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CURRENT TOPICS AND CASES.

Lord Chief Justice Russell has everywhere had a cordial reception in America, and has made a most favorable impression. An observer of the highest order of intelligence and experience, with unusual opportunities of observation, his lordship will undoubtedly gather a store of knowledge both extensive and accurate of cis-atlantic affairs—knowledge which will prove useful to himself in the future, and probably be serviceable to others. It is to be hoped that other gentlemen holding high judicial office in England will follow the example of Lord Russell, and occasionally spend a portion of their vacation on this side of the Atlantic.

The Supreme Court of Canada is well up with its business, so that a temporary interruption of the sittings, if it should occur, will be less serious than it otherwise would be. Unfortunately, there seems to be some danger of a partial dislocation of the Court. The health of Mr. Justice Gwynne, who has been away on leave of absence, is said to be still not very good, and Mr. Justice Taschereau has also asked for leave. In addition to this, Mr. Justice King may be obliged to absent himself in

connection with his duties as commissioner on the arbitration of the Behring Sea claims. To make provision for such an emergency as the absence at one time of three members, the Minister of Justice has introduced a measure authorizing the appointment of *ad hoc* judges. It is necessary that the government should have this power, but it is to be hoped that occasion for its exercise will not arise, as a Supreme Court depending for its working existence on the presence of temporary assistants will lose much of its vitality.

We made brief reference some time ago to the numerous changes which have occurred in the Supreme Court within a few years, after a long period of stability. Some further alterations will naturally take place in this tribunal in the near future. The present Chief Justice was appointed a puisne judge of the court in 1875, and has served 21 years. He was appointed Chief Justice in 1892. Mr. Justice H. E. Taschereau was appointed a puisne judge in 1878, and has served 18 years in the Supreme Court, besides seven years in the Superior Court, making 25 years in all. Mr. Justice Gwynne was appointed a puisne judge of the Supreme Court in 1879, and has served nearly 18 years in that court, besides more than ten years in the Common Pleas Division of Ontario, making nearly 28 years of judicial service. The other three members of the court have all been appointed recently.

Mr. Justice Hawkins seems to be in favour of what resembles a modified form of arbitration as applied to jury trials in civil cases. He says: "I do not like the notion of diminishing the number of jurors now required to sit upon a case. But in civil cases I do not see why, *by consent of both parties* in any particular case, the jurors should not be any number not exceeding twelve. Nor do I see any reason why, with the like consent, the verdict should not be—after deliberation for a fixed period of

time—given by a majority." The difficulty of getting twelve jurors together in some cases is one of which we have had experience in Montreal. There does not seem to be any valid reason why the parties may not consent to go on with ten or eleven jurors if there be one or two lacking, or even to accept beforehand any lesser number than twelve. But, under our system, there would have to be some provision as to the proportion necessary to find a verdict. Mr. Justice Hawkins' suggestion that the parties be at liberty to agree to a majority verdict is a simple solution of the question. The law of this province has long sanctioned a verdict (in civil cases susceptible of trial by jury) by not less than three-fourths of the jury—nine out of the twelve. This system has worked well, and we are disposed to think that it is preferable to one requiring absolute unanimity, or to a rule permitting a simple majority to find a verdict. To reduce the jury to a number less than twelve leaves more to the chance of individual prejudice, but if the parties consent beforehand they cannot reasonably complain.

