REVIEWS AND NOTICES.

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THE ROMAN LAW OF MARRIAGE.*

In all communities that have arisen out of the savage state no legal institution is at once so universal and also so fundamental a part of their social system as is marriage. None affects the inner life of a nation so profoundly or in so many ways, ethical, social and economic. None has appeared under more various forms, or been more often modified by law when sentiment or religion prescribed a change. In a famous passage which has been constantly quoted, and often misunderstood, Ulpian takes marriage as the type of those legal relations which are prescribed by the Law of Nature, and extends that law so as to make it govern the irrational creatures as well as mankind. If then, the relation be so eminently natural one might expect it to be also uniform. Yet it so happens that there is no relation with which custom and legislation have in different peoples and at different times dealt so differently. Nature must surely have spoken with a very uncertain voice when as the jurist says, she "taught this law to all animals." Nor does this infinite diversity show signs of disappearing.

In these words Bryce introduces in his *Studies in History and Jurisprudence* his well-known discussion of the Roman Law of the marriage relation as compared with the English law and more particularly with some of the later developments of English law in the United States. The diversity of modern laws as to marriage and divorce and the multiplication of grounds for the latter are even more apparent in this day than they were when Bryce wrote, and the problems raised have assumed in the many countries the degree and character of a national menace. Perhaps in no field of law is there a more crying need for study and for constructive reform—in no field can judge and legislator profit more widely by a consideration and comparison of the experiences of other countries and other periods.

So Professor Corbett's book is timely. Its author, formerly a Fellow of All Souls, has been nurtured in the tradition of Bryce and Vinogradoff, and his work as Dean of the Law School and Gale Professor of Roman Law at McGill University, is too well known among scholars to need any extensive mention here. The book is designed to provide English speaking students with a con-

* *The Roman Law of Marriage.* By Percy Ellwood Corbett. Toronto: Oxford University Press, 1930. xii—251pp.

cise general statement of the Roman law pertaining to marriage. The author modestly says that his work "will not have been in vain if its only result is to make the researches of foreign scholars into particular aspects of marriage law more familiar to English readers." The book however is much more than that, and the author is justified in claiming to have produced a monograph of wider scope and containing more exhaustive treatment of the subject than any work hitherto available.

The author has not attempted to compile a popular treatise; and any reader must be prepared to bring to the study of this volume a fairly extensive acquaintance with the general field of Roman private law. There is no attempt directly to discuss the ethical, social, or economic implications of the institution of marriage nor to institute any comparison between the Roman legal system and the systems of our own day. One may notice, too, that the author is less concerned with primitive law or with Justinian's legislation than he is with the classical law: the book is in essence an objective study of the classical Roman law of marriage and divorce as it is to be gathered from the Digest and the legal texts, supplemented by the literary authors, inscriptions, and papyri. The author need not, and probably does not, expect a wide audience; but we may confidently predict that scholars of whatever land who deal with the subject of marriage and divorce must take this comprehensive and masterly discussion under consideration.

The critic must bear in mind that he is dealing essentially with a commentary upon the Roman legal texts, and not a philosophical discussion, yet it is somewhat strange to find that Dean Corbett nowhere deals directly with the Roman conception of the essential nature and purpose of marriage. One might have expected some comment upon Ulpian's classical definition *"justae nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio,"* (to which we are justified in adding *"liberorum quaerundorum gratia"*),—a conception which, however theoretically recognized, was widely at variance with the facts existing in classical times when, as Maine said, the marital tie was in fact the laxest the western world has ever seen, and marriage amounted in law to little more than a temporary deposit of the woman by her family. Discussion of the influence of philosophical and religious ideas upon the Roman conception of marriage has been excluded by the author: but a little space might very well have been devoted to a summary of the effect of these concepts.

The influence of Christian asceticism upon Roman institutions in the late Empire cannot be lightly considered. It is true that somewhat of a gulf separates the classical view of marriage and that of Augustine who considered that the ideal married life was that attributed to Mary and Joseph, cited this as an example that a true marriage may exist where there is a mutual vow of chastity —and held that the sooner this relation was established the better— but it was not long after Constantine that the Church began to make its power felt—and the gradual change in the conception of the marriage relation is matter well worth considering.

The subject matter of the book is divided into four parts. The first of these deals with betrothal, capacity and conditions of marriage, and the forms of marriage. Dealing with the last of these, Professor Corbett emphasizes the fact that in the classical period of Roman law marriage was almost, if not entirely, a formless transaction—the religious or secular observances celebrating the union were, except to a limited extent in *confarreatio*, indifferent.

