness' (*an begrifflicher Schärfe*), we must enter our protest against the belief that notions in a state of flux can make any contribution to accurate thought.

In his ss. 23–7 Dr. Boghitchéwitch discusses the particular questions arising on the administrative and political condition of the dependent states in the Ottoman empire under the system of the treaties of Paris and Berlin. This part of the book is of great value for the facts collected in it and the arguments used on the respective questions, but it is difficult to understand its exact relation to the author's general views, because many of the facts adduced as having a bearing not to be ignored are drawn from the relations of the empire to the vassal principalities during some part or other of the period before 1856, from which he has seemed so completely to differentiate the later period. Again, in all juridical reasoning facts and documents have to be weighed with the assistance of legal principles, but this is carried rather far when a writer's conception of semi-sovereignty or of a protectorate is allowed to control the facts and documents, as if such conceptions were necessary pigeon-holes into which actual arrangements must be fitted. Accordingly we are not convinced when we read that 'while the duties of the suzerain to the semi-sovereign state are duties of bona fides, so to speak duties of behaviour (*Anstandspflichten*), with a quantitative and qualitative measurement of them lying in the exclusive will of the suzerain, the duties of the semi-sovereign state are unchangeable duties of *strictum jus* finding its source in the constitutive act' (p. 223). On particular points there is not much novelty in our author's

conclusions, nor could there be when on each point perhaps every possible view has been already taken, and a general notice of his book, of which they do not form either the largest or (we believe in his own opinion) the most important part, would not be the place for examining them. But we repeat that they form a valuable part, and we recommend Dr. Boghitchéwitch's reasonings and conclusions to the attentive consideration of all who may have to deal with the questions concerned.

As a point interesting to English readers we may mention the classification which, after a careful discussion, Dr. Boghitchéwitch assigns to the South African Republic after the London convention of 1884. He places it not as a state under either the suzerainty or the protectorate of the United Kingdom, nor as a dependent state, nor as a state which under the articles of the convention, especially that which made the consent of the British Crown necessary to its treaties with all powers except the Orange Free State, was subject to a servitude, for he considers that a term of private law ought not to be used in public law except on the grounds of fact on which its use in the former is based, and a servitude in private law is a burden on the soil. He considers the republic to have been a sovereign state subject to obligations creating a condition in the nature of status (*Zustandsobligationen*), an analogy in private law being the condition of a servant of the state, who enters into the service by a contract but whose misconduct in the service is not a breach of contract but an offence. And he mentions as analogous in international law the condition of neutralized states like Belgium or Switzerland. The republic might be called a state subject by obligation to duties (*ein obligatorisch verpflichteter Staat*), pp. 75–84. In note 14 on page 201 Dr. Boghitchéwitch says that the doctrine of perpetual allegiance, as maintained in the United Kingdom for British subjects until the Naturalization Act, 1870, raises, on the recognition of the independence of the Transvaal by the Sand River convention in 1852, which he admits to have been complete (p. 73), a difficult question as to what became the precise allegiance of its inhabitants. No difficulty was ever felt in the United Kingdom on that question, nor do we perceive how a doctrine, which asserted the inability of a subject to free himself from his duty to the Crown, could throw doubt either on the power or on the intention of the Crown to free him from it by a convention which, as it seems to us, would otherwise be without meaning.

J. Westlake.

Comparative Principles of the Laws of England and Scotland: Courts and Procedure. By J. W. Brodie-Innes. Edinburgh: W. Green & Sons; London: Stevens & Sons, Lim. 1903. La. 8vo. cxl and 868 pp.