Referring to the form of trial in the *Jameson* case the *Law Journal* remarks that except as to the constitution of the Bench, a trial at Bar does not differ from any other trial of an indictment in the High Court. "Even before the Great Charter it was not uncommon to remove an indictment from the county in which it was found for trial *coram rege*, and a precedent of this will be found in Maitland's 'Select Pleas of the Crown.' In such a case the trial was before the full Court, as is shown in the interesting illumination of the Court of King's Bench published in the late Mr. Serjeant Pulling's work on the degree of the Coif. But after the Statute of Nisi Prius (13 Ed. I. stat. 1, c. 30), which did not bind the Crown, trials at Bar at the instance of the subject were restricted to cases requiring great examination, and have gradually become very rare, or to state the law with more historical

accuracy (*Regina* v. *Castro*), the award of a writ of Nisi Prius became more and more a matter of course, the old practice as to the trial of indictments before the Court itself became a rarer and rarer exception, and the most modern precedents are those of *Regina* v. *O'Connell* (1843), *Regina* v. *Castro* (1874), and *Regina* v. *Parnell* (1880), two of them Irish cases. But the right, as already stated, remains unaffected by the Judicature Acts, except that, instead of having the whole Queen's Bench Division sitting, as occasionally happens in the Court for Crown Cases Reserved, a Divisional Court of two or three judges constitute the Court. The incidents of the trial in no way differ from those in an ordinary trial of an indictment in the Queen's Bench Division, except that each judge is entitled to charge the jury, which in some old State trials, as of the seven bishops, has led to conflicting directions from the Bench. The right which exists in *Regina* v. *Jameson* (a misdemeanor case) to apply for a new trial is not in any way affected by trial at Bar, and such an application *could* be made to any judges of the Division, even including those who sat at the trial. This was actually done in *The Attorney-General* v. *Bradlaugh*."

APPOINTMENTS.

The *Canada Gazette* announces the appointment of Mr. C. A. Geoffrion, Q.C., of Montreal, to be a member of the Queen's Privy Council for Canada (appointment dated 13 July, 1896), and of Mr. Ludovic Brunet, of Quebec, to be a commissioner to act judicially in extradition matters uuder the Extradition Act within the Province of Quebec (appointment dated 20 August, 1896.

QUEEN'S COUNSEL.—Two appointments of Queen's Counsel appear in the *Canada Gazette* of 29th August. Charles Fitzpatrick, of the City of Quebec, and Augustine Samuel Hurd, of the City of Sherbrooke. The appointment of Mr. Fitzpatrick is dated 7th March, 1893, and that of Mr. Hurd, 11th June, 1896.

PUBLICATIONS.

LE DROIT CIVIL CANADIEN.—By P. B. MIGNAULT, Esq., Q.C.; publisher, C. Theoret, Montreal. Vol. 2.

The appearance of the second volume of Mr. Mignault's work recalls attention to its general scope and plan. For the benefit of those who are not acquainted with the first volume it may be stated that it is a treatise on the civil law of this province, based on the text of Mourlon's *Répétitions Ecrites sur le Code Civil* as far as that is applicable, but it also contains a large amount of original matter—probably one third of the whole being new. The formidable nature of the undertaking will be appreciated when it is remembered that with the exception of the unfinished work of the late Judge T. J. J. Loranger, there is no general treatise on the civil law of this province. Under the circumstances it was necessary to enter upon ground almost unexplored and to make extensive researches into the origin and history of the law.

The first volume opens with an introduction of 57 pages, in which special attention is given to the sources of French and Canadian law, and to the preparation of our civil code. Then follows the Preliminary Title, and the first five Titles of Book I, concluding with marriage. The Titles comprised in the second volume are from the 6th to the 11th of the first book, and the first three Titles of the second book. The subjects treated are separation from bed and board; filiation; paternal authority; minority, tutorship and emancipation; majority, interdiction, curatorship and judicial advisers; and corporations. And in the second book of the Code the subjects discussed are: The distinction of things; ownership and usufruct, use and habitation. The work, as already stated, is based on the *Répétitions Ecrites* of Frederic Mourlon, but considerable modifications and additions have been made, and some of the titles, such as that on corporations, are wholly original. The commentary on the subject of separation from bed and board is in great part new. A number of important decisions bearing on this branch of the law have been rendered by our courts, and these are noted and analyzed. The title of filiation also presents a number of interesting questions, and the reader will find the latest cases—such as *Lahay* v. *Lahay* —noticed and discussed. Paternal authority is a subject which has not yet given rise to a large number of controversies in our courts; nevertheless, several interesting cases have arisen,

and they will be found carefully stated and examined in the work of Mr. Mignault. In the subsequent titles of tutorship, interdiction, corporations, distinction of things and usufruct, the student will obtain much valuable assistance. Mr. Mignault does not pass in silence over questions yet unsolved by the courts, but gives his opinion, with the reasons which lead him to the conclusions stated.

