COMMENT.

THE MOLINEUX CASE.

The fact that the appeal papers in the Molineux case are now practically completed makes pertinent some allusions to the existing misconceptions relating to this celebrated case. It would occasion but little surprise if these misconceptions existed only in the public mind, since the prominence of the parties concerned, the enormous cost of the prosecution entailed to the State, and the space devoted in the public prints, have combined to obscure the legal issues involved.

In the Molineux appeal now pending, the appellant mainly relies upon the alleged wrongful admission of the Barnet evidence. Apart from its justification in this particular case, the principle of the admission of collateral evidence can be examined in the light of abundant precedent and judicial decision.

It is one of the distinguishing principles of the English law of evidence that the State cannot prove other independent crimes—except in rebuttal under certain circumstances—merely for the purpose of showing the general depravity of the defendant or to serve as the basis of an inference that he committed the crime in question. It may be stated that this rule is qualified to the extent that evidence of an independent crime is admissible when it is committed as part of the same common purpose. In such a case, the test of admissibility is not its criminality, but its relevancy. Precedent acts that are relevant and material are clearly admissible, and but little reasoning should suffice to show that such acts should not be precluded merely because they happen to be criminal.

Many suppose the Barnet evidence was allowed to go to the jury because, in the opinion of the trial judge, it came within the foregoing principle. They argue, and with reason, that neither the same motive nor a common purpose existed in the two cases, nor were the acts in the same chain that led up to the case on trial. It is very probable that if the admissibility of the Barnet evidence were defended on this ground alone, it would be open to serious exception.

But we are satisfied that the State will urge the propriety of its admission on a different ground. It will urge that on account of the peculiar manner of Barnet's death, his relations with the accused, and other connecting circumstances, a sufficient foundation was laid for the introduction of the so-called Barnet evidence; that it was simply a decision by the Court on a preliminary question of fact as to whether this evidence should properly go to the jury. In such a case it does not devolve on the State to prove beyond all doubt and question that the defendant has committed a prior crime. It yet remains the duty of the jury to weigh the evidence for what it is worth, and they must still be satisfied, beyond a reasonable doubt, as to the guilt of the accused as charged in the indictment.

As to the relation the particular facts in the Molineux case bear to these principles of the law of evidence, we, of course, do not presume to state. We may, however, be assured that the entire matter is in safe custody and confidently expect a careful and luminous exposition of the law on the subject.

STATE GAME LAWS—IMPORTATION UNDER.

The close check that the Federal Commerce Clause puts upon State legislation is again illustrated by two recent cases involving the right to make possession of game unlawful during the close season. A law of New York is declared unconstitutional so far as it applies to imported fish. *People* v. *Buffalo Fish Co.*, 58 N. E. 35. This overrules *Phelps* v. *Racey*, 60 N.Y. 10, where, under a similar law, a defense that the game had been imported from Illinois and Minnesota was held unavailing, it would seem because Congress had not legislated thereon. This latter is no longer law. The right to regulate foreign and inter-State commerce is given to Congress and imposes upon the States the duty not to interfere. So a State cannot prevent the importation of liquor. *Leisz* v. *Hardin*, 135 U. S. 100. The same doctrine was again applied in *Minnesota* v. *Barbour*, 136 U. S. 313, where it was held incompetent for a State to exclude beef killed outside of the State, by compelling an inspection twenty-four hours before the killing. The latest pronouncement is that a State cannot exclude a healthy product like oleomargarine. *Schollenberger* v. *Pennsylvania*, 171 U.S. 1. It would seem, therefore, that if the States are powerless to prohibit the importation of liquor and oleomargarine, which they deem injurious to the public welfare, or to provide inspec-

tion laws considered necessary as a health regulation, they are equally helpless to protect their own game if importation, by making evasion of their laws easy, practically destroys their effect. So it was held *in re Davenport*, 103 Fed. Rep. 540 (Cir. Ct. Wash.).

The Commerce Clause prohibits the States from putting any direct burden upon foreign or inter-State commerce. Under it a State can, in the exercise of its police power, interfere with commerce indirectly, provided it acts reasonably and in good faith. It is free to pass laws facilitating such commerce so long as Congress remains from the field. But the line of the legitimate exercise of its police power, with its indirect effect upon commerce other than internal, is separated but by a hair's breadth from the power that is Congress' alone. We do not think the argument of the three dissenting judges in favor of the State's right to legislate far enough to make its game laws effectual, can withstand the authority of *Leisz* v. *Hardin*, 135 U. S. 100, which is directly against this power, and which it is certainly a defect in the opinion not to mention. Of itself, the consumption of imported game tends to preserve the local supply. If it is prevented merely because its remote effect may be to render the evasion of game laws easier, it seems to make the innocent suffer for the guilty, and may be objectionable as an unreasonable restraint upon commerce. The people of one State have a right to buy wholesome products of the people of another, and State legislation cannot restrict this without good cause. *Minnesota* v. *Barbour*, 136 U. S. 313.

At all events, it is too late now to question the wisdom or unwisdom of the rule laid down in *Leisz* v. *Hardin*, *supra*. It is certainly an odd result worked out under the very same Commerce Clause, that a State which can prohibit absolutely the exportation of its game (*Geer* v. *Connecticut*, 161 U. S. 519) should be powerless to restrain its importation, which is equally effective, it is contended, to render nugatory the object desired.

EXTRADITION TO CUBA.

In re Neely, 103 Fed. Rep. 626-31, is the first case, so far as we know, that recognizes our protectorate over Cuba as constitutional. It arose out of the notorious postal frauds. Neely, the embezzler, fled to the United States. To meet this very exigency, Congress passed in June, 1900, an act allowing

extradition to any foreign country under the control of the United States upon probable cause being shown. The proceedings under this act were resisted by Neely upon two grounds, viz., that Congress had no right to surrender an American citizen to a country with a totally different criminal procedure, and that Congress having declared Cuba to be free and independent could neither occupy it nor exercise control there. The sufficient answer to the first was that the criminal elects the procedure of the place where he commits his crime. His citizenship could make no difference, for it is clearly not the policy of Congress to make of this country an asylum for criminals, whether citizens or not. Even without a treaty, a criminal can be surrendered by one country to another, as Spain did "Boss" Tweed to us, in return for a similar favor on our part. Since, then, a treaty is not needed, it is difficult to see how our control over Cuba, whether lawful or not, could have affected the present case. But as the proceedings were brought under the Act of Congress which presupposed an occupation and control over foreign territory, the Court holds to the obvious view that our occupation, rightfully undertaken as a war measure, continues so until Congress sees fit to relinquish it. The soundness of this does not seem to be open to doubt.