CRIMINAL LAW: M'NAUGHTEN'S CