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Judicial Virtues and Duties.*

Voet (5, 1, 39) and Huber (*Heed. Rechts*, 4 15, 16), define a judge as an honourable man, skilled in the laws and of sound judgment, appointed by public authority to decide all manner of disputes. Of all sciences, says Huber, jurisprudence is the most difficult.

In a general sense and according to the universally accepted definition of the honourable and distinguished position and office of the judge, writes Kersteman (*sub voce "Rechter"*), that dignitary is appointed pre-eminently to uphold the laws, to administer justice, and to bring right and justice home to every man. There are various special and important observations concerning the office of a judge, which have particular reference to the authority, dignity, and duties of the office, and, be it specially noted, to the requisites, personal virtues and attributes which must essentially be associated with one holding so exalted an office. Such virtues and noble attributes as one requires a judge to be possessed of are the following :—

(1) Integrity. "Above all things, integrity is their portion and proper virtue" (Bacon's *Essays*).

(2) *Habilitas* : the faculty of investigating disputes and deciding thereon (Gluck, vol. 6, p. 211).

* S. A. L. J. xxvii. 235.

(3) He must be God-fearing. Out of piety all other virtues and concomitant qualities, which a judge needs in the exercise of his office, flow forth of themselves (*cf.* Merula, 1, 6, 1, 3: Huber, *Heed. Rechts.* 4, 15, 8; *D.* 1 18, 19).

(4) He must be *just*. Righteousness is the soul and lustre of the office of a judge, and in general binds him to strictly observe the laws in his judgments and decisions, with the result that he, on the one hand, punishes wickedness and misdeeds with unbending severity, and, on the other hand, protects the oppressed and does justice to the wronged without, in such matters, making the slightest distinction or difference between rich and poor, high and low. So strictly is justness regarded in the person of a judge, where his office is concerned, that in Vromans (*De foro competenti*, lib. 2, cap. I, sec. 8. num. 22, *in notis*) the following noteworthy and pregnant observation occurs *inter alia*:—

And in case it should happen that the allegations and the evidence adduced be in conflict with his own certain knowledge of the matter, it would be safest and best for such a judge to recuse himself in that case and, putting off the person of a judge, become a witness in order that the truth may thus be revealed. The reason of this is that *in casu nostro* a judge would certainly be dishonest and wicked if he, following the documents and the evidence produced *in judicio*, should acquit him whom he privately and positively knew to be an offender or to owe something, or should condemn him whom he knew positively to be innocent or to owe nothing to his opponent. *Conscientiam enim propriam nemo debet laedere* (Menochius, *De Arbitrar. Judic. Quaest.* cap. 494, num. 17 and 18). On the other hand, he would rightly be called unjust, unreasonable and a scorner of the laws, which demand that justice be done according to the documents and the evidence, if he, disregarding the allegation and the evidence produced, decided a case according to the knowledge which he privately had thereof.

In giving judgment he must have regard to the allegations and evidence (*acta et probata*, Van Leeuwen, *Cens. For.* 2, 30, 2) and at the same time hearken to the voice of his conscience. If the evidence is contrary to his convictions, it is an ancient controversy (as appears from Gellius, *Noct Attic.* 14, 2) whether he ought to give judgment in accordance with the evidence or with the true facts. For he would without doubt be an unrighteous judge who were to absolve the person known to him to be guilty or liable, or to condemn the party who, to his

personal knowledge, is innocent or not liable to his adversary. On the other hand, it would open the door wide to iniquity if a judge were to decide in accordance with his own private knowledge and in opposition to the facts deposed to in evidence. Pomponius, says Voet (5, 1, 50), held that in the event of a conflict of such considerations nothing remains for the judge but to lay aside his judicial functions and to discharge the duties of an ordinary witness in the interests of the discovery of the truth. Gellius inclines to the view that the judge, who firmly believes that the debt, which at the trial has not been proved, is actually due, should declare *sibi non liquere.*