This is an important instalment of what will be, when completed, a monumental study in comparative law. In spite of the intimate and manifold relations between England and Scotland in legal matters, and the differences between the laws of the two countries, there is no more recent treatise on the subject of Mr. Brodie-Innes's work than the excellent, but now rather ancient, Compendium, published by Mr. Paterson some thirty years ago. Mr. Brodie-Innes has wisely departed from his original idea of bringing out a new edition of Mr. Paterson's book. The development of law both in England and Scotland, during the period that has elapsed since its publication, rendered such a task hopeless; and there was room

also for improvements on Mr. Paterson's method. An attempt to place the laws of England and Scotland side by side, notwithstanding its formal and, to a large extent, substantial merits, necessarily left considerable tracts both of Scots and of English law unexplored. Mr. Brodie-Innes has pursued a different system. Starting with Courts and Procedure (to which the present volume is confined) he narrates the history, and sketches the present condition, first of the English, and then of the Scotch, tribunals. The jurisdiction and distribution of business in the two countries, treated on similar lines, come next. An exhaustive analysis of practice and procedure, from the preliminary steps necessary in order to bring the opposite party before the Court down to execution, follows. The special administration and probate procedures in England and Scotland are then described: while titles on special forms of action, Inferior Courts, Appeal Courts, and costs and expenses, complete the work.

We have tested the book at various points and have found it uniformly clear, learned, and accurate. Full bibliographies precede each title, and—a useful feature—the general index is also a dictionary of the technical terms employed, every term of art being translated by its equivalent (if there is one) in the other system.

A. Wood Renton.

Freie Rechtsfindung und freie Rechtswissenschaft. Vortrag gehalten in der juristischen Gesellschaft in Wien am 4. März 1903 von Dr. Eugen Ehrlich, Prof. der Rechte in Czernowitz. Leipzig: C. L. Hirschfeld. 1903. 8vo. vi and 40 pp.

This is a welcome and most interesting tribute to the judicial methods of the Common Law from a learned civilian. Dr. Ehrlich regrets that Continental judges hold themselves, as a rule, bound to find positive authority for every conclusion they arrive at, instead of holding themselves bound to find some reasonable solution for every question, old or new, subject only to the proviso that it must not contradict any rule already settled. This latter is the way of our law, and was that of the classical Roman jurists. Dr. Ehrlich truly says that development may go so far as to change its direction. 'It has happened more than once that acknowledged rules of law have in course of time had their effect quite reversed when a series of decisions has departed from them little by little.' But this is really a merit; the law, while it is guarded from abrupt change, is a living and adaptable law. Judges in the Common Law system are not law-*makers*, but they are true law-*finders*. On the other hand, the modern reception of Roman law, followed by extensive codification, has, contrary to the spirit of the Roman law itself, tended to enslave judicial interpretation and reduce the Courts to the position of mere subordinate officials carrying out superior instructions. Unlike the judges of the Common Law, and the Roman lawyers having the *ius respondendi* who were their real prototypes, Continental judges under the prevailing system lose their individuality, while jurisprudence is divorced from the practical sense of affairs and becomes merely technical or merely speculative. Yet the modern codes themselves tell the judge, expressly or by implication, that he must find appropriate law for every case, and they do not tell him to pretend to find it in some authoritative text when it is not there. The French Court of Cassation, and the German courts of last resort of late years, have risen to the true conception of judicial duty.

'Merely knowing the text of the French Codes will tell a man nothing of the real working law of France.' But in Austria, Dr. Ehrlich says, letter-worship still prevails. His plea for 'free law-finding' must have the good wishes of all followers of the Common Law. By a curious coincidence, within a few weeks after this address was given at Vienna, Prof. R. Saleilles read a paper partly covering the same ground, and tending to similar conclusions, before the legal section of the Historical Congress at Rome. So far as we know, this has not yet appeared in print.

We do not know what opportunities Dr. Ehrlich has had of studying English case-law and judicial traditions; whether greater or less, he has made excellent use of them.

F. P.

Les Justices Seigneuriales en Bretagne aux XVII^e^ et XVIII^e^ siècles. Par André Giffard. Paris: Arthur Rousseau. 1903. 8vo. xxviii and 392 pp.

