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CURRENT TOPICS AND CASES.

Associated, apparently, with the idea of Imperial consolidation and Imperial unity, we have heard not a little, in the last year, of Canadian representation on the Judicial Committee of the Privy Council. There can be no objection to the appointment of eminent members of the Colonial bench or bar to this high office, but such appointments, if made, should be carefully separated from the idea of territorial representation, or of special aid to be rendered by a judge so appointed in the adjudication of cases from the section from which he is appointed. If, for example, a Canadian is to be placed on the Judicial Committee with the idea of aiding the judges in Canadian appeals, we venture to think that the bar of Canada, or those members of it who have cases before the Privy Council, will be inclined to protest against the innovation. The glory and the security of the final appeal to England have consisted to a large extent in the confidence of the public that the tribunal cannot be approached or biased by any local consideration or prepossession. In very many cases the members of the Canadian bar attend the hearing of the appeals in which they are concerned, and with the aid of their counsel in England, and the assiduous attention of the judges themselves, ample justice is done to the cases, and we are inclined to believe

that Canadian lawyers would be more content to accept the idea of a Canadian judge on the Imperial board if it were understood that he would not take any part in the hearing of Canadian appeals. We do not wish to be understood as implying that any actual injustice would result from such participation, but we fear that the confidence of the public in the perfect independence of the tribunal might be impaired, and we can see no advantage likely to accrue from the presence of a Canadian on the bench that would offset such a misfortune. The ultimate appeal, as far as possible, must be above the suspicion of those most inclined to suspicion. We have heard lately, even in a serious state paper, an unfortunate reference to the political opinions of Canadian judges. It would be a calamity indeed if the decision of an important cause could be supposed to be affected by the political opinions of the Canadian member of the Judicial Committee. The perfect independence of the tribunal in the past has never been questioned, and this fact has accounted largely for the respect with which its decisions have invariably been received.

There are some minor objections to the presence of a Canadian member of the Committee in Canadian appeals, to which it is hardly necessary to advert. It has been strongly suggested of late that the Judicial Committee should assume the method of an ordinary court, and pronounce a judgment, with liberty to dissentient members to express their individual opinions, and that the form of an apparently unanimous recommendation to Her Majesty should be abandoned. If this suggestion be ultimately approved and carried out, a Canadian member sitting in a Canadian case may find himself in the delicate position of giving the casting vote which reverses the decision of the Supreme Court of Canada. It may reasonably be doubted whether such a decision would carry the weight which attaches at

present to a judgment of the Judicial Committee of the Privy Council. Then, again, we have now a tribunal the members of which, for the most part, have not been engaged in Canadian appeals. The name of Mr. Blake has been freely mentioned in the press as the possible or probable Canadian member. It may be assumed that no appointment could give greater satisfaction. Yet it would frequently happen, if this appointment were made, that the counsel for the appellant would feel that the entire success of his appeal must depend on his ability to show that the argument of that eminent lawyer in some constitutional case in which he was engaged before the Privy Council was unsound. Personally, we do not think that this would make the slightest difference in Mr. Blake's action as a judge, but we can readily understand that it might make a serious difference in the public estimate of the result.

A meeting has been called for Tuesday, 15th September, at Montreal, of persons interested in the formation of a Canadian bar association. Last year, in referring to an effort which proved abortive, to establish a local bar society in Montreal, we suggested (Vol. 18, p. 49), the advantages which might result from an association embracing all the provinces of the Dominion. The visit of Lord Chief Justice Russell to America has directed special attention to the bar association which has existed for some years in the United States, and the occasion does not seem inopportune for the formation of a similar association in Canada.

We omitted to notice the death of Judge Thomas Hughes, County Court Judge of Cheshire, which occurred in the end of March last. To some of those who are able to recall the appearance of his two most famous works, "Tom Brown's School Days" and "Tom Brown at Oxford," it may seem singular to hear of the author end-

ing his career, nearly forty years after their publication, as a county court judge. Judge Hughes was 72 years of age. He was admitted to the bar in 1848, appointed a Queen's Counsel in 1869, and a county court judge in the same year. He sat in Parliament, first for Lambeth, and afterwards for Frome, from 1865 to 1874.