(5) He must be *diligent* and painstaking—a no less important requisite to constitute a skilful and able judge, for through diligence he acquires more and more experience in the particular duties of the onerous office of a judge, and ultimately, by continual application and thorough investigation of cases, that is, by careful, unremitting and mature consideration and weighing of all the circumstances of a case, he arrives with greater accuracy and certainty at the true and correct merits of the question in dispute between litigants, ever carefully guarding against ignorance, inattention or misconception entering into the decisions of cases tried by him. Therefore, amongst the chief requisites of a capable and wise judge, must particularly be reckoned a knowledge of jurisprudence and the application of laws, as well as a thorough acquaintance with all those things which essentially appertain to the exercise of the office of a judge. This apparently caused the learned pagan Plato, in describing the character of a judge, to say, *Non oportet legibus esse sapientiorem?* And Justinian (*Novella*, 82 *pr.*) warns us : *Judicis officium noli committere stultis* (*cf* Huber, *Heed. Rechts.* 4, 15, 9 to 21).

(6) He must be disinterested and abstain from covetousness. He must not allow himself to be corrupted or bribed by any presents, donations or gifts by or on behalf of either litigating party. This is expressly forbidden by par. 10 of the Instructions of the Court of Holland. Corruption of a judge in the exercise of his duties is, moreover, criminally punishable. However, according to the opinion of Mr. Gerhard de Hass in his notes on Merula, 4, 6, 2, that prohibition in no way includes acceptance of such gifts or presents from near relatives or intimate friends who are in no way interested in any action, especially if the precept be observed contained in *D.* 1, 16, 6, 3 : *Neque omnia neque quovis tempore, neque ab omnibus : nam valde inhumanum est, a nemine accipere ; sed passim, vilissimum est; et omnia, avarissimum* (*cf.* Huber, *Heed. Rechts.* 4, 15, 8).

In England (says Stephen, *Commentaries*, vol. 4, p. 250) the offence of bribery "has in the present day become inconceivable as regards our judges: for their integrity is stronger than their susceptibilities." The Transvaal Law (10 of 1894) enacts that any judge who shall directly or indirectly accept a gift or promise, knowing or having reason to suspect that the same has been made in order to influence the result of any case submitted to his decision, shall be punished by imprisonment with or without hard labour for a period not exceeding ten years. And any one so making any gift or promise to a judge shall be similarly punished, and in addition mulcted in a fine not exceeding £ 1000.

(7) He must be *impartial*. A judge must indifferently exercise and display impartiality in respect of parties and their cause, except in criminal cases, in which a judge may and should always in doubtful and still unproved cases incline in favour of the defendant, because the defence is to be favoured and must prevail over the accusation or charge (*cf.* Kotze's *Van Leeuwen*, vol. 2, p. 549, and Gluck, vol. 6, p. 213), *Favorabiliores rei potius, quam actores habentur* (*D.* 50, 17, 125), *Sed nec de suspicionibus debere aliquem damnari* (*D.* 48, 19, 5). *Arianus ait multum interesse, quaeras, utrum aliquis obligetur, an aliquis liberetur? Ubi de obligando quaeritur, propensiores esse debere nos, si habeamus occasionem, ad negandum. Ubi deliberando, ex diverso ut facilior sis ad liberationem* (*D.* 44, 7, 47). *Satius enim esse, impunitum relinqui facinus nocentis quam innocentem damnare* (*D.* 48, 19, 5). *Scipio et Antoninus dicebant malle se unum civem servare quam mille hostes occidere. Het is beter den schuldigen vrij te spreken dan de onschulaigen te veroordeelen* (Moorman, p. 152).

Amongst the manifold duties attaching to the office of a judge, and included unquestionably amongst the moral virtues which a judge must observe in his official capacity. Kersteman states that the following particulary deserve most notice :—

(1) He should never give judgment upon the oral or documentary argument of one of the parties without having heard the other party, but hear both parties, to a suit alternately and in no way restrict their right of defence, according to the ancient maxim : *Audi et alteram partem. Judicium non fer, si non sint ambo locuti* (*cf.* Kotze's *Van Leeuwen*, vol. 2 p. 512 ; Merula, 1, 6, 1, 4).

(2) He should attempt to investigate as exhaustively as possible the truth of a case and adopt all legitimate means to discover the same without allowing himself to be led away from it by any plausible arguments.

A judge must not supply matters of fact omitted by either party, unless they appear *ex facie* of the documents produced at the hearing, lest he appear to defend a cause rather than inquire into it, thus discharging at once the office of advocate and judge in the same suit contrary to law (Voet, 5, 1, 49; 2, 13, 13; Kersteman, *sub voce* "*Rechter*"). Neither may a judge remove a doubt as to facts in the evidence, this being the province of the advocate, and not of the judge.