A paper in this Review (vol. v, pp. 113–131) on the subject of manorial jurisdiction was directed to the support of the proposition that this jurisdiction was not originally peculiar to what we now call a manor, but was the representative of a far more general idea that all tenure involved jurisdiction. And it was suggested that this idea could be traced in all countries which have been subject to what we designate as the feudal system. M. Giffard's work before us gives very interesting support to this theory. It appears that in Brittany seigneurial jurisdictions lasted longer than anywhere else in France, in fact down to the Revolution; and the documents cited by M. Giffard of the seventeenth and eighteenth centuries show the conflict still raging between the two rival principles; the one being that all jurisdiction is derived from the Crown, *justice concédée*; and the other that it is involved in tenure, *l'union de la justice et du fief*. No doubt, even in Brittany, the Crown theory had by the seventeenth century made considerable inroads upon its opponent, but enough remains to illustrate in a very curious manner the process of encroachment. Not that M. Giffard is at all willing to admit that the Crown was the encroaching party. He is far too scientific a jurist, one may almost say far too good a Frenchman, to feel any doubt that *justice concédée* is the only true principle, and this persuasion leads him occasionally to treat the royal courts as acting on the defensive, when other investigators might perhaps put the boot on the other leg. But whether the royal courts were attacking or resisting, the points they raised have a peculiar interest to English students.

We read of a rule that the judge must sit in his jurisdiction (p. 103): of the introduction of the classification of *haute, moyenne*, and *basse justice* (p. 110,; of the Crown's claim to regulate criminal appeals, and of a sort of compromise by which persons convicted in the royal courts were sent back to the seigneur for execution (p. 121). We find the Crown issuing commissions to investigate usurped jurisdictions, a claim which must have been based on the theory of *justice concédée*; and of attempts of these royal commissioners to reject all claims unsupported by written titles (p. 178); and we at once recall our Hundred and Quo Warranto rolls. We even find the principle that jurisdiction is inherent in the fief invoked for the purpose of limiting it to feudal tenants, and consequently excluding it over demesne lands (p. 26). Of course we find the usual claim to exclude *cas royaux, placita coronae*, from the seigneurial jurisdiction (p. 122).

We find the principle recognized, though the practice is attempted to be restrained, of dividing the jurisdiction together with the division of the fief. And we are shown the absurd number of little jurisdictions to which this led (p. 37). M. Giffard also shows how the absence of any control of the homage over the customs led in the eighteenth century to the abuses on the part of the seigneurs which led to the Revolution. He gives us in fact, not merely an extremely interesting description of the progressive steps by which the Crown courts superseded the seigneurial jurisdiction, but also a striking picture of what the feudal principle might have led to if left to develop itself undisturbed.

G. H. B.

A Treatise on the Law and Practice of Injunctions. By WILLIAM WILLIAMSON KERR. Fourth Edition. By EDGAR PERCY HEWITT, assisted by SYDNEY E. WILLIAMS and JOHN MELVIN PATERSON. London: Sweet & Maxwell, Lim. 1903. La. 8vo. xlv and 656 pp. (35*s.*)

THE reasons for treating injunctions as a separate subject for a legal treatise are by no means so cogent at the present day as they were when the first edition of this work was published. It is now a matter of purely historical interest to discuss the theoretical grounds upon which equity based its interference by injunction with legal rights.

The operation of the Judicature Acts has made it practically useless, and perhaps misleading, to state without inverted commas or some other indication that it is a description of the past, that 'Perpetual injunctions are such as form part of the decree made at the hearing on the merits, whereby the defendant is perpetually inhibited from the assertion of a right or perpetually restrained from the commission of an act which would be contrary to equity and good conscience' (p. 2). We think the editors would have done better if they had emancipated themselves altogether from Kerr, and had trusted solely to their own abilities for a recommendation.

They have provided a very complete description, classified by the subject-matters, of all the cases in which injunctions are now granted. Of course a certain amount of discussion is necessary of the general law relating to each subject-matter; and in each case no doubt the editors must have felt some difficulty in deciding how much of that general law they should discuss. Some subjects which come before the Courts almost wholly on application for an injunction, such as building schemes and covenants running with the land in equity, the editors naturally discuss with completeness, and the result is perfectly satisfactory; but in the case of other subjects, such as waste and trespass, it is difficult to say how much discussion is germane to the law of injunctions.