The rival theories as to the respective antiquity of *usus, confarreatio,* and *coemptio* are discussed and the author inclines to Rossbach's view that *coemptio,* the sale of the woman to her intended spouse for a nominal price was a survival of that primitive marriage by real sale which was common to all the Indo-European races, and that the recognition of valid marriage without sale on the performance of a special religious ceremony, *confarreatio,* was of later development as also was *usus,* a development where a legitimate marriage took place but where there was no *conventio in manum,* where *transitio in manum* might be produced during the course of the marriage, provided that during a year the woman should have lived continuously with her husband. One may question however whether Rossbach has rebutted the cogent arguments of Marquardt, Karlowa, and a host of equally eminent authorities which hold that *confarreatio* limited to patricians was the only legal marriage in the period when none but a patrician was a citizen, that *coemptio* was recognized as a valid plebeian usage when the plebeian class acquired civil and political rights; while *usus* in turn was a development from *coemptio.* The institution of sacred marriage appears to be as old in the Indo-European race as the domestic religion: for the one could not exist without the other. The Greek and Roman writers habitually designate marriage by a word indicative of a religious act (*θύειν γάμον*, *sacrum nuptiale*) and Homer, Hesiod, and Herodotus describe the primitive Greek mar-

riage ceremonies in a way that shows a striking similarity to the essential characteristics of the Roman sacred marriage. Professor Corbett carefully examines the theories as to *usus* and concludes that this was not a device for transforming an irregular union into *justum matrimonium*, but that free marriage existed prior to the Twelve Tables and the *trinoctium* was utilized not to prevent an irregular union becoming regular but merely as avoiding in a *justum matrimonium*, what would otherwise be an *inevitable manus*.

An interesting section on *matrimonium juris gentium*, is in substance a reprint of an article by Professor Corbett which appeared in the Law Quarterly Review. Roman law attached legal consequences to various types of union in which a man and a woman conducted themselves as man and wife, but which lacked one or more the elements of *justae nuptiae*. Such were, for instance, the matrimonial relations between patrician and plebeian prior to the *lex Canuleia;* the relation preceding the accomplishment of *usus;* the relations between Romans and non-Romans. Such cases have been explained by the hypothesis of a *matrimonium juris gentium*: in other words, we are asked to admit the existence of two recognized types of marriage, even as between Roman citizens; the one valid by the civil law of the city, the other by a law common to all civilized peoples. The author examines the texts relied upon in support of this view and holds that they are insufficient to prove that the concept was present to the mind of the Roman jurist. The term *matrimonium juris gentium* is never found in the texts; nor is there any reference to a *jure gentium* mode of celebrating marriage; nor any designation of *jure gentium* effects: the rule that where there is no *conubium* any offspring follows the mother, and the classification of marital relations between descendants and ascendants as "*incestus jure gentium*" do not presuppose a category of lawful marriage depending upon universally recognized conditions.

The second part of the book deals with the effects of marriage under the headings of status, capacity, and proprietary relations of consorts, and matrimonial rights and duties. The difference between the position of a wife in *manu* and a wife under the regime of free marriage is discussed in detail and with admirable clearness. One could wish however, that somewhat fuller treatment had been accorded to the subject of the rule prohibiting gifts between husband and wife and that the list of exceptions to the rule (*pp*. 116-117) had been expanded so as to render it unnecessary for the reader to refer constantly to the Digest.

The subject of actions between husband and wife is fully dis-

cussed and a careful study made of prevailing theories as to the nature and purpose of that somewhat mysterious action, the *judicium de moribus.* It was suggested by Czyhlarz that the sole purpose of the *judicium* was to enforce the payment of *retentiones* not obtained for any reason, when the *dos* was restored. Keller took the view that the *judicium* was granted where *dos* had been promised but never delivered. Karlowa, bearing in mind the description of the action as *publica coercitio* found its rationale in its character as penal proceedings involving *infamia* for the wife found guilty; Professor Corbett thinks that the action may have served all the purposes suggested: certain it is that it was not a mere *praejudicium.* Its infrequent use appears to have been as a subsidiary remedy when circumstances prevented retention of a proportion of the *dos.*

Marriage contracts (*dos* and *donatio ante nuptias*) are comprehensively treated in the third part of the book. Of particular interest is the author's careful review of the origin of *dos* which he concludes, (in spite of the fact that the Twelve Tables are silent on the subject), was as old as the institution of civilized marriage itself, and an accompaniment of marriage *cum manu* no less than of marriages *sine manu,* though, of course, the submergence of the *uxor in manu* in her husband's family made unnecessary the elaboration of rules as to *dos* which was required under the regime of free marriage.

The fourth part of the book deals with the legal problems of dissolution of marriage, and all students will feel indebted to Professor Corbett for his brilliant review of the law of divorce, than which no subject in the entire field of Roman legal institutions has more immediate and timely interest.

It would appear that divorce was, in spite of the ancient idea of the indissolubility of sacred marriage, very early recognized as possible. It was regarded as a consequence of the domestic jurisdiction vested in the head of the *domus* under the regime of *manus;* necessarily it was a one sided power so far as the wife was concerned since her position *in manu* deprived her of any right of repudiation. There is a well authenticated tradition that the earliest divorce occurred in 230 B.C., when Sp. Carvilius Ruga divorced a wife because she was barren and he had taken an oath that he would have a wife *liberorum quaesundum gratia.* But there are references to repudiation being practised as early as the middle of the 5th Century B.C. Professor Corbett thinks that the date of the Carvilian episode may have been mistaken or that the story was mere legend: but there is much to be said for the theory that this was

not the first divorce, but the first divorce on grounds independent of the wife's conduct.

Divorce from marriage with *manus* required formalities in substance, as it appears, the reverse of the constituent ceremonies (*contrarius actus*). With the advent of free marriage as the normal regime these formalities were unnecessary and in the time of Cicero it was a moot point whether a first marriage might not be dissolved by a second without *certa quaedam verba*, or anything in the nature of a formal repudiation. The need of some sort of regulation was obvious and this, according to the view generally held, was supplied by Augustus in the *Lex Julia de Adulteriis* which provided that no divorce should be held good unless made in the presence of seven Roman witnesses of full age, besides the declarant's freedman, who was directed to make or deliver the declaration. This view has been attacked by Levy in *Der Hergang der romischen Ehescheidung,* 1925, whose thesis is discussed by Professor Corbett with considerable elaboration. In essence Levy's view is that the declaration with seven witnesses was not a form of divorce at all, but a method of expelling the woman *in manu mariti* from the family in order to avoid a prosecution for *lenocinium*. The form was designed and included in the *lex* to enable the husband to terminate *manus* without co-operation on the woman's part. Without this she would have had to be present for remancipation to take place and a malicious adulteress could thus have exposed an already injured husband to all the rigours of the statute. Professor Corbett's rebuttal of this view involves a detailed consideration of all the material texts. He shows that Levy's view makes the *Lex Julia* require different courses of conduct of the husband according as his marriage is with or without *manus*: in a word, free mariiage can be terminated merely by turning out the adulteress, marriage with *manus* involves the formalities noted above. The reason assigned by Levy is that after divorce the woman *in manu* is still *filiae loco*—something further must be done to cut her off from the family. But *Gaius* 1, 137*a*. makes it clear that the woman was already by the mere act of *repudium* in a more independent position than a *filia* and that she could compel remancipation. Professor Corbett further points out that *manus* marriages were rare in the time of Augustus and that it would be surprising to find detailed statutory provisions with regard thereto. Then again none of the texts make reference to any mode of voluntary liberation other than remancipation. Levy's view involves an elaborate assumption of interpolations in the Digest of a character which the author lucidly demonstrates to be inherently improbable.

Levy further maintains that after the legislation of Theodosius (C. 5.17.6) a written *repudium* was necessary. But this enactment merely declares that where a written *libellus* has been drawn up its receipt by the other party is not essential. Professor Corbett claims that even after the Theodosian enactment *repudium* might be oral or written—provided the requirements of the Lex Julia were observed: the purpose of the *repudium* was merely evidentiary, and receipt of notification by the divorced party was not essential.

The confused and contradictory story of legislation as to divorce, from the first of Constantine's enactments down to the novels of Justinian, is briefly discussed by the author, too briefly, perhaps, for the story has much in it of interest and value. The view that marriage was a sacrament gained ground rapidly during this period, and the emergent canon law had at least an oblique influence upon Imperial legislation: the story of the influence of this influence merits, it is suggested, somewhat more extended treatment.

The book closes with a brief but comprehensive review of the legal aspects of widowhood and remarriage.

The systematic bibliography of sources and references, in point of completeness and utility, leaves nothing to be desired.

This volume may be unreservedly recommended to all students of legal institutions: *"ut nihil inutile nihilque perperam positum, sed quod in ipsis rerum optinet argumentis accipiant."* (Just. Inst. Pr.)

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F. C. AULD.

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Annotations to the Revised Statutes of Ontario, 1927, and Annual Statutes.—By G. Verona Taylor, B.A., of Osgoode Hall, Barrister at-law, and Librarian of the County of York Law Association: Toronto, The Carswell Company, Limited, 1930.

This work, well-written on good paper and well-bound must prove invaluable to the busy practitioner. The plan followed by the author is to take the Revised Statutes of Ontario, 1927, Chapter by Chapter and Section by Section, *seriatim,* citing the cases in which the particular section has been considered by the Courts—sometimes, referring to the previous form of the law. This takes up 756 of the 898 pages of the book, the first 120 being a very full and carefully prepared Table of Contents, etc., then, in the remaining 22 pages, we find certain miscellaneous Acts similarly treated.

This has been done with great care, appreciation and judgment; the accuracy of the work, on being tested leaves nothing to be desired.

Moreover, it recommends itself by its style as well as by its content; the reader may take it up again and again, almost as a literary work—I read it through without intermission, and it well repaid the labour.

Such a work does not lend itself to quotation or to specific comment; the reviewer can say only that it is admirably adapted to the purpose for which it was written.

Where so much has been given, and so well given, it may seem ungracious to find fault with the proof-reading. None of the errors, indeed, is at all calculated to mislead; but it is not pleasant to see such misprints as "Volcanice," "evdence," "contest—": the orthography is sometimes erratic— "irrebutable" but "rebutted"; when a "Licence" is for marriage, it is a "licence," but when for other purposes, a "license". Latin expressions suffer rather badly—"in *loco parentis,*" "in *pari materiâ,*" "certiorari," but *"habeas corpus,"* "bonâ fide" along with "bona fide" and the solecism "bonâ fides." The syntax is not impeccable; two singular subjects (disjunctive) have a plural verb; "not" is sometimes followed by "nor" and sometimes (correctly) by "or."

Whether the same case should be cited, *totidem verbis,* on the same page as comment on two sections of a Statute must be a matter of judgment.

With any trivial faults the book may present, it is a valuable contribution to our legal literature.

Toronto.

WILLIAM RENWICK RIDDELL.

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The Canada Year Book, 1930. Published by the King's Printer, Ottawa.—We have previously had occasion to congratulate the officers of the Dominion Government who are responsible for the matter contained in the annual issues of this publication on the excellent work performed by them. This particular volume was prepared under the editorship of Mr. S. A. Cudmore, B.A. (Tor.), M.A. (Oxon.), assisted by Messrs. R. F. Clarke, W. H. Lanceley and A. E. Milward. It is replete with just the sort of information that the lawyer often finds himself in need of, and generally despairs of getting with any degree of despatch. For in-

stance, if called upon to consider a question involving the expectation of life, he might find the chapter on Vital Statistics in Canada of excellent service to him. Again, he may be lending money of his clients on farm mortgages, then the chapter dealing with Agriculture will inform him by the statistical method how far he can rely for security on the productivity of the soil in a certain district. True, he may pass over the portion of the work dealing with "Constitution and Government" as not telling him much that he does not already know, or would naturally seek elsewhere; but we are sure that he could not get anywhere else in print the reliable, systematised and well indexed information that is to be had in this publication.

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Taswell-Langmead's English Constitutional History, 9th edition. By A. L. Poole. London: Sweet & Maxwell, Ltd. 1930.

When one during his *Studenten-jahre* takes to a text-book as an infant takes to the bottle of no economic value to the bootlegger, its reappearance to him in riper years all dressed up in a new—maybe the dozenth—edition brings back all his old-time faith in the impeccability of its witness to the truth. We are in such case respecting "Taswell-Langmead." We knew it as an expounder of the constitution of the nation that needs no bulwarks although its march is on the mountain wave and its home is on the deep. We reverenced it as a store-house of wisdom for the political guidance of our Dominion in its callow years. Hence we could not enlarge upon the defects in any new edition without a sense of profanation. We are, therefore, glad to say that Mr. Poole's editing has nothing of dissatisfaction for us. The book remains substantially the same as when we pored over it—the while we burnt the midnight oil—before the dread examination days. It is only put into touch and consonance with knowledge brought to light by scholars like Maitland and Vinogradoff since the work first appeared some fifty years ago.

Ottawa.

CHARLES MORSE.