A question of law may, however, be supplied by the judge when overlooked by the litigant. He must not give judgment on the strength only of the authorities quoted before him, for even those not quoted must be known to him (Voet, 5, 1, 49, and *C.* 2, 11). "In accordance with the rule *curia novit jus*, it is the duty of the court to take into consideration all questions of law which arise in an action and affect its issue, and to decide the same, although no mention of these points has been made in the pleadings. Champerty need not be pleaded" (*per* Kotzé, C. J., in *Hugo and Moller* v. *Transvaal Loan Co.* 1894, Off. Rep. p. 336). The judge must take notice of well-established laws, although not relied on, and even of customs if they have been duly stamped by long usage. He may also for just reasons treat a document put in as suspicious even though the adversary failed to observe it; or take into consideration legal exceptions that have been neglected and are evident from the facts on the record or documents produced (for example, where a certain will is shown to have been made by one who lacked testamentary capacity); or to dismiss the action if it appears clearly that it has been prescribed, although the exception had not been raised (Voet, 5, 1, 49, 2, 13). "If anything in law is omitted by the advocate through inexperience or neglect, the same may and ought to be supplied by the judge, and be considered as if it had been pleaded or said; but this does not extend to matters of proof, for in such matters we can only judge according to the evidence" (Kotze's *Van Leeuwen*, vol. 2, p. 378; *Weatherley* v. *Weatherley*, K. 66).

As to exceptions, Van der Linden (*Supplementum to Voet*) says, *Exceptiones non supplet, nisi oppositae fuerint*, but he adds that there is no impediment *quominus judex ex officio omnia facere possit, quae ad veritatis indagationem* (investigation), *et justitiae administrationem faciunt: idque praesertim in causis summariis.*

In criminal matters he must inquire into (*navorschen*) the innocence of the accused, even although it has not been asserted by any one (Kotze's *Van Leeuwen*, vol. 2, p. 549).

(3) He must sternly check oppression, especially of widows, orphans, minor children, and persons in custody, and employ his authority to protect them with the aid of the laws. The courts are the upper guardians of all minors (*Van Rooyen* v. *Werner*, 9 S.C. 428) One of the principal duties of a judge is to suppress fraud and force, "whereof force is the more pernicious when it is open, and fraud when it is close and disguised" (Bacon, *Essay* 56).

(4) He must not make any distinction between, or be more favourably disposed to, litigants of superior or inferior position, but consult justice alone and the righteousness of the cause. (*Cf.* Merula, 1, 6, 1, 7.)

(5) He should always, by advising an amicable settlement, try to reconcile or unite parties, if practicable, especially when litigation takes place between husband and wife or parents and children, so as to prevent domestic feuds and family differences. (*Cf.* Merula, 4, 54, 1, 6, who adds that the judge may not *compel* the parties to effect an amicable settlement.)

(6) When reserving judgment he should not delay the delivery of it too long. In Merula's day (2, 5, 3) a limit of fourteen days was permitted.

(7) He should never let his feelings or passion carry him away on the Bench, or in his decision of cases give vent to arbitrary opinions, but he must at all times observe the laws as studiously as the helmsman does the compass. *Ab odio, amicitia, ira, atque misericordia, et avaritia vacuos esse decet* (Voet, 5, 1, 57). A judge is not a *censor morum* (*per* Laurence, J. P., in *Preston and Dixon* v. *Biden's Trustee*, 1 A.C. 333; cf. *Liquidators Union Bank* v. *Beit*, 9 S.C. 137). *Eum qui jus dicit in cognoscendo neque excandescere oportet adversus eos, quos, malos putat, neque precibus calamitosorum inlacrymari, id enim non est constantis et recti judicis cujus animi motum vultus detegit. Et summatim ita jus reddet, ut autoritatem dignitatis ingenio suo augeat* (*D.* 1, 18, 19, 1; and Bynkershoek, *Obs. jur. Rom.* 5, 14).