This work bids fair to be the most important treatise on the law which has appeared in this Province, and we trust that it will proceed without interruption to its conclusion. We are glad to know that it has been most cordially welcomed by the profession, and is already in general use. It has received the approval of the judges, and has been cited in several cases. Its merits alone have won this approbation, and we have no doubt that, with time, the favor accorded to it will increase. All students of law, as well as advocates, should obtain a copy, as it will immensely facilitate and simplify their labors.

"CONTRAINTE PAR CORPS," by MR. RODOLPHE LEMIEUX, Advocate.—Publisher, C. Theoret, Montreal.

This is the title of a thesis presented on the 1st May last, by Mr. Lemieux, to the law faculty of Laval University, on the occasion of his receiving the diploma of doctor of laws. In a volume of about 200 pages, Mr. Lemieux has fully treated the difficult subject selected by him. The author begins with a historical review of the question. In this review he sketches the legislation of Persia, of China, of Egypt, of Greece, and also of the Jewish people. This is followed by a notice of Roman legislation under paganism as well as under Christianity. Then, after a glance at the various systems of the Middle Ages, he deals with the modern system of law, and concludes his examination of the subject by setting forth the various phases of Canadian legislation.

In the second part of his work, Mr. Lemieux examines the cases in which *contrainte par corps*, or coercive imprisonment, is authorized by law. In the third part he indicates the mode of execution. The two latter parts of the work form an excellent commentary on the second title of the Code of Procedure. This is what may be termed the practical part of the work; the reader finds the solution of difficulties which present themselves, the jurisprudence on the subject is accurately stated, and when it

seems to vary the author lays down the principle which he conceives should govern.

By way of conclusion, Mr. Lemieux, in the final portion of his work, treats the question whether *contrainte* should be maintained in this country. This is a question of considerable importance, and it is discussed in an able manner. It may be observed that according to a table which the author has inserted at the end of his work, the cases of capias and coercive imprisonment are not increasing in number, but rather the reverse. For example, in 1842, there were 45 cases of capias in Montreal, in 1845 there were 51 cases, and in 1848 there were 50 cases. On the other hand, in 1890 there were only 26 cases of capias and 6 of *contrainte;* in 1893 there were only 14 cases of capias and none of *contrainte;* in 1894 there were 11 cases of capias and 2 of *contrainte;* and in 1895 there were 13 cases of capias and 7 of *contrainte.*

We have no doubt that this treatise will have a favorable reception from the profession. It may be added that the typographical execution is neat and does credit to the establishment of Mr. Theoret, the publisher.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

LONDON, 28 July, 1896.

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, and SIR RICHARD COUCH.

STEWART (plaintiff in court of first instance), appellant, and MACLEAN (defendant in court of first instance), respondent.

Partnership — Judicial abandonment — Dissolution — Composition — Subrogation—Confusion of rights.

A partner in a firm which made a judicial abandonment was indebted to the firm at the time of the abandonment in an amount overdrawn upon his personal account. Subsequently he made a composition with the creditors of the firm, and the curator transferred to him the assets and estate of the firm "as they existed at the time the curator was appointed," and the creditors at the same time discharged both him and his partners from all liability in respect of the partnership.

HELD (*reversing the judgment of the Supreme Court of Canada, 25 Can. S. C. R. 225, and restoring the judgment of the Court of Queen's Bench, Q.R., 3 Q.B. 434, which affirmed the judgment of the Superior Court, Jetté, J., Q.R., 4 S.C. 36*): *that the assignment of the estate to the curator and the discharge by the creditors, had not the effect of releasing the partners from their liability to account inter se, having regard to the articles of partnership and their respective contributions and drawings.*

This was an appeal from a judgment of a majority of the Supreme Court of Canada (Chief Justice Strong and Mr. Justice Taschereau dissenting) of June 26, 1895, which dismissed the action taken by the appellant against the respondent and reversed the judgments of the Court of Queen's Bench for the province of Quebec (Appeal Side) and of Mr. Justice Jetté in the Superior Court.

Mr. Donald Macmaster, Q.C., and Mr. Beaudin, Q.C. (of the Canadian Bar), were counsel for the appellant; the Hon. Edward Blake, Q.C., (of the Canadian Bar) and Mr. Montague Muir Mackenzie for the respondent.

LORD DAVEY now delivered their Lordships' judgment. This appeal, he said, arises out of an action by one of three partners against another partner for recovery of a sum of money under the following circumstances. By articles of partnership, dated December 30, 1886, McLean (the present respondent), Stewart (the present appellant), and Smith (who was called as *mis-en-cause*) entered into a partnership for five years. The three partners agreed to contribute to the capital certain amounts which were ascertained at the following sums:—MacLean, $4,180; Stewart, $25,292; Smith, $30,350. The profits and losses were divisible in the following proportions, viz.:—McLean one-half, and Stewart and Smith each one-quarter.

On the 22nd of July, 1891, the partners made an "abandonment" of all their property to their creditors. Their movable property was described as consisting of their stock-in-trade in store in the city of Montreal, book debts, and bills receivable. The list of creditors did not contain any of the separate creditors of the partners. At the date of the abandonment the capital accounts of the partners were as follows, viz.:—MacLean had a debtor balance against him of $29,079, or, in other words, had overdrawn to that amount: Stewart had a

credit balance of $17,185; and Smith a credit balance of $27,379.

MacLean made an arrangement for purchasing the assets for a sum which would be sufficient for payment of the privileged debts and expenses in insolvency in full and of 50c in the dollar to the other creditors. The creditors agreed to accept this composition in satisfaction of their claims and to discharge all the partners, and the proposal was approved by the proper authorities. Accordingly, by a deed of November 6, 1891, the curator, in consideration of the agreed payments by MacLean, transferred to him all the assets and estate of the late firm as it existed at the time the curator was appointed.

There was no mention made throughout the proceedings of any separate estate of the partners or of their separate debts. The right of action by the partners for an account and partition, after payment or satisfaction of all the debts, was not a right of action of the firm and did not pass by the assignment to the respondent.

In April, 1892, this action was commenced by the appellant against the respondent to recover $11,213, being the proportion of respondent's overdraft due to him if the same were brought in and divided between the appellant and Smith in proportion to the sums standing to their credit respectively at the date of the abandonment. Smith was called as *mis-en-cause*, but apparently took no part in the litigation.

The action was heard before Mr. Justice Jetté, who gave judgment for the appellant for $10,261. This sum was arrived at in a somewhat different mode than that suggested in the appellant's declaration. In the Court of Queen's Bench Chief Justice Lacoste pointed out that the action was irregular in form, and that it ought to have been an action for account and partition between all the partners, but considered that justice might be done between the partners in the action as framed. The learned Chief Justice also pointed out what he considered to be the proper form of account and relief to which the appellant was entitled, but, as the result would be a sum in excess of the judgment, the Court dismissed MacLean's appeal.

The judgment of the Queen's Bench was reversed by a majority of the Supreme Court.

Their Lordships have no hesitation in saying that they agree with the judgment of the Court of Queen's Bench and the minority of the Judges in the Supreme Court.

The form of the action was no doubt wrong, but Smith had an opportunity of intervening had he desired to do so, and the respondent's counsel could not point out to their Lordships any injustice that would be done to any party by giving relief in the action as framed.