The reluctance with which the judges of superior courts in England relinquish office is illustrated by the fact that since the death of Sir William Grove on the 1st of August only three retired judges of the superior courts survive. They are Lord Field, Sir Edward Fry, and the Right Hon. George Denman. On the other hand, if no changes occur before November, there will then be on the bench no less than ten judges entitled to retiring pensions. If we compare this statement with that of a country nearer to us, we find that in the Province of Quebec alone there are seven judges on the retired list, viz., ex-Justice Baby of the Queen's Bench, and ex-Justices Berthelot, M. Doherty, Chagnon, Papineau, Buchanan and Brooks of the Superior Court. Mr. Justice Berthelot retired from the bench 1st September, 1876, just twenty years ago, and is the oldest ex-judge. There are nine judges of the Superior Court now entitled to retiring pensions, viz., Chief Justice Casault, appointed to the bench in 1870, Justices Routhier and Bélanger, appointed in 1873, Justices Plamondon and Caron, appointed in 1874, Mr. Justice Bourgeois, appointed in 1876, Justices Jetté and H. T. Taschereau appointed in 1878, and Mr. Justice Gill, appointed in 1879. Mr. Justice Mathieu will complete fifteen years' service on the 3rd October next.

COURT OF APPEAL.

LONDON, 4 March, 1896.

Before LORD ESHER, M. R., LOPES, L. J., RIGBY, L. J.

HENDERSON BROTHERS *v.* SHANKLAND & Co. (31 L.J.)

Shipowner and cargo-owner—General and particular average—Contribution—Value of ship, how ascertained—'New for old' allowance.

Appeal from a decision of MATHEW, J., sitting without a jury for the trial of commercial cases.

The plaintiffs were owners of cargo on board a sailimg ship, the *Woodburn*, belonging to the defendants. While on a voyage from Chittagong to Dundee she encountered a hurricane and was considerably damaged. A general average sacrifice was necessary, and was so far successful that the ship was able to put into Calcutta; but it was there found that the cost of repairing her would exceed her value when repaired, and she was accordingly sold as a constructive total loss for 883*l.*

The question then arose how the general average contribution was to be adjusted.

The plaintiffs contended that the value of the ship for this purpose was her value at the time at which she suffered the general average damage, and they arrived at this by deducting from the value of the ship before the storm the estimated cost of repairing the particular average damage. From the sum so found they proposed to further deduct the sum of 883*l.*, which the vessel fetched, and the balance remaining would, they contended, be the amount to be contributed to in general average, it being agreed that of the total damage sustained 63 per cent. was attributable to general average loss.

The defendants, on the other hand, proposed to deduct from the value of the ship before she encountered the storm only the 883*l.* which she fetched, and they contended that 63 per cent. of the sum so found would be the sum to be contributed to in general average. They further contended that, if the cost of repairing the particular average damage was to be taken into account, as the plaintiffs suggested, they were entitled to the benefit of the one-third new for old allowance which is made to the shipowner where the value of a ship is increased by repairs.

Mathew, J., held that the plaintiffs' contention was correct,

and gave judgment in their favour, directing the adjustment to be made according to the method proposed by them.

The defendants appealed.

Their LORDSHIPS dismissed the appeal. The principle of adjustment as contended for by the plaintiffs was the right principle, and as the defendants were not entitled to the benefit of the one-third new for old allowance, the amount in respect of which general average contribution must be paid must therefore, be found by the average adjusters in accordance with the rule laid down by Mathew, J., at the trial.

CHANCERY DIVISION.

LONDON, 9 March, 1896.

Before ROMER, J.

In re THE SEVERN AND WYE AND SEVERN BRIDGE RAILWAY COMPANY. (31 L.J.)

Company—Winding-up—Unclaimed dividends—Statutes of Limitation.

This was a summons taken out by the liquidators in the winding-up of the above company which raised the question whether the claim of a shareholder, or his representatives, to dividends which had been declared more than twenty years ago, but not claimed, was barred by the Statutes of Limitation.

In 1894 an Act was passed (57 & 58 Vict. c. clxxxix.) authorizing the transfer of the undertaking of the company to two other railway companies in consideration of a cash payment. The Act provided that the affairs of the company should be wound up as if it were a company registered under the Companies Acts, 1862 to 1890, and had passed a special resolution for a voluntary liquidation on the day of the passing of the Act. The purchase-money and other assets of the company were, after providing for its debenture and other debts, to be divided among the preference and ordinary stockholders in certain proportions.