(8) He should scrupulously guard and maintain his dignity and the lustre of his office, and accordingly not appear in improper places where his dignity would be in peril of being degraded or impaired. *Judici vitanda familiaritas cum hominum vulgo, num ea conversatione aequali contemptio dignitatis nascitur* (familiarity breeds contempt). *At vero qui sapiunt, et se sibi priores probarunt, non habent, quod a familiaritate et contemptu metuant* (Bynkershoek *Obs Jur. Rom.* 5, 14; VanLeeuwen, *Cens. For.* 2, 1, 30, 1).

(9) *Judge and Counsel.*—Touching the relationship between the Bench and the Bar, the canons of professional

etiquette demand that judges owe courtesy to counsel in return for the respect which the latter are bound, and ever ready, to exhibit to them. Furthermore, patience and gravity of bearing are essential parts of justice ; and an overspeaking judge is no "well-tuned cymbal." It is nothing exciting admiration in a judge first finding that which he might have heard in due time from the bar ; nor is it indicative of quickness of intelligence to cut off evidence or cut counsel short ; nor is it laudable to prevent information by questions, though pertinent. "The parts of a judge in hearing are four : to direct the evidence ; to moderate length, repetition or impertinency (irrelevancy) of speech ; to recapitulate, select and collate the material points of that which hath been said ; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness to speak, or of impatience to hear, or of shortness of memory, or of want of a staid and equal attention. There is due from the judge to the advocate some commendation and gracing (*i.e.* compliment) where causes are well handled and fair pleaded ; especially towards the side which obtaineth not (*i.e.* is unsuccessful) : for that upholds in the client the reputation of his counsel, and beats down in him the conceit (opinion) of his cause. There is likewise due to the public a civil reprehension of advocates, where there appeareth cunning counsel at the bar chop (*i.e.* bandy words) with the judge, nor wind himself into the handling of the cause anew after the judge hath declared his sentence ; but on the other side, let not the judge meet the cause halfway, nor give occasion for the party to say his counsel or proofs were not fairly heard" (Bacon's *Essays : Of Judicature*).

Decisiones Frisicæ.

Translated by F. H. de Vos, Barrister-at-Law, Galle.

IX.

(lib. 3. tit. 4. def 4.)

That a vendee who has bought a land on the condition that if he desires to sell it will give the preference to the vendor over all others, can sell to a stranger if the vendor, being requested thereto, refuses to buy it.

Some persons sold a land on the condition that if the vendees desired to sell the land, the vendors should be preferred to all others. The vendees being desirous of selling put it to the election of the

vendors to buy the same but they could not agree as to the price, refusing to give more than fifty guilders for each acre. Thereupon the vendees gave the vendors public notice of the intended sale and finally sold the land to Titius at the rate of seventy five guilders per acre. When the previous vendors heard of this they claimed preference over Titius in this sale, but as they, after being more than once requested thereto, refused to pay the price offered by Titius, their claim was dismissed by the court.* For the vendees had satisfied the terms of the condition by so often noticing the vendors who refused to buy back the land at the same price for which it was afterwards sold, *facit. Dig 45. 1. 122 sec. 3. vide* General Maynard *decis. Tholos. lib. 4. decis. XI. et* Jacob Menoch. *lib 2. de arbit. jud. cas. 37.* And he who has once declared that he will not buy cannot afterwards change his mind,as such a variation is reprobated, *Dig 33. 5. 2, 20.* although, when an election is given by law, a variation is allowed. *Dig. 45.1. 138. et ibi Doctores.*

X.

(lib. 3. tit. 4. def. 5.)

Whether, when in time of war the property of exiles is sold for their debts and afterwards sold or alienated by the vendees, if the exiles are afterwards restored to their rights by the conditions or terms of the treaty of peace and are given back the property and are evicted by third parties in possession, such vendees have an action against their vendees for eviction? This has been decided in various ways.

A person banished from Groningen whilst that city was still in the power of the Spaniards, being burdened with debt, in order to avoid a sale in execution of his property, sold by private sale his land to Titius, his creditor, who transferred the same to Gaius in satisfaction of some yearly dues. The city being afterwards besieged by the States General under the command of Prince Maurice of Nassauw, capitulated on certain conditions, *inter alias*, that the exiles may get back their property sold for their debts during their banishment or otherwise confiscated, on payment of the price within four years. The exile, relying on this provision, after tendering the price, sought to vindicate the land from Gaius the possessor who, among other pleas, pleaded that the aforesaid provision of the Treaty of Groningen did not apply to the present case, but referred, and must be understood to apply, to the case where the property of the exile was sold in execution and that the land was of his own free will sold by the exile. The plaintiff replied that the article of the treaty spoke generally of the property of exiles sold for their debts and proved that he sold the land to avoid the threatened sale in execution, which public sale would have otherwise taken place as the creditor was eager about selling it in execution, and that this was not a voluntary but a forced sale. The Judge of the Court below condemned Gaius to restore the land for its price, which judgment was affirmed in appeal. Afterwards Gaius (who had given his vendor Titius notice of the action) sued him in this court on the ground of eviction.

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* A° 1611.
Tydts van Botnia...plaintiff *v.* Tiallengh van Camstra *cum socio* defendant.

Titius answered that he was in no wise liable for the eviction, as the land was evicted, not through any fault of his, as, for instance, as belonging or bound to another, but by chance, which no human sagacity could have foreseen at the time of its alienation, viz. by the Treaty of Groningen, and that it is clear law that the vendor is bound to the vendee only for those causes of eviction which existed before the sale and not after the sale. *Cod. 4. 48. 1.* Hence Paulus has given it as his opinion *Dig. 21. 2. 11.* that the vendor is not concerned with rights accrued after sale and delivery. Clearly this restoration of the exiles to their property sold for their debts was a new and unexpected event which no human judgment could foresee, as Ulpianus says *in l. 2 sec si es 7. ff. de administ. tut.* And as Jacobus Cujacius says of a similar case *Consultat. 38.* this restitution did not arise from solemn grounds of restitution followed in law but from new favours conferred by the States General. And Pureus *lib 3. decis. 391.* says that it was decided that those who bought the confiscated property of the Bentivoli and thereafter sold the same were not bound for the eviction when the Pope had restored the same to the Bentivoli.

Although these arguments were, with a show of reason, urged for the defendant and appeared to me to be sound in law, yet the majority of the judges condemned the defendant to restore the yearly dues and the rents and profit enjoyed since the transfer, after deducting the price of the land and all that the plaintiff had acquired by the redemption or could have acquired and absolved the defendant from the further prayer of the action.* For the Court interpreted the said article of the Treaty of Groningen as if all things should be restored to their former condition, and that therefore, as this land had passed through many hands, not only should the exile get back the land from its present possessor on payment of its price with interests thereon, but the possessor should claim back the dues which he had ceded to his vendor provided he paid what he had received from the exile for the redemption, so that thus every one may be restituted *in integrum*, and not only the interest of the exile but also those of others to whom the property of the exile came should be as much as possible safeguarded. This decision seems to be supported by Angelus *ad l. 1. num. 2. C. de pericul. et commod. rei vendit* Octavianus Cacheranus *decis 48.* and Heeronymus de Laurentius *pec. 133.* But when this question came up before the court again as a special case where the property sold had been evicted by virtue of the Treaty of the Peace of the Netherlands the Court adopted the above arguments of the defendant and ruled that the vendor was not bound to restore the price of the property sold.

* 13 July 1605.
Tiepke Goverts, plaintiff v. Mr. Regnerus Bros. defendant.

Sanjiva Row's Evidence Act.*

We have already introduced to our readers Mr. T V. Sanjiva Row, the learned commentator of the Indian Code of Civil Procedure; we have before us the same author's two-volume edition of the Indian Evidence Act. On the plan of this work it is stated in the preface :

> My plan in the case of the Evidence Act is almost similar to that I pursued in the case of the Acts of the Lawyer's Companion series. Here, as in the case of those Acts, I mark numerically the words, phrases, or clauses of the sections, which have been judicially interpreted and, underneath the numbers and the corresponding words, etc, I have grouped the whole of the Indian case-law bearing thereon with appropriate headings, sub-headings and catch-words. This arrangement will, I venture to think, enable the practitioner or the judge to find, under such appropriate headings and catch-words, the case he requires. One departure, the utility of which, I feel sure the profession will readily admit, I have made in the case of this Act, is that I have, where it is necessary or possible, drawn upon such of the English and other cases as have been quoted in the works of the learned authors above referred to; whereas, as regards the Indian cases noted in this book, I have merely cited the volume and page, reserving the names of parties for the table of cases, as for the English decisions I give the names in full, there, and then. So that the readers may be able to look for them in the Indian Reports etc. without much difficulty.