On the merits, the case appears to their Lordships one of extreme simplicity. The partnership has been dissolved, all the debts have been discharged or satisfied, and there remains nothing to be done but to adjust the rights of the partners *inter se*, having regard to the articles of partnership and their respective contributions and drawings. The fact of one of the partners having been the purchaser of the assets for the sum required for satisfaction of the debts does not seem to affect the question any more than if the purchaser had been a stranger. MacLean has not only drawn out his capital, but has also drawn out $29,079 in addition. He must at least pay back the amount of his overdraft, to be divided between his partners on whom the whole loss has been allowed to fall. It is unnecessary for the purpose of the present appeal to go further.

The exact form of the account (if any account had been necessary) may be a matter of nicety, but it is unnecessary to consider that, as the learned counsel for the respondent did not suggest that an alteration in the form would result in any benefit to his client.

Their Lordships, therefore, will humbly advise her Majesty that the order appealed from be reversed, and the judgment of the Court of Queen's Bench be restored. The respondent must pay the costs in the Supreme Court and of this appeal.

THE LORD CHIEF JUSTICE OF ENGLAND ON INTERNATIONAL LAW.

[Continued from page 256.]

Like all law, in the history of human societies, it begins with usage and custom, and unlike municipal law, it ends there. When, after the break-up of the Roman Empire the surface of Europe was partitioned and fell under the rule of different sovereigns, the need was speedily felt for some guiding rule of international conduct. International law was in a rudimentary stage; it spoke with ambiguous voice, it failed to cover the whole ground of doubtful action. It needed not only an interpreter of authority but one who should play at once the part of mediator, arbiter and judge. The Christian religion has done much to soften and human-

ize the action of men and of nations, and the papal head of christendom became, after the disruption of the Roman Empire, the interpreter and almost the embodiment of international law. The popes of the middle ages determined many a hot dispute between rival forces without loss of human life. Their decrees were widely accepted. Their action, however, at the best, could not adequately supply the place of a rule of conduct to which all might indifferently appeal. And when, later, with the reformation movement, the time came when the pope could not command recognition as the religious head of a united christendom, the necessity of the time quickened men's brains and, under the fostering care of the jurists of many lands, there began to emerge a system which gave shape and form to ideas generally received and largely acted on by nations.

What Sir James Stephen has eloquently said of religion may truly be predicated of international law. The jurists set to music the tune which was haunting millions of ears. It was caught up, here and there, and repeated till the chorus was thundered out by a body of singers able to drown all discords and to force the vast unmusical mass to listen to them.

Although Hugo de Groot is regarded as the father and founder of international law, he was preceded by two men born into the world forty years before him, namely, Ayala (the Spanish Judge-Advocate with the army of the Prince of Parma) and Suarez, (a Jesuit priest, also a Spaniard) both born in 1548, whose labors ought not to be forgotten.

Suarez in his "*De Legibus et Deo Legislatore*" and Ayala in his "*De Jure et Officiis Bellicis et Disciplina Militari*" has done good work.

Suarez, from the point of view of the Catholic theologian, assumes that the principles of the moral law are capable of complete and authoritative definition and are supported by the highest spiritual sanction. He therefore treats of the *lex naturalis* as a definite substantive law, sufficient and complete in its own sphere and binding on all men. But he regards international law as a code of rules dealing with matters outside the sphere of the natural law—matters not strictly right or wrong in themselves, but becoming so only by virtue of the precepts of the law which he considers to be founded upon the generally recognized usages of nations. In the following passage, which is interesting from the singular modernness of its spirit, he explains his view of the origin of international law:

"The foundation of the law of nations lies in this, that the human race, though divided into various peoples and kingdoms, has always a certain unity, which is not merely the unity of species, but is also political and moral; as is shown by the natural precept of mutual love and pity, which extends to all peoples, however foreign they may be to one another, and whatever may be their character or constitution. From which it follows that although any State, whether a republic or kingdom, may be a community complete in itself, it is nevertheless a member of that whole which constitutes the human race; for such a community is never so completely self-sufficing but that it requires some mutual help and in-

tercourse with others, sometimes for the sake of some benefit to be obtained, but sometimes, too, from the moral necessity and craving which are apparent from the very habits of mankind.