Part of the surplus assets consisted of sums representing dividends on ordinary shares of a company which was in 1879 amalgamated with the above company. The dividends were declared prior to November, 1873, but never claimed. The question was whether those sums should be paid to the personal representa-

tives of the shareholders, or be divided among the preferenec and ordinary stockholders as provided by the Act. The unpaid dividends had always appeared in the books, both of the original and the amalgamated company, as a liability of the respective companies.

ROMER, J., said that the dividends were debts due to the shareholders, for which they could have sued the company, and time began to run in favour of the company under the Statutes of Limitation from the time when the dividends became payable. The company had not become a trustee for the shareholders either by the declaration that the dividend was payable or by the entry of their liability in respect thereof in their books. Neither could it be said that the company and the shareholders were in the position of partners, or in an analogous position. The defence of the statutes was, therefore, fatal to the claims of the shareholders' representatives.

DIVIDENDS AND THE STATUTE OF LIMITATIONS.

In re The Severn and Wye and Severn Bridge Railway Company, before Mr. Justice Romer, is another reminder that a shareholder cannot sleep on his rights. Not that shareholders as a rule are in the habit of doing so. On the contrary, when dividends are unpaid they manifest a burning desire to know the reason why; but for some mysterious reason a shareholder in the *Severn Case* had not done so. There the dividends were declared year after year for forty years, and carried to the shareholder's account in the books of the company, and the shareholder's executor did not see why he should not have them; but the company by its liquidator said, 'No; the dividends were a debt for which you might have brought your action. You are barred now.' To this the shareholder rejoined: 'The company, by declaring the dividend and crediting it in the books to me, constituted itself a trustee, and no lapse of time can bar such a trust. Besides, we were partners with an open account, and while we were so the statute does not apply.' But neither contention found favour with the Court. It refused to find a trust, and it differentiated an incorporated company from an unincorporated partnership, like that in *Renny* v. *Pickwick*, 16 Beav. 246. The Statute of Limitations, though it often wears the semblance of hardship, is a very salutary

statute. Its policy is not only to discourage stale demands, but to quiet titles and end litigation; and, though in the *Severn Case* there was no adverse possession, no quieting of title, we cannot sever the elements which make up the policy of the statute, and say, 'This or that element was not present; therefore the statute does not apply.' 'Vigilantibus non dormientibus' is a principle which is worth inculcating, even at the expense of some lost dividends.—*Law Journal* (*London*).

EVIDENCE IN CRIMINAL CASES.

Regina v. *Mortimer* (the World's Great Marriage Association case), heard at the last sittings of the Central Criminal Court, involved considerable detail and much exposure of folly and cupidity, but raised only one point of any interest as to the law of evidence.—Sir Frank Lockwood, Q. C., for the defence, asked for the ruling of the Recorder (Sir C. Hall) on the following point: 'Counsel was in a position to call a large number of witnesses to prove that a genuine business was being done by the association—a large number of witnesses who were introduced to persons through the association, and in some cases he was in a position to prove that marriages resulted. He gathered from the opening statement for the prosecution that it was not suggested, so far as the routine business was concerned, that the prosecution raised any question that the association was doing a genuine business. There was one count in the indictment to which he himself wished to call the Recorder's attention, and that the second part of the fourth count, "that the more select, well-to-do, and advantageous marriages of the said association were then and had been effected through the medium of the said fashionable and high-class marriage department." He asked for a ruling whether under that count the Recorder would allow him to call general evidence of there being a genuine business done by the association. If the Recorder would allow that, he was in a position to call a large number of witnesses who were introduced to persons by the association. Mr. Mathews submitted that the evidence was not admissible. The Recorder said he did not see how it could be admissible. The indictment charged, in specific cases, conspiracy to obtain money; it charged some of the defendants with attempting to obtain money by false pretences in individual cases, and it also charged the obtaining of

money by false pretences. He should tell the jury that, even if the association were negotiating or attempting to negotiate marriages between various persons, that would be no defence if they found that they did obtain money from any of the complainants by pretences which were false, the persons paying the money relying on the statements made. Any general evidence of the nature of the business carried on was not relevant.'—Whether evidence as to the general business of the association could have been tendered as part of evidence to character is not definitely decided; but from the point of view of logic on which the law of evidence is presumed to rest, the existence of a genuine business with C., D., and E. is of inappreciable relevancy to show that the accused did not cheat A.—*Ib.*

THE LORD CHIEF JUSTICE OF ENGLAND ON INTERNATIONAL LAW.

