

UNIVERSITY GAZETTE.

VOL. IV.—NEW SERIES.

MONTREAL, FEBRUARY 23, 1878.

No. 8.

PRIVATE INTERNATIONAL LAW.

(An Essay read by PROFESSOR W. H. KERR, Q. C.,
D. C. L., before the *Atheneum Club, Montreal.*)

The increase of commerce between civilized nations, the tide of emigration from Europe to America, and the facilities afforded for the investment of capital in the funds and securities, public and private, of the different States of the world, have all tended to increase immensely the number of legal questions involving the consideration of the laws and customs of States other than the one wherein such questions are presented for decision. In France, previous to the Revolution, owing to the division of the kingdom into the *pays du droit écrit*, and the *pays du droit Coutumier*, and the differences existing between the several *Coutumier* into which the *pays Coutumier* was divided, legal questions frequently arose in one part of France which necessitated for their decision reference to the law of another division of the kingdom. It is not to be wondered at, then, that many of the old French writers should have treated of such questions, and laid down rules for their decision. Bartolus, the Voets, Huberus, Hertius, and others outside of France, also discussed the so-called Conflict, or Collision of Laws, whilst, in the last seventy years, Savigny, Puchta, Wächter, Bar, Story, Burge, Westlake, Kent, Thöl, Phillimore, Fælix, Massé and others, have cast light on this most difficult subject.

To begin from the beginning, to trace the gradual formation of what may be called territorial law, would exceed the limits of a paper such as this, and I must content myself with asking you to take for granted that by the laws of all civilized States persons have rights, and are subject to duties.

Each one of you, I am sure, will admit that the state of society in which he lives gives him certain rights; and, at the same time, imposes upon him certain duties.

Every human being is a person in law—the capacity for the enjoyment of rights commences for the physical person at birth; and terminates only at death.

A right, in the subjective sense, is a power vested in a person by virtue of a legal enactment (right in an objective sense). Every right belonging to one person imposes a duty on some other person or persons. Thus the right A. has to possess and enjoy his house imposes on all other persons the duty of refraining from disturbing him in such possession and enjoyment; and in the event of B. so disturbing A., an action lies by A. v. B. for the violation of A.'s right.

A right, whose correlative duty imposes upon all persons the necessity of refraining from disturbing the person in whom such right is vested, is termed an absolute right; whilst a right whose correlative duty is imposed solely upon one or more persons (not upon all) is styled a relative right.

The violation of an absolute right creates an obligation between the person in whom is vested such right and the person who violates it.

An obligation in its full technical meaning is a legal chain by which one or more certain persons are bound towards one or more other certain persons to give, to do, or not to do a certain thing.

The obligation gives a right to the one set of persons, called the creditor, to compel the other set, called the debtor, to give, to do, or not to do the certain thing which forms the object of the obligation, and it imposes on the debtor the correlative duty of giving, doing, or not doing that certain thing.

The relations of persons to one another, originating in rights and duties, are styled legal relations. (*Rapports de droit.*)

As Savigny remarks, 8th volume, section 344, "It is the function of the rules of law to govern legal relations. But what is the extent or sphere of their authority? what legal relations (cases) are brought under their control? The force and import of this question becomes apparent when we contemplate the nature of positive law, which does not happen to be one and the same all over the world, but varies with each nation and state; being derived in every community, partly from principles common to all mankind and partly from the operation of special agencies."

The question to be solved, in the first instance, then, in each case is by what law are the particular legal relations under consideration governed? If they have arisen within the State wherein they present themselves for consideration, and have not been exposed to the operation of any foreign law, the municipal law of that State is alone to be regarded as the governing power. If they have been formed wholly in a foreign State, the law of that State must be regarded generally as the governing power. Cases may arise in which the legal relations between persons are governed by the laws of three or more States. Where, then, it becomes necessary to submit legal relations to the application of foreign municipal law, the case falls within the domain of Private International Law.

Private International Law may be defined to be "That body of rules common to the laws of all States regulating the application of foreign municipal law to legal relations."