It is obviously impossible to discuss adequately the whole law of waste and trespass in a work relating to injunctions; and if this proposition is admitted, we venture to think that there is little advantage in dealing at all with these subjects outside their connexion with injunctions. For instance, we do not think the value of the book as a treatise on injunctions would have been in any degree lessened if the following passage had been omitted: 'If there be evidence of damage to the mine from wrongful working, an inquiry will be directed as to what should be allowed to the plaintiff as compensation for such damage. The defendant may be ordered to pay the plaintiff compensation for the damage done by breaking down the barrier between the mines, or for the damage sustained by the plaintiff in

being obliged to have additional barriers. He may also be charged with a copyhold rent in respect of air-courses and roads through the mine of the plaintiff' (p. 113).

In dealing with injunctions against breach of covenant, the editors do not forget covenants not to assign (p. 375); but we have not been able to find a reference to this in the index. It is not under 'assignment,' 'lease,' 'landlord and tenant,' or 'covenant.' In a book dealing with a subject so multifarious as injunctions, it is essential that the index should be complete and ample.

A Code of the Law of Compensation. By SYLVAIN MAYER. London: Sweet & Maxwell, Lim., and Waterlow & Sons, Lim. 1903. La. 8vo. 853 pp. (38*s.*)

MR. MAYER has written an excellent treatise upon a subject on which there are not too many trustworthy books.

The scheme of the work is novel. The principal enactments dealing with compensation for the taking of land, such as the Lands Clauses Acts, Railways Clauses Acts, the Waterworks Clauses Act, and portions of many statutes relating to local government, are set out. Following each section is a series of 'Articles,' consisting of propositions in which the effect of decided cases is concisely and clearly set forth, following which are fuller statements of the cases on which they are founded. We have tested a good many of these Articles, and found them generally to contain clear and accurate expositions of the law; but in some instances Mr. Mayer seems to have somewhat hastily enlarged a decision upon some unusual facts into a general proposition of law. See, for instance, his summary of *Morgan* v. *L. & N. W. Ry. Co.* ([1896] 2 Q. B. 469) at p. 151.

It is the use of these Articles that justifies the author in describing his book as a code. Lawyers will use them with caution: but laymen will find them an extremely short and generally safe means of getting at the law—much safer in the result than attempting to evolve the law for themselves from reported cases.

The appendices contain a quantity of useful matter, such as the Arbitration Act, specimens of valuations, valuation tables, and various practice rules, so that the book comprises nearly everything that lawyers or arbitrators are likely to want, both in compensation cases and in subsequent proceedings arising thereout. The whole of the work appears to have been done conscientiously and thoroughly and with a full understanding of the subject.

The Imperial Statutes applicable to the Colonies. Vol. I. Statutes of General Application down to the year 1901—1 Edward VII. By FRANCIS TAYLOR PIGGOTT. London: William Clowes & Son, Lim.; Port Louis, Mauritius: The Mauritius Printing Establishment. 1902. La. 8vo. lx and 753 pp. (£2 12*s.* 6*d.*)

THAT Imperial legislation is still a great factor in Colonial laws may be seen from the many statutes and sections of statutes collected in this book, covering the principal heads of the law from Admiralty to Will. If the application and extent of these statutes are almost forgotten by the average lawyer, he may plead that even those whose business it is to know do not always duly consider the effect of Imperial enactments on Colonial laws. Mr. Piggott says in his Preface that 'the impression left on the

mind after prolonged study of these statutes . . . is that the draftsmen have not always borne the Colonies in mind and have dealt with them as the humour seized them, in some cases almost whimsically': and he suggests that the fact of the compilation not having been made before 'leaves it at least open to doubt whether some of the enactments contained in it have not, in the *oubliettes* of the statutes at large and revised, passed clean out of mind.'

Mr. Piggott points out one curious fact—that probably the operation of the old statute relating to coinage is preserved in the Colonies by the repeal clauses of the Coinage Offences Act, 1832. It is rather startling to find that in the Colonies the crime of bringing counterfeit coin into the realm may still be treason, punishable by death and forfeiture.

Those looking for light on Colonial laws will bless Mr. Piggott for relieving them of the task of searching through many unwieldy volumes of the Revised Statutes. The arrangement of the book is alphabetical and there is a full index.