Lord Russell, as already mentioned, had undertaken to deliver an address before the American Bar Association on the occasion of his visit to America. The address, which was in writing, has attracted great attention both in England and the United States. It is hoped that it may have considerable influence in introducing a more satisfactory method of settling international difficulties. His lordship said:—

MR. PRESIDENT:

My first words must be in acknowledgment of the honor done me, by inviting me to address you on this interesting occasion. You are a congress of lawyers of the United States met together to take counsel, in no narrow spirit, on questions affecting the interests of your profession; to consider necessary amendments in the law which experience and time develop; and to examine the current of judicial decision and of legislation, State and Federal, and whither that current tends. I, on the other hand, come from the judicial bench of a distant land, and yet I do not feel that I am a stranger amongst you, nor do you, I think, regard me as a stranger. Though we represent political communities which differ widely in many respects, in the structure of their constitutions and otherwise, we yet have many things in common.

We speak the same language; we administer laws based on the same juridical conceptions; we are co-heirs in the rich traditions of political freedom long established, and we enjoy in common a literature, the noblest and the purest the world has known—an accumulated store of centuries to which you, on your part, have made generous contribution. Beyond this, the unseen "crimson thread" of kinship, stretching from

the mother Islands to your great Continent, unites us, and reminds us always that we belong to the same, though a mixed, racial family. Indeed, the spectacle which we, to-day, present is unique. We represent the great English-speaking communities—communities occupying a large space of the surface of the earth—made up of races wherein the blood of Celt and Saxon, of Dane and Norman, of Pict and Scot, are mingled and fused into an aggregate power held together by the nexus of a common speech—combining at once territorial dominion, political influence and intellectual force greater than history records in the case of any other people.

This consideration is prominent amongst those which suggest the theme on which I desire to address you—namely, international law.

The English-speaking peoples, masters not alone of extended territory, but also of a mighty commerce, the energy and enterprise of whose sons have made them the great travellers and colonizers of the world—have interests to safeguard in every quarter of it, and therefore, in an especial manner it is important to them, that the rules which govern the relations of States *inter se* should be well understood and should rest on the solid bases of convenience, of justice and of reason. One other consideration has prompted the selection of my subject. I knew it was one which could not fail, however imperfectly treated, to interest you. You regard with just pride the part which the judges and writers of the United States have played in the development of international law. Story, Kent, Marshall, Wheaton, Dana, Woolsey, Halleck and Wharton, amongst others, compare not unfavorably with the workers of any age, in this province of jurisprudence.

International law, then, is my subject. The necessities of my position restrict me to, at best, a cursory and perfunctory treatment of it.

I propose briefly to consider what is international law; its sources; the standard—the ethical standard—to which it ought to conform; the characteristics of its modern tendencies and developments, and then to add some (I think) needful words on the question, lately so much discussed of international arbitration.

I call the rules which civilized nations have agreed shall bind them in their conduct *inter se*, by the Benthamite title, "International Law," And here, Mr. President, on the threshold of my subject I find an obstacle in my way. My right so to describe them is challenged. It is said by some that there is no international law, that there is only a bundle, more or less confused, of rules to which nations more or less conform, but that international law there is none. The late Sir James F. Stephen takes this view in his "History of the Criminal Law of England," and in the celebrated "Franconia" case (to which I shall hereafter have occasion to allude), the late Lord Coleridge speaks in the same sense. He says: "Strictly speaking, 'International Law' is an inexact expression and it is apt to mislead if its inexactness is not kept in mind. Law implies a lawgiver and a tribunal capable of enforcing it and coercing its trangressors." Indeed it may be said that with few exceptions the same note is

sounded throughout the judgments in that case. These views, it will at once be seen, are based on the definition of law by Austin in his "Province of Jurisprudence Determined," namely, that a law is the command of a superior who has coercive power to compel obedience and puuish disobedience. But this definition is too narrow: it relies too much on force as the governing idea. If the development of law is historically considered, it will be found to exclude that body of customary law which in early stages of society precedes law, which assumes, definitely, the character of positive command coupled with punitive sanctions. But even in societies in which the machinery exists for the making of law in the Austinian sense, rules or customs grow up which are laws in every real sense of the word, as for example, the law merchant. Under later developments of arbitrary power laws may be regarded as the command of a superior with a coercive power in Austin's sense: *Quod placuit principi legis vigorem habet.* In stages later still, as government became more frankly democratic, resting broadly on the popular will, laws bear less and less the character of commands imposed by a coercive authority, and acquire more and more the character of customary law founded on consent. Savigny, indeed, says of all law, that it is first developed by usage and popular faith, then by legislation and always by internal silently-operating powers, and not mainly by the arbitrary will of the lawgiver.

