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Compliments -

SOME REMARKS

ON THE

DESIRABILITY OF SIMULTANEOUS AND IDENTICAL LEGISLATION

FOR

ENGLAND AND IRELAND.

BY

HENRY JEPHSON,

MEMBER OF COUNCIL OF THE STATISTICAL AND SOCIAL INQUIRY SOCIETY OF IRELAND.

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REMARKS.

As Ireland is this year honoured by the British Association meeting in the Irish capital, I thought it might be not unpleasing to those of its members who take an interest in the matters treated of in this section, if some topic specially relating to this country were brought under their notice; and having been accorded the privilege of addressing you, I have selected an Irish topic of wide interest and primary importance.

The subject I have chosen is connected with Irish legislation. I say connected with, for to deal with the whole question would be—what I believe is against the Rules of the Association—to originate a political discussion on questions which are the subject of present party strife. I purpose, therefore, to confine my remarks as closely as possible to those matters which affect the people of each country independent of race or creed, though as the result I feel that I am but stating little more than half the case, and am excluding many cogent arguments which could be urged in favour of the main proposition which I wish to establish. That proposition is, that it is desirable that legislation for England and Ireland should be simultaneous, and as far as possible identical.

No one, I think, who has for any length of time watched not only the course but the matter of legislation for Ireland can have failed to be impressed with the want of system, and with the entire absence of any sustained effort for the assimilation of the laws of the different parts of the United

Kingdom. At times the laws are assimilated and the legal system and institutions, thus brought into greater harmony; but at times fresh legislative differences are created—with fresh causes of divergence—and so, though considerable progress has been made in the direction of simultaneous and identical legislation for England and this country, still progress is by no means so rapid as is feasible or desirable, nor is there any evidence that the practice of creating fresh differences has been finally eschewed.

The principle of identity of legislation occupies a very conspicuous place in Anglo-Irish history. From the very earliest time down to the beginning of the present century, we have instance after instance of the efforts made to render the laws of the two countries as nearly as possible identical. Not to go back further than the reign of Henry VII. we have Poyning's celebrated Acts—

"Whereof (to use Sir John Davis's words) one did look backward to the time passed, and gave a great supply to the defects of former Parliaments by confirming and establishing in this realm all the statutes formerly made in England. The other looked forward to the time to come by providing that from thenceforth there should be no Parliament holden here until the Acts which should be propounded were first certified into England and approved by the King and his Council there, and then returned hither under the Great Seal of that realm."

Again, in Elizabeth's reign, in one of the earliest of the State Papers—containing probably Cecil's views as well as the Queen's—we find instructions given to the Lord Deputy of her Grace's realm of Ireland that,

"Considering how needful it is in many cases to provide like laws as be of late established in this realm, the said Deputy shall therein confer with the rest of the Council there, showing to them the titles and books of the last Parliament here, and upon determination which of them may seem meet for that realm, either as they be or with other alteration, the same to be accorded or any other also to be newly devised for the weal of that realm, and as the manner hath been to return some person instructed therewith to the end Her Majesty so allowing the same may give authority for her Royal consent to be given thereto by her said Deputy."

In the next reign we find Sir John Davis—in this matter probably the most experienced man of his time—(he was Attorney-General to James I.) saying—

"If from the beginning the laws of England had been established, and the Brehon or Irish law utterly abolished, as well in the Irish countries as in the English colonies—if there had been

no difference made between the nations in point of justice and protection, but all had been governed by one equal just and honorable law, ... assuredly the Irish countries had long since been reformed and reduced to peace, plenty, and civility, which are the effects of laws and good government, . . . and there had been a perfect union betwixt the nations." . . . .

And in another place he adds—

"There can never be unity and concord in any one kingdom but where there is but one king, one allegiance, and one law."

Half a century later again, an effort, more real than any former ones, was made towards effectual identity by Cromwell, who, with views long in advance of other English statesmen, had one Parliament for England, Ireland, and Scotland. That union, however, lasted for but a short time; and from the middle of the seventeenth century down to nearly the close of the last century, the only provision which kept legislation somewhat similar was Poyning's Act. Then came a period when even that Act no longer exercised its restraining influence, and finally in the year 1800 came the Union.