Cases on International Law. By JAMES BROWN SCOTT. Boston, U.S.A.: Boston Book Company. 1902. La. 8vo. lxvii and 961 pp. (16*s.*)

THESE cases are exclusively selected from decisions of the English and American Courts, the volume being based on the late Dr. Freeman Snow's Cases and Opinions on International Law, published in 1893. It was originally intended to be a revision of that work, but many and radical changes, as the learned Dean of the Illinois College of Law explains in his preface, led the publisher to issue it as an independent work, though, he adds, 'it is identical in most respects,' and 'Dr. Snow's notes have generally been retained.'

The idea underlying the volume is that international law is part of the English Common Law; that as such it passed with the English Colonists to America; that when the United States were admitted to the family of nations, 'the new republic recognized international law as completely as international law recognized the new republic.' The United States courts, State and Federal, take judicial cognizance of it and enforce it, so that for the American student or practitioner it is domestic or municipal law.

The cases are preceded by an elaborate 'syllabus' containing references to the authors of works on International Law and articles in periodical publications on the same subject. The text of the book is composed of the judgments, supplemented by footnotes. There is a good index. The book will be found decidedly useful, especially as completing Wharton's Digest of the International Law of the United States, which gives the official, while Mr. Scott's book gives the judicial, view of matters of International Law.

La succession aux biens réels dans les coutumes anglo-normandes: son développement en droit moderne. Par EDOUARD ESCARRA. Paris: Henri Jouve. 1903. La. 8vo. 355 pp.

A DETAILED account of this work, intended for the instruction of French students, would be useless to English readers. Enough to say that M. Escarra has used the right authorities with diligence and good judgment, and produced a clear and accurate historical account of the English law of succession to real property. Strict settlements appear to him, as they have always done to Continental inquirers, a marvellous invention; but he has mastered them, in a general way at any rate. The alteration

of descent in the borough of Leicester in 1255, from ultimo-geniture to primo-geniture, by a charter of Simon de Montfort granted at the request of the burgesses and confirmed by the king the next year, is cited by M. Escarra from an abstract: the full texts are now given in Miss Bateson's Records of the Borough of Leicester, pp. 49–57, and indeed had been printed, though not together, before. We have observed only one historical error. It was not exactly 'accompagné de ses amis' that the late Mr. Augustus Smith, nearly forty years ago, demolished Lord Brownlow's fences on Berkhamstead Common. The so-called 'amis' were navvies hired for the job. Pulling down a mile of wire fence is not amateurs' work. And M. Escarra does not seem to be aware that Mr. Augustus Smith was not a labourer or small farmer, but was a great landlord himself. This, however, is a very small detail.

Coutumiers de Normandie: textes critiques publiés par E. J. Tardif. Tome I (2e partie). Le très ancien coutumier de Normandie. Textes français et normand. Rouen: A. Lestringant; Paris: A. Picard et Fils. 1903. 8vo. x and 143 pp.

This is the thirteenth-century French version of the custumal edited with a critical and philological introduction, and accompanied by a full verbal index. The *Société de l'Histoire de Normandie* is to be congratulated on the learned editor's performance.

We have also received:—

A treatise on the law relating to Pleasure Yachts. By C. F. Jemmett and R. A. B. Preston. London: Sweet & Maxwell, Lim. La. 8vo. xii and 185 pp. (10*s.* 6*d.*)—This is a second and enlarged edition of Yachting Under Statute. It is intended as a handbook of the law relating to yachts and yachting for the use of yacht owners. A yacht owner may jog along for a long while without even knowing that a Merchant Shipping Act exists, but there are occasions when it is very necessary for him to know a little law, particularly if he 'goes foreign' and has to do with custom house officers and consuls. This, and much other law besides, our authors supply in a readable and rather sumptuous little volume. The Merchant Shipping Acts were certainly not drawn primarily for yachts or yachtsmen; nor, seemingly, did the draftsman often give yachts a thought; consequently some of the clauses of those Acts read oddly when applied to yachts, e. g. Merchant Shipping Act, 1894, s. 426, which imposes a duty on the 'managing owner or ship's husband.'

We turned with some interest to see what view the authors took of the legal status and authority of the owner on board his own vessel. His authority, in fact, depends entirely upon the manner of man he is. Whether he calls himself master or not, whether he holds a Board of Trade certificate or not, matters little. His crew will obey him in times of stress and danger, if he has shown himself fit to command his ship, and not otherwise. Whether or no he has, as our authors assert (p. 38), 'vested in him the supreme control of the yacht, and, as employer both of the master and crew, can by law require them to carry out his orders,' is not free from doubt. Whatever the law may be as to this, the fact is as above stated.

The Official Reports of the High Court of the South African Republic. Translated into English, with Index and Table of Cases, by WALTER S. WEBBER, and revised by the Hon. J. G. KOTZÉ, K.C. Vol. II. 1895. London: Stevens & Haynes. 1903. 8vo. xii and 335 pp. (£2 10*s.* net.)—This is the second volume of Mr. Webber's translation of the reports of the High Court of the Transvaal, and embraces the year 1895. The volume contains some eighty or ninety cases. Many of these are decisions on points of domestic law and procedure, but some are of more than local interest. *Hess* v. *The State* (p. 112) raised questions of constitutional importance as to the relative functions of the Executive and Judiciary. In one case of negligence we find the Court expressly following the decision of the Court of Appeal in *Davey* v. *L. & S. W. Ry. Co.* 12 Q. B. Div. 70, and in another adopting the principles decided by the Exchequer Chamber in *Readhead* v. *Midland Ry. Co.* L. R. 4 Q. B. 379. These translations should be useful to English lawyers interested in the laws of our new Colonies.

A selection of Leading Cases on various branches of the law: with notes by JOHN WILLIAM SMITH. Eleventh Edition. By THOMAS WILLIAM CHITTY, JOHN HERBERT WILLIAMS, and HERBERT CHITTY. Two vols. London: Sweet & Maxwell, Lim. 1903. La. 8vo. Vol. I, 853 pp.; Vol. II, 865 pp. (+indexes and tables of cases). (£3 10*s.*)—There is no special feature about the eleventh edition of Smith's Leading Cases beyond some useful rearrangement in some of the notes. If the important case of *Clarke* v. *Army and Navy Co-operative Society* (see p. 119 above) had been reported in time to be noticed by the learned editors, they would perhaps have modified the extreme caution of the comment in cases of that class, and endeavoured to state a positive rule of responsibility for the sale or circulation of dangerous goods. It is curious that *Dixon* v. *Bell*, which Mr. Melville M. Bigelow treats as a leading case, was ignored by the late Mr. J. W. Smith, and is still ignored by his editors.

Mayne's Treatise on Damages. Seventh Edition. By JOHN D. MAYNE and LUMLEY SMITH, K.C. London: Stevens & Haynes. 1903. 8vo. xlvi and 687 pp. (28*s.*)—This new edition has been duly posted up. We should have liked to see *Quinn* v. *Leathem* discussed, but it would have been *de gratia* and not *de jure* for a book on Damages to enter upon the fundamental principles of law which are involved in this line of cases (referred to in a note at p. 9 with the brief introduction 'See further as to trade combinations'). It is curious that *Allen* v. *Flood* is cited in connexion with *Lumley* v. *Gye*, but the conclusive confirmation of the much discussed rule in that case by *Quinn* v. *Leathem* is not mentioned. The no less vexed question of damage from 'nervous shock' is more fully considered. Mr. Mayne seems to approve of *Dulieu* v. *White* [1900] 2 K. B. 669, but to think that the decision of the Judicial Committee in the *Victorian Railways Commissioners'* case, though not to be relied on as laying down any general rule of law, may be distinguished on the facts.