I claim, then, that the aggregate of the rules to which nations have agreed to conform in their conduct towards one another are properly to be designated "International Law."

The celebrated author of "Ecclesiastical Polity," the "judicious" Hooker, speaking of the Austinians of his time, says: "They who are thus accustomed to speak apply the name of law unto that only rule of working which superior authority imposeth, whereas we, somewhat more enlarging the sense thereof, term every kind of rule or canon whereby actions are framed a law." I think it cannot be doubted that this is nearer to the true and scientific meaning of law.

What, then, is international law?

I know no better definition of it than that it is the sum of the rules or usages which civilized States have agreed shall be binding upon them in their dealings with one another.

Is this accurate and exhaustive? Is there any *a priori* rule of right or of reason or of morality which, apart from and independent of the consent of nations, is part of the law of nations? Is there a law which nature teaches, and which, by its own force, forms a component part of the law of nations? Was Grotius wrong when to international law he applied the test "*placuit-ne Gentibus?*"

These were points somewhat in controversy between my learned friend, Mr. Carter, and myself before the Paris Tribunal of Arbitration in 1893, and I have recently received from him a friendly invitation again to approach them—this time in a judicial rather than in a forensic spirit. I have reconsidered the matter, and, after the best consideration which I

can give to the subject, I stand by the proposition which in 1893 I sought to establish. That proposition was that international law was neither more nor less than what civilized nations have agreed shall be binding on one another as international law.

Appeals are made to the law of nature and the law of morals, sometimes as if they were the same things, sometimes as if they were different things, sometimes as if they were in themselves international law, and sometimes as if they enshrined immutable principles which were to be deemed to be not only part of international law, but, if I may so say, to have been preordained. I do not stop to point out in detail how many different meanings have been given to these phrases—the law of nature and the law of morals. Hardly any two writers speak of them in the same sense. No doubt appeals to both are to be found scattered loosely here and there in the opinions of continental writers.

Let us examine them.

What is the law of nature?

Moralists tell us that for the individual man life is a struggle to overcome nature, and in early and what we call natural or barbarous states of society the arbitrary rule of force and not of abstract right or justice is the first to assert itself. In truth, the initial difficulty is to fix what is meant by the law of nature. Gaius speaks of it as being the same thing as the *Jus Gentium* of the Romans, which, I need not remind you, is not the same thing as *Jus inter Gentes*. Ulpian speaks of the *Jus naturale* as that in which men and animals agree. Grotius uses the term as equivalent to the *Jus stricte dictum*, to be completed in the action of a good man or state by a higher morality, but suggesting the standard to which law ought to conform. Pufendorf in effect treats his view of the rules of abstract propriety, resting merely on unauthorized speculations, as constituting international law and acquiring no additional authority from the usage of nations, so that he cuts off much of what Grotius regards as law. Ortolan, in his "*Diplomatie de la Mer*," cites with approval the following incisive passage from Bentham, speaking of so-called natural rights springing from so-called natural law:

"Natural right is often employed in a sense opposed to law, as when it is said, for example, that the law cannot be opposed to natural right, the word 'right' is employed in a sense superior to law, a right is recognized which attacks law, upsets and annuls it. In this sense, which is antagonistic to law, the word 'droit' is the greatest enemy of reason and the most terrible destroyer of governments.

"We cannot reason with fanatics armed with a natural right, which each one understands as he pleases, applies as it suits him, of which he will yield nothing, withdraw nothing, which is inflexible, at the same time that it is unintelligible, which is consecrated in his eyes like a dogma and which he cannot discard without a cry. Instead of examining laws by their results, instead of judging them to be good or bad, they consider them with regard to their relation to this so-called natural right. That is to say, they substitute for the reason of experience all the chimeras of their own imagination."