The statesmen who proposed that measure evidently contemplated the completion in time of the structure of which they were little more than laying the foundations, for the Act was very far from being complete. Its incompletenesses explain the causes of many of the present differences between the laws of the two countries. First of all, though it declared Her Majesty's subjects of Great Britain and Ireland to be on the same footing generally in respect of trade and navigation, yet it left both countries with separate customs departments and tariffs, and thus left them in this matter virtually separate countries. Next, it left each country with its separate Exchequer, its different coinage. Next, it directed that all laws then in force, and all the courts of civil and ecclesiastical jurisdiction within the respective kingdoms should remain as then by law established within the same, subject however to "such alterations and regulations from time to time as circumstances might appear to the Parliament of the United Kingdom to require." It left Ireland also with a separate Peerage, a separate Privy Council, and finally and perhaps the most important of all, as being the ever fruitful cause of separate legislation—it left Ireland with a separate Executive.

Manifestly, therefore, it was a very imperfect measure, and one which would require many amendments and additions before the object should be realized of which it was the first real and not very much more than formal expression.

Slowly, spasmodically, and with much difficulty, some of these differences have been abolished; others of them have been diminished, whilst others, strange to say, have been added to, and extended.

Seventeen years elapsed before any material progress was made, the union of the Exchequers then taking place. The next step of importance was not taken until 1825, when the two countries were commercially united, and in the following year the currencies were assimilated; but it was not until so very recently as 1858 (just twenty years ago) that the fiscal systems of the two countries were finally assimilated.

A certain amount of progress in assimilation of matters not referred to in the Act of Union, was also made. In the year 1838 the Poor Law was introduced into Ireland (some 250 years after it had been introduced into England). In 1840 Municipal Corporation Reform was effected, the measure following the lines of the English measure. Certain Parliamentary reforms were also effected, following to a certain extent the English precedents; and a few other measures were carried which aimed at bringing the matters they treated of into a general harmony with English laws.

The very striking fact, however, remains that after a lapse of now very close on 80 years, many of the above enumerated defects of the Act of Union exist in full vigour. Another very striking fact also to be noticed is that new differences are frequently created by current legislation; and so now it results that partly from habit, partly from necessity consequent on that habit, partly from other causes, legislation for Ireland is, and has to be, conducted almost separately.

In the brief enumeration of some of the differences to which I will now proceed, it will make itself very evident that the very imperfections of the Union to which I have alluded instead of being carefully eradicated by judicious legislation were allowed to become the source of further differences.

It might reasonably be supposed that the substantial uniformity which, at the time of the Union, existed in the course and practice of the Superior Courts of Common Law and Equity in both countries, would after that measure have become more than ever an object to be carefully preserved. About the close, however, of the first quarter of a century, a system of legislation crept in, and gradually gained ground which resulted in the creation of a vast number of differences. Reforms in the administration of justice naturally became necessary, but instead of their being carried simultaneously for both countries as ought to have been done, each country was dealt with separately. A commission of inquiry would be appointed as regards England alone, and legislation would generally follow. Years afterwards a Commission of Inquiry would be appointed on the same matter as regarded Ireland only, and then legislation for Ireland would follow, and so differences grew and multiplied. So noticeable did this divergence of legislation at last become, and so detrimental to the general course of legal business, that in 1862 a Royal Commission was appointed to inquire into the constitution, procedure, &c., of the Superior Courts of Common Law and Court of Chancery in Ireland, with the view, amongst other things, "to assimilate as far as might be practicable the administration of justice in England and Ireland."

No report could be stronger in favour of general assimilation than that which the Commissioners made in 1863 as the result of their inquiry.

I will only quote one paragraph.

"We have come to a unanimous resolution that the system of practice and procedure of the Courts of Common Law of England and Ireland should as far as practicable be consolidated. In adopting this resolution we feel that we are only in effect restoring that substantial uniformity which existed in the course and practice of the Superior Courts of Common Law in both countries from the reign of King John to that of King William IV."