The work is on the same lines as his Civil Procedure Code. He gives not only cases but also appropriate extracts from recognised text-books, on the law of evidence. The two volumes contain about 2,100 pages, brimful of matter, exceedingly well arranged. There are over 9000 cases made use of in annotating the various sections of the Act. The case-law is Indian, English, and American. Among the text-writers cited are Taylor, Best, Stephen, Phipson and Wigmore. Though the author very modestly states that his work is not meant to be compared with the Commentaries of Amir Ali, Field, and Cunningham, yet there cannot be any doubt that his work by no means suffers by such comparison. The great facility which his arrangement of the notes affords for reference is a merit which more famous treatises on the subject decidedly lack. To illustrate the arrangement adopted by the author we give the following from Vol. I p 44, on circumstantial evidence :—

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* The Indian Evidence Act, annotated By T. V. Sanjiva Row, Pleader, Trichinopoly. Two Volumes, Madras, The Law Printing House, 1910, Price Rs. 19.

(1) **The Fundamental Principle in Cases Depending on Circumstantial Evidence.**

In cases dependent on circumstantial evidence, the incriminating facts must be incompatible with the innocence of the accused, and incapable of explanation on any other reasonable hphothesis than that of his guilt 8 C. W. N. 278 (286) = 1. A. L. J. 28 (29).

(2) **Improper Disregard of Circumstantial Evidence.**

Circumstantial evidence of the strongest and most worthy character is improperly disregarded by native jurists in the Mofussil, though the facts constituting it be well put together, and their effect obvious to the trained judicial mind.

(3) **Circumstantial Evidence often the most Satisfactory in India. Method of Dealing with such Evidence.**

In India, evidence entirely circumstantial is frequently the most satistactory evidence, though, in appreciating such evidence, a court ought to see that, (1) each of the facts from which guilt is inferred must be proved beyond reasonable doubt, and (2) there is a complete link of evidence leaving no reasonable ground for any conclusion consistent with the innocence of the accused 15. P. R. 1867 (Criminal).

(4) **Circumstantial Evidence not Conclusive—Unsustainability of Conviction.**

Circumstantial evidence not furnishing conclusive evidence against an accused, though forming a ground for grave suspicion against him, cannot sustain a conviction, 10. C. W. N. 219 (220).

(5) **Rule in case where Circumstantial Evidence alone Exists.**

In case where there is no evidence of eye-witnesses, and where the stolen property is never found, the possibility of any other person being the culprit must be excluded before convicting the accused 10 C. W. N. 446. (448).

(6) **Exclusion of Circumstantial Evidence** not intended by Sec. 60 of the Act was not intended to exclude circumstantial evidence of the thing which could be seen, heard, and felt. 12. B.L.R. Ap. 18.

(7) **Incorrect Rule as to when guilt can be Inferred from Circumstantial Evidence.**

It is not a correct statement of the rule that every possible hypothesis but that of the guilt of the accused must be excluded before circumstantial evidence can be made the basis of a safe inference of guilt 22. C. 391 (409).

(8) **Conditions Justifying Inference of guilt from Circumstantial Evidence.**

In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation in any other reasonable hypothesis than that of his guilt 22 C. 391 (409) citing from Wills on circumstantial evidence.

(9) **Circumstantial Evidence of good Quality can be acted upon in cases of fraud.**

There is no reason whatever why circumstantial evidence should not be acted upon in dealing with questions of fraud, if it is sufficient to overcome the natural presumption of honesty and fair dealing, and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption 11. W. R. 482 (484).

(10) **Reasonableness a Question of fact Depending on Cirucmstances.**

What is reasonableness is a question of fact which must be decided in each case according to the particular circumstances and the local customs 11 C. L. R. 143 (144).

Each section is annotated, and every portion of it, so fully and the annotation is so attractively presented that the exhaustiveness of treatment does not weary the reader, but is calculated to make the practitioner realise that the perusal of the book is quite a pleasure. We very heartily recommend the work to all concerned.