Austin, also, in his work on Jurisprudence, already mentioned, and referring to Pufendorf and others of his school, says:

"They have confounded positive international morality or the rules which actually obtain amongst civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they call the law of nature. Professor von Martens of Gottingen is actually the first of the writers on the law of nations, who has seized this distinction with a firm grasp; the first who has distinguished the rules which ought to be received in the intercourse of nations, or, which would be received if they conformed to an assumed standard of whatever kind, from those which *are* so received, endeavored to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them and gave to these rules the name of positive international law."

Finally Woolsey, speaking of this class of writers, says they commit the fault of failing to distinguish sufficiently between natural justice and the law of nations, of spinning the web of a system out of their own brain as if they were the legislators of the world, and of neglecting to inform us what the world actually holds the law to be by which nations regulate their conduct. So much for the law of nature.

What are we to say of the appeal to the law of morality?

It cannot be affirmed that there is a universally accepted standard of morality. Then what is to be the standard? The standard of what nation? The standard of what nation and in what age?

Human society is progressive—progressive let us hope, to a higher, a purer, a more unselfish ethical standard. The Mosaic law enjoined the principle of an eye for an eye, a tooth for a tooth. The Christian law enjoins that we love our enemies, and that we do good to those who hate us. But more. Nations although progressing, let us believe, in the sense which I have indicated, do not progress *pari passu*. One instance occurs to me pertinent to the subject in hand.

Take the case of privateering. The United States is to-day the only great power which has not given its adhesion to the principle of the Declaration of Paris of 1856, for the abolition of privateering. The other great nations of the earth have denounced privateering as immoral, and as the cover and the fruitful occasion of piracy. I am not at all concerned to discuss, in this connection, whether the United States were right or were wrong. It would not be pertinent to the point; but it is just to add that the assenting powers had not scrupled to resort to privateering in past times, and also that the United States declared their willingness to abandon the practice if more complete immunity of private property in time of war were secured.

Nor do nations, even when they are agreed on the inhumanity and immorality of given practices, straightway proceed to condemn them as international crimes. Take as an example of this, the slave trade. It is not too much to say that the civilized powers are abreast of one another in condemnation of the traffic in human beings as an unclean thing—

abhorrent to all principles of humanity and morality, and yet they have not yet agreed to declare this offence against humanity and morality to be an offence against the law of nations. That it is not so has been affirmed by English and by American judges alike. Speaking of morality in connection with international law, Professor Westlake, in his "Principles of International Law," acutely observes that while the rules by which nations have agreed to regulate their conduct *inter se*, are alone properly to be considered international law, these do not necessarily exhaust the ethical duties of States one to another, any more, indeed, than municipal law exhausts the ethical duties of man to man; and Dr. Whewell has remarked of jural laws in general that they are not (and perhaps it is not desirable that they should be) co-extensive with morality. He says the adjective *right* belongs to the domain of morality; the substantive *right* to the domain of law.

The truth is that civilized men have at all times been apt to recognize the existence of a law of morality, more or less vague and undefined, depending upon no human authority and supported by no human external sanction other than the approval and disapproval of their fellowmen, yet determining, largely, for all men and societies of men what is right and wrong in human conduct, and binding, as is sometimes said, *in foro conscientiæ*. This law of morality is sometimes treated as synonymous with the natural law, but sometimes the natural law is regarded as having a wider sphere, including the whole law of morality. It cannot be said either of international law or of municipal law that they include the moral law, nor accurately or strictly that they are included within it. It is a truism to say that municipal law and international law ought not to offend against the law of morality. They may adopt and incorporate particular precepts of the law of morality; and on the other hand, undoubtedly, that may be forbidden by the municipal or international law, which in itself is in no way contrary to the law of morality or of nature. But whilst the conception of the moral law or law of nature excludes all idea of dependence on human authority, it is of the essence of municipal law that its rules have been either enacted or in some way recognized as binding by the supreme authority of the State (whatever that authority may be), and so also is it of the essence of international law that its rules have been recognized as binding by the nations constituting the community of civilized mankind.

We conclude then that, while the aim ought to be to raise high its ethical standard, international law, as such, includes only so much of the law of morals or of right reason or of natural law (whatever these phrases may cover) as nations have agreed to regard as international law.

In fine, international law is but the sum of those rules which civilized mankind have agreed to hold as binding in the mutual relations of States. We do not indeed find all these rules recorded in clear language—there is no international code. We look for them in the long records of customary action; in settled precedents; in treaties affirming principles; in State documents; in declarations of nations in conclave—which draw to

themselves the adhesion of other nations; in declarations of text writers of authority generally accepted, and lastly, and with most precision, in the field which they cover, in the authoritative decisions of prize courts. I need hardly stop to point out the great work under the last head accomplished, amongst others, by Marshall and Story in these States, by Lord Stowell in England and by Portalis in France.