Remarks equally strong or stronger were made as regards the Court of Chancery.

If the laws in Ireland had originally been dissimilar from the English laws, as was the case with Scotland, then separate legislation would have been only natural, would indeed have been a necessity, but where identity in great

measure already existed, it appears to have been a grave error to begin after 25 years of union creating new differences—differences which were not justified by anything peculiar or exceptional in the state of Ireland—but which arose from the defective system of legislation—and which of necessity must tend to destroy that unity of system and principle which was so desirable—differences which, as the result shows had subsequently to be removed, for as the result of the Commission several Acts were passed which removed many of the differences and consolidated and amended the laws of the two countries. The English Judicature Act of 1873, however, once more widened the breach, and it required four years to pass an Irish Judicature Act which at last brought the course and practice of the superior courts of law and equity into general harmony in the two countries.

I have gone into some detail in this matter, as it explains the manner in which differences are allowed to be created, and displays very clearly the defective system of legislation. There is, it is to be observed, no question as to the desirability of identity of legislation for the two countries in matters common to both—thereon opinion is unanimous—but the opinion is not acted on at the time. Separate legislation ensues. Then years afterwards, under the pressure of necessity, a spasmodic effort is made, and the differences, which never ought to have arisen, are removed. But there is no recognition of the fact that the unity which it was desirable to attain had been attained, and therefore should not again be lost—there is no guarantee afforded that once assimilated the laws shall remain similar—and so every now and then the vicious circle is once more entered on.

A very similar system of legislation to that which I have here described has been pursued as regards matters in the inferior courts of justice. There, too, identity is desirable, but for a long period no successful effort was made to assimilate them, whilst constant legislation, now on this matter, now on that, was increasing the differences. Commissions inquired, but their recommendations were not acted on. Bills were introduced but not carried, and it was not until last year that the County Courts (Ireland) Act brought the Irish County

Courts up to a level with the English County Courts, and that important reforms long in beneficial action in England was extended to the people of this country.

The differences which I have so far adverted to have been in connection with institutions that existed in both countries at the time of the Union. Many, however, have been of a creation entirely independent of anything existing at that time. A large portion of modern legislation deals with matters of recent growth—the product of a modern and more enlightened school of political philosophy and economy—and which were not dreamt of when the 18th century closed. Here we shall find differences being created without the least conceivable reason in affairs that are perfectly similar in both countries. Here, too, we shall find examples of reforms being extended to Ireland years after they have been adopted in England, although no excuse is even hinted at for not applying them simultaneously to Ireland.

I have only time to give a few examples—they could be easily multiplied, but they will suffice to convey an idea of the manner in which Irish legislation is conducted.

It might reasonably be expected that in the matter of sanitary legislation the two countries should be treated as one. Such an opinion, however, if it prevailed was not acted on. In 1855 a Sanitary Act was passed for England only. In the recital of the Act it was stated that the provisions of the Acts of 1848 and 1849 which were then in force :—"So far as the same relate to the prevention or mitigation of epidemic, endemic, or contagious diseases are defective, and it is expedient to substitute other provisions more effectual in that behalf." The "more effectual" provisions made in the Act of 1855 were, however, confined to England only. In 1866, when an invasion of cholera was anticipated in Ireland, the only precautions which the Irish Privy Council could take against the introduction of that disease into Ireland were under the condemned Acts of 1848 and 1849 which were still in force there. The emergency, however, became so great that a Sanitary Act had to be passed for Ireland, and the law was then assimilated to the English law. It would, I think, be very difficult to justify the course pursued in 1855.

The Acts which had been so defective in England as to create the necessity for more effectual measures had been equally defective in Ireland; but such is the system of legislation pursued that an urgently required reform was not carried for Ireland until the great calamity of an outbreak of cholera was impending. Since the assimilation in 1866 further differences were made, but in the present year an Act has been passed which codified the Irish laws and once more assimilated the sanitary laws of the two countries. The question may, however, fairly be asked, how long will they remain similar?

Another difference created since the union, and one which entails a number of others is as regards the valuation of property. I had the honour of bringing the subject before the Association at its meeting two years ago, so need not do more than allude to it now.

In England and Scotland the valuation of property is based upon rent; in Ireland it is based on the prices of agricultural produce; furthermore in Great Britain the valuation is annually revised, whereas in Ireland no revision as to the value of land as distinct from buildings has taken place during the last 25 years. The result is that the valuation of property in Great Britain and Ireland is far from being approximate. If we consider how extensive are the uses of a valuation we see at once what numerous differences of legislation must be entailed by the existence of different systems. Its immediate use is for local taxation, but it is used also for the purposes of imperial taxation, and it furnishes a criterion for Parliamentary and Municipal Franchises, and for other public rights and duties in which a property qualification is an ingredient. The desirability therefore of an uniform system is very evident, whilst the arguments which formerly were urged for an exceptional system have, I venture to submit, lost their weight.

It would require a large volume to enumerate the differences that exist in many other matters. It would require the labours of a Royal Commission to ascertain them all. Besides those which I have alluded to there are differences in the laws relating to the representation of minorities, relating to the legal status of women, in the pawnbroking laws,

in the licensing laws, in the poor laws, and in a host of other minor subjects. I will just quote two instances not as being of importance in themselves, but as showing the ridiculous extreme to which separate legislation is carried.

It appears that great inconveniences were constantly arising from the inability of persons who wished to marry during minority to make binding settlements of their property. In 1855 an act was passed removing this disability, but it was held that the act did not apply to Ireland, and it was not until five years afterwards that another act was passed extending the English act to Ireland.

This is by no means the most ridiculous case, for even a more absurd one is to be found in the "Drugging of Animals' Act" of 1875, which was passed with the object of "making provision against the practice of administering poisonous drugs to horses and other animals by disqualified persons, and without the knowledge or consent of its owner." The fifth section enacted that the act should not extend to Scotland or Ireland.

The differences which I have thus pointed out are in matters more or less distinct from Local Government, and though the latter forms a not unimportant part of the subject, I cannot do more than mention it, referring you for particulars to the very valuable essays of the Cobden Club and to some reports recently presented to Parliament.

I have said enough to convey an idea of the legislative distinctions that exist between this country and England. In almost every function of Government from the highest to the lowest differences of a marked character are to be found. I can find no argument in favour of such a state of things, and I think that a calm and dispassionate consideration of the matter forces one to the conclusions that not alone do no benefits arise from thus legislating for Ireland, but that the practice has many most unsatisfactory and most undesirable results. No good end can be attained, no object realized by needlessly perpetuating old differences still less by needlessly creating new ones. It is a self evident proposition that the surest way of reaching identity and uniformity of legislation is by carefully avoiding the creation of fresh differences as well as by steadily minimising the differences

that do exist. The converse of the proposition is equally self evident. Separate legislation for Ireland increases the labours and occupies a greater amount of the time of Parliament. It precludes English members from taking due interest in Irish affairs; it keeps alive the false impression of the existence of separate interests; and what is to be above all things noticed is that it can lead to no definite end.

These, surely, are results sufficiently to be deprecated; and they are so easily to be avoided that I trust the publicity given to the matter by a discussion upon it before this Association will contribute materially to a very desirable amendment.

I cannot more forcibly illustrate the working of the present system of separate legislation than by referring to a Bill which was introduced during the last session of Parliament, called the "Criminal Code Indictable Offences Bill." It is a Bill of unusual magnitude. It repeals the whole of the present statute law on the subject of indictable offences, and substitutes a code in place of the present statute law. It also sets out the whole of the common law in regard to the same subject. It deals with offences against public order, internal and external; with acts injurious to the public generally; with offences against the person, the conjugal and parental rights, and the reputation of individuals. It introduces new principles of law in some of these matters. The measure, however, is confined to England. Ireland is excluded from its operation; and so, when passed, the laws of England and Ireland in all these numerous subjects—laws which, after years of labour and numerous Acts of Parliament, are now almost if not quite identical—will once more be dissimilar.