"On this account, therefore, a law is required by which States may be rightly directed and regulated in this kind of intercourse with one another. And although to a great extent this may be supplied by the natural law, still not adequately nor directly, and so it has come about that the usages of States have themselves led to the establishment of special rules. For, just as within an individual State custom gives rise to law, so for the human race as a whole, usages have led to the growth of the laws of nations; and this the more easily, inasmuch as the matters with which such law deals are few and are closely connected with the law of nature, from which they may be deduced by inferences which, though not strictly necessary, so as to constitute laws of absolute moral obligation, still are very conformable and agreeable to nature, and therefore readily accepted by all."

Nor ought we to overlook the work of a writer even earlier than these. I mean Franciscus à victoria. Hall says of him that his writings in 1533 mark an era in the history of international ethics. Spain claimed, largely by virtue of Papal grant and warrant, to acquire the territory and the mastery of the semi-civilized races of America. He denied the validity of the Papal title; he maintained the sovereign rights of the aboriginal races, and he claimed to place international relations upon the basis of equal rights as between communities in actual possession of independence. In other words, he, first, clearly affirmed, the juridical principle of the complete international equality of independent states, however disproportionate their power.

Grotius undoubtedly had had the field of international relations explored by these, amongst other writers who had preceded him, but to him is certainly due the credit of evolving in his "*De Jure Belli ac Pacis*" a coherent system of law for the aggregation of states.

But I turn from this interesting line of thought, to consider, first, the part played by the United States in shaping the modern tendencies of international law, and, next, whither those tendencies run. I have already spoken of the international writers of whom you are justly proud. It is not too much to say that the undoubted stream of tendency in modern international law to mitigate the horrors of war, to humanize or to make less inhuman its methods, and to narrow the area of its consequential evils, is largely due to the policy of your statesmen and the moral influence of your jurists.

The reason why you thus early in your young history as an independent power took so leading and noble a part in the domain of international law is not far to seek;—it is at once obvious and interesting.

In the first place, you were born late, in the life of the world, into the family of nations. The common law of England you had indeed imported and adopted as colonists in some of the States, but subject as you then were to the mother country, you had no direct interest or voice in inter-

national relations, which were entirely within the domain of the sovereign power. But when you asserted your independence, the laws of the family of nations, of which you then became a member, were bound up with and became in part the justification for your existence as a sovereign power, and assumed for you importance and pre eminence beyond the common law itself. Further, your remoteness from the conflicts of European powers and the wisdom of your rulers in devoting their energies to the consolidation and development of home affairs gave to your people a special concern in that side of international law which affects the interests, rights and obligations of neutrals; and thus, it has come to pass that your writers have left their enduring mark on the law of nations touching allegiance, nationality, neutralization and neutrality, although as to these there are points which still remain indeterminate.

It is substantially true to say that while to earlier writers is mainly due the formulation of rules relating to a state of war, to the United States,—to its judges, writers and statesmen, we largely owe the existing rules which relate to a state of peace and which affect the rights and obligations of powers, which, during a state of war, are themselves at peace.

On the other hand, while in Great Britain, writers of great distinction on international law are not wanting, and while the judges of her Prize Courts have done a great work in systematizing and justifying, on sound principles, the law of capture and prize, it is true to say that British lawyers did not apply themselves, early, or with great zeal, to the consideration of international jurisprudence.

Nor, again, is the reason far to seek. Great Britain had existed for centuries before international law, in the modern sense, came into being. The main body of English law was complete. The common law, springing from many sources, had assumed definite and comprehensive proportions. It sufficed for the needs of the time. Neither English statesmen nor English lawyers experienced the necessity which was strongly felt on the continent of Europe—the constant theatre of war—for the formulation of rules of international conduct.