From these sources we get the evidence which determines whether or not a particular canon of conduct, or a particular principle, has or has not received the express or implied assent of nations. But international law is not as the twelve tables of ancient Rome. It is not a closed book. Mankind are not stationary. Gradual change and gradual growth of opinion are silently going on. Opinions, doctrines, usages, advocated by acute thinkers are making their way in the world of thought. They are not yet part of the law of nations. In truth, neither doctrines derived from what is called the law of nature (in any of its various meanings) nor philanthropic ideas however just or humane, nor the opinions of text writers, however eminent, nor the usages of individual States—none of these, nor all combined, constitute international law.

If we depart from the solid ground I have indicated, we find ourselves amid the treacherous quicksands of metaphysical and ethical speculations; we are bewildered, particularly by the French writers in their love for *un systeme*, and perplexed by the obscure subtleties of writers like Hautefeuille with his *Loi primitive* and *Loi secondaire*. Indeed it may, in passing, be remarked that history records no case of a controversy between nations having been settled by abstract appeals to the laws of nature or of morals.

But while maintaining this position, I agree with Woolsey when he says that if international law were not made up of rules for which reasons could be given, satisfactory to man's intellectual and moral nature, it would not deserve the name of a science. Happily those reasons can be given. Happily men and nations propose to themselves higher and still higher ethical standards. The ultimate aim in the actions of men and of communities ought, and I presume will be admitted, to be to conform to the divine precept, "Do unto others as you would that others should do unto you."

I have said that the rules of international law are not to be traced with the comparative distinctness with which municipal law may be ascertained—although even this is not always easy. I would not have it, however, understood that I should to-day advocate the codification of international law. The attempt has been made, as you know, by Field, in this country, and by Professor Bluntschli, of Heidelberg, and by some Italian jurists, but has made little way towards success. Indeed codification has a tendency to arrest progress. It has been so found, even where branches or heads of municipal law have been codified, and it will at once be seen how much less favorable a field for such an enterprise international law presents, where so many questions are still indeterminate. After all it is to be remembered that jural law in its widest sense, is as

old as society itself; *ubi societas ibi jus est;* but international law, as we know it, is a modern invention. It is in a state of growth and transition. To codify it would be to crystalize it; uncodified it is more flexible and more easily assimilates new rules. While agreeing, therefore, that indeterminate points should be determined and that we should aim at raising the ethical standard, I do not think we have yet reached the point at which codification is practicable, or if practicable would be a public good.

Let me give you an analogy. Amongst the most successful experiments in codification, in English communities, have been those in Anglo-India, particularly the Penal Code and the Codes of Criminal and Civil Procedure. Prompted by their comparative success, Sir Roland Wilson urged the extension of the process of codification to those traditional unwritten native usages, or customary law, of Hindu or Mahomedan origin, still recognized in the government of India by Englishmen. But the wiser opinion of Indian experts was, that it was better not to persevere in the attempt. Many of these usages, by sheer force of contact with European life and habits of thought are falling into desuetude. The hand of change is at work upon them, and to codify them would be to stop the natural progress of disintegration.

As we are not to-day considering the history of international law, I shall say but a word as to its rise and then pass on to the consideration of its later developments and tendencies.

[To be continued.]

GENERAL NOTES.

APPOINTMENT OF QUEEN'S COUNSEL IN CANADA.—An announcement has been made that the special case stated for the opinion of the Ontario Court of Appeal, as to the validity of appointments by the Federal and Provincial Governments, will be argued in September. It was set down for argument as long ago as April, 1892, but, owing to difficulties in the constitution of the Court and representation of the different interests by counsel for the purposes of the argument, it was adjourned from time to time, and finally taken off the list, with the understanding that it should be put down again when the difficulties should be removed. One difficulty has now been removed by the appointment of Mr. H. J. Scott, Q. C., to argue the case on behalf of the Dominion Government, and it is believed that one of the "divisions" of the Court of Appeal—if it sits in September in two divisions—will be so constituted as to hear this case. There are three views taken as to the jurisdiction in question, viz., that the Dominion Government alone has power to appoint, that the Provincial Government alone has power, and that both Governments have concurrent power.