A Handy Book on the Formation, Management, and Winding up of Joint Stock Companies. By F. GORE BROWNE and WILLIAM JORDAN. Twenty-fifth Edition. London: Jordan & Sons, Lim. 1903. 8vo. xl and 604 pp. (5*s.* net.)—Editions of this book follow one another at short intervals—the twenty-fourth edition appeared only last year. This edition has been brought up to date, recent decisions being incorporated up to July, 1903. Attention is called in the Preface to the uncertain state of the law as to payment of dividends when capital has been lost, having regard to the decisions of the H. L. in *Dovey* v. *Cory* [1901] A. C. 477 and of Farwell J. in *Bond* v. *Barrow Haematite Steel Co.* [1902] 1 Ch. 353.

Encyclopaedia of the Laws of England, being a new abridgment by the most eminent legal authorities. Vol. XIII. Supplement. Edited by A. W. DONALD, with an exhaustive index to the entire work prepared by WILLIAM BOWSTEAD. London: Sweet & Maxwell, Lim.; Edinburgh: Wm. Green & Sons. 1903. La. 8vo. 583 pp. (20*s.*)—This volume contains recent legislation and case law affecting the subjects dealt with in the preceding twelve volumes—practically all the recognized heads of the law. Cases have been brought up to the end of 1902, and legislation to the end of the session of that year. Nearly half the volume consists of a very complete index to the thirteen volumes. Such an index adds much to the utility of the work.

Notes on Perusing Titles. By LEWIS E. EMMET. Fifth Edition. London: Jordan & Sons, Lim. 1903. 8vo. xlviii and 404 pp. (12*s.* 6*d.* net.)—This is a practical little book, full of information and useful hints. It tells the conveyancer the things that he really wants to know. The 'Reminders,' pp. 254 sqq., are no doubt especially useful to the conveyancer with a bad memory. The fact that five editions have appeared within eight years shows a full measure of appreciation by the profession.

Mr. Serjeant Stephen's New Commentaries on the Laws of England. Fourteenth Edition. Under the general editorship of EDWARD JENKS. Thoroughly revised and modernized and brought down to the present time. Four vols. London: Butterworth & Co. 1903. 8vo. Vol. I, ccxxxvi and 563 pp.; Vol. II, xx and 782 pp.; Vol. III, xviii and 776 pp.; Vol. IV, xiv and 649 pp. (£4 4*s.*)—Review will follow.

Historical Introduction to the Roman Law. By F. P. WALTON. Edinburgh and London: Wm. Green & Sons. 1903. 8vo. xi and 256 pp. (7*s.* 6*d.* net.)

Précis de Législations Commerciales Étrangères. Par EMILE PICARDA. Ouvrage contenant les textes des conventions internationales de Berne sur le transport international des marchandises par chemins de fer et de Paris pour la protection de la propriété industrielle. Paris: L'Emancipatrice. 1903. 8vo. 319 pp. (8 fr.)

Littleton's Tenures in English. Edited by EUGENE WAMBAUGH. Washington, D. C.: John Byrne & Co. 1903. 8vo. lxxxiv and 341 pp.

The Data of Jurisprudence. By WILLIAM GALBRAITH MILLER. Edinburgh and London: Wm. Green & Sons. 1903. 8vo. xiv and 477 pp.

Gold Coast Native Institutions. By CASELY HAYFORD. London: Sweet & Maxwell, Lim. 1903. 8vo. xvi and 418 pp. (15*s.*)

The Law of Torts. By MELVILLE MADISON BIGELOW. Second Edition. Cambridge: at the University Press. 1903. 8vo. xxvii and 422 pp. (12*s.* 6*d.*)

The Acts relating to the House Tax, with notes, &c., incorporating the House Tax Laws of the late STEPHEN DOWELL. By JOHN EDWIN PIPER. London: Butterworth & Co. 1903. 8vo. xxxvi, 132 and 22 pp. (10*s.* 6*d.*)

A Manual for Colonial Commissioners. By GEORGE EUGENE SOLOMON. London: Sweet & Maxwell, Lim. 1903. 8vo. viii and 87 pp. (3*s.* net.)

A Digest of the Law of Easements. By L. C. INNES. Seventh Edition. London: Stevens & Sons, Lim. 1903. 8vo. xx and 142 pp. (7*s.* 6*d.*)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
His address is 13 Old Square, Lincoln's Inn, *not Oxford.*