The need for these was slowly forced upon England, and, it is hardly too much to say that, to the British admiral, accustomed to lord it on the high seas, international law at first came, not as a blessing and an aid, but, as a perplexing embarrassment.

Notwithstanding all this, there is a marked agreement between English and American writers as to the manner in which international law is treated. They belong to the same school—a school distinctly different from that of writers on the continent of Europe. The essential difference consists in this: Whereas in the latter, what I shall call the ethical and metaphysical treatment is followed, in the former, while not ignoring the important part which ethics play in the consideration of what international law ought to be, its writers for the most part carefully distinguish between what is, in fact, international law from their views of what the law ought to be. Their treatment is mainly historical.

By most continental writers, and by none more than Hautefeuille,

what is, and what he thinks ought to be law, theory and fact, law and so-called rules of nature and of right, are mixed up in a way at once confusing and misleading.

One distinguished English writer indeed, the late Sir Henry Maine, thought that he had discovered a fundamental difference between English and American jurists as to the view taken of the obligation of international law.

His opinion was based on the judgments of the English judges in the celebrated Franconia case, in which it was held that the English courts had no jurisdiction to try a foreigner for a crime committed on the high seas although within a marine league from the British coast. The case was decided in 1876 and is reported in 2d vol. of the Law Reports, Exchequer Division, p. 63. The facts were these: The defendant was Captain Keyn, a German subject, in charge as captain, of the German steamship, Franconia. When off Dover the Franconia, at a point within two and a half miles of the beach, ran into and sank a British steamer, Strathclyde, thereby causing loss of life. The facts were such as to constitute, according to English law, the crime of manslaughter, of which the defendant was found guilty by the jury, but the learned judge who tried the case at the Central Criminal Court reserved, for further consideration by the court for crown cases reserved, the question whether the Central Criminal Court had jurisdiction over the defendant, a foreigner, in respect of an offence committed by him on the high seas, but within a marine league of the shore. All the members of the court were of opinion that the chief criminal courts, that is to say, the Courts of Assize and the Central Criminal Court, were clothed with jurisdiction to administer justice in the bodies of counties, or, in other words, in English territory; and that from the time of Henry the VIII a court of special commissioners, and, later the Central Criminal Court (in which the defendant had been tried) had been invested by statute with the jurisdiction previously exercised by the Lord High Admiral on the high seas. But the majority held that the marine league belt was not part of the territory of England, and therefore not within the bodies of counties, and also that the admiral had had no jurisdiction over foreigners on the high seas. The minority, on the other hand, held that the marine belt was part of the territory of England and that the admiral had had jurisdiction over foreigners within those limits.

While I do not say that I should have arrived at the conclusions of historical fact of the majority, I am by no means clear that the judges of the United States, accepting the same data as did the majority of the English judges, would not have decided in the same way. But however this may be, the views of the majority do not seem to me to warrant the assumption of Sir Henry Maine that the case fundamentally affects the view taken of the authority of international law.

What it does incidentally reveal is a constitutional difference between the United States and Great Britain as to the methods by which the municipal courts acquire, at least in certain cases, jurisdiction to try and to punish offences against international law.

An example of that difference is ready to hand. Improved and stricter views of neutral duties constitute one of the great developments of recent times.

These views were (for reasons to which I have already adverted) adopted earlier and more fully in the United States than in England. What was thereupon the action of the executive? No sooner had Washington, as President, and Jefferson, as secretary of State, promulgated the rules of neutrality, by which they intended to be guided, than they caused Gideon Henfield, an American citizen, to be tried for taking service on board a French privateer, as being a criminal act, because in contravention of those rules. Political feeling procured an acquittal in spite of the judge's direction.

Later, no doubt, Congress passed the act of 1794, making such conduct criminal, not (as I gather) because it was admitted to be necessary, but simply to strengthen the hands of the executive.

I can hardly doubt how the same case would have been dealt with in England.