Almost despairingly one asks, will this system of separate legislation never end? Years hence, possibly, a similar measure will be passed for Ireland; but in the intervening years the laws will be dissimilar, and ultimately there will be an Irish code and an English code, whilst the golden opportunity will have been lost for establishing a code not exclusively English or exclusively Irish, but which should be common to both countries. It is no quixotic enterprise

that I am advocating, but one which with a certain amount of labour and care could be easily brought to a successful conclusion.

If it were recognised as a general principle that it is desirable that the laws and institutions of the two countries should as far as possible be assimilated, and that legislation affecting them should be simultaneous, certain very definite principles can be laid down, and certain rules prescribed for carrying those principles into effect.

The principles which should regulate all legislation for Ireland—I am speaking still subject to the limitation which I prescribed to myself at the beginning of this paper though they cannot but have a wider application—may, I think, be thus stated.

Firstly—In all legislation regarding matters which affect equally the people of both countries, no differences whatever should be permitted. In the next place, where similar results cannot be obtained by identical means, the difference of means should be as far as possible minimised; and the absolute condition should be insisted on that legislation should be simultaneous. And lastly, where special legislation is a necessity, it should aim at bringing the matters that form the subject of such legislation as far as possible into harmony in the two countries.

The rules which should be followed to give effect to these principles may be thus stated.

No measure that comes under the first of these principles should be introduced into either House of Parliament for England only, but should be made to extend to both countries. When special clauses were required to adapt a measure to the institutions of Ireland, the necessary clauses, instead of being postponed to a future period and then made a separate Act, as now so often happens, should be tacked on to the principal Act. The Ballot Act shows how, even in a large and very complicated subject simultaneous legislation is possible. Certain cases remain where the subject would be of such a nature or extent that a separate Act for Ireland would be required. Under this class would come all the legislation which will have to be effected to assimilate Irish institutions to English ones, and

to bring Irish laws into harmony with English laws. In these cases the English precedent should be followed as closely as possible and every unnecessary difference avoided.

If the principles here stated were kept steadily in view, and systematically acted on, a considerably increased degree of legislative uniformity would soon be attained; and what is also very important, a guarantee would be afforded that such uniformity would be lasting.

I must, however, conclude. I trust that the brief and very general review which I have here given of differences in the laws of the two countries, and the remarks I have made on the present system of legislation will be of use in directing attention to a subject which is really of the utmost importance. I have not attempted to enumerate all the differences which exist, for they could not be compressed within the space of a single paper, nor would they be of sufficient general interest, but I have said enough to show how numerous those differences are, how they permeate the whole system of laws and government, and how unsystematic and unsatisfactory the present system of separate and unsimultaneous legislation for Ireland is.

It is somewhat surprising that such a state of things should be allowed to exist, and that such slow progress should have been made towards identity of institutions and laws, the more especially as the necessity for the maintenance of certain special institutions has long since passed away, and as causes other than legislative have, within the last half-century, had the most powerful effect in bringing Ireland and England close together, and in fusing the two peoples into one. The commercial union removed the causes of commercial jealousy which had so long estranged the two countries. Steam and the electric telegraph broke down the barrier of distance between them; the spread of education, the increase of literature, and the wonderful development of the Press have all operated strongly in drawing the people together. So real has the union become that external events, be they political, commercial, or social, make their effects felt in each country equally, and thus daily in a hundred different ways the lesson is brought home to the peoples of the two countries

that practically, and in actual truth and verity their real interests are no longer antagonistic but common. The progress which has been made in this direction has been remarkable, and owing to the free intercourse between the countries the whole current of social, intellectual and commercial life is flowing towards the establishment of that community of interests which ultimately will weld the two countries together.

Surely, under these circumstances legislation should aid rather than obstruct the development of such natural tendencies; it should lead rather than impede such progress. Surely too under such circumstances it should be the object of those who mould our laws and frame the future destinies of our country, to strive for the attainment of as much unity of government and uniformity of legislation as it is possible to effect.