Assuming the doing of the acts forbidden by proclamation of neutrality, although infractions of international law, not to be misdemeanors at common law, and not to have been made offences by municipal statute, the judges (I cannot doubt) would have said the act was yesterday legal or at least not illegal, and that municipal law not having declared it a crime, they could not so declare it. According to the law of England a proclamation by the executive, in however solemn form, has no legislative force unless an act of parliament has so enacted. Parliament has in fact so enacted as to orders of the Queen in Council in many cases. But assuming the law to be as I have stated, it points to no failure in England to recognize the full obligation of international law as between States. For, notwithstanding isolated expressions of opinion uttered in times of excitement, it will not to-day be doubted that it is the duty of States to give effect to the obligations of international law by municipal legislation where that is necessary, and to use reasonable efforts to secure the observance of that law.

In England we have an old constitution under which we are accustomed to fixed modes of legislation, and when at last we accept a new development of international law, we look to those methods to give effect to it. Indeed, that habit of looking to legislation to meet new needs and developments, even in internal concerns, a habit confirmed and strengthened in the current century, has done much to restrain the judges from that bold expansion of principle to meet new cases, which, when legislation was less active, marked judicial utterances.

On the other hand, with you things are materially different. Your constitution is still so modern that equally fixed habits of looking to legislation have not had time to grow up. Meanwhile that modern constitution is, from time to time, assailed by still more modern necessities, and the methods for its amendment are not swift or easy. The structure has become completely ossified. Hence has risen what I may call a

flexibility of interpretation, applied to the Constitution of the United States, for which I know no parallel in English judicature, and which seems to me to exceed the latitude of interpretation observed by your judges in relation to acts of Congress. I refer as examples, to the emanicipation of the slaves by President Lincoln during the civil war, which was justified as an act covered by the necessities of the case and within the "war power" conferred on the executive by the Constitution; and also to the judicial declaration by the Supreme Court of the validity of the act of Congress making greenbacks legal tender, on the ground that certain express powers as to currency being vested in Congress by the Constitution, the power of giving forced circulation to paper flowed from them as a desirable, if not a necessary, implication. With us no such difficulties arise. Our constitution is unwritten and the legislature is omnipotent. With you the constitution is written and the judicial power interprets it and may declare the highest act of Congress null and void as unconstitutional. With us there can, in the strict sense of the words, be no such thing as an unconstitutional act of Parliament.

I turn now to the consideration of what characterizes the later tendencies of international law. In a word it is their greater humanity.

When Menelik, Emperor of Abyssinia, was recently reported to have cut off the right arms and feet of 500 prisoners, the civilized world felt a thrill of horror. Yet the time was when to treat prisoners as slaves and permanently to disable them from again bearing arms, were regarded as common incidents of belligerent capture. Such acts would once have excited no more indignation than did the inhumanities of the African slave trade before the days of Clarkson and Wilberforce.

Let us hope that it is no longer possible to do as Louis XIV did in his devastations of the Palatinate, or to do so as he threatened to do, break down the dykes and overwhelm with disaster the low countries. Let us hope, too, that no modern Napoleon would dare to decree as the first Napoleon did in his famous or infamous *seront brulées* edict of 1810. The force of public opinion is too strong and it has reached a higher moral plane.

A bare recital of some of the important respects in which the evils of war have been mitigated by more humane customs must suffice.

Amongst them are: (1) the greater immunity from attack of the persons and property of enemy-subjects in a hostile country; (2) the restrictions imposed on the active operations of a belligerent when occupying an enemy's country; (3) the recognized distinction between subjects of the enemy, combatant and non-combatant; (4) the deference accorded to cartels, safe conducts and flag of truce; (5) the protection secured for ambulances and hospitals and for all engaged in tending the sick and wounded—of which the Geneva Red Cross Convention of 1864 is a notable illustration; (6) the condemnation of the use of instruments of warfare which cause needless suffering.

[To be concluded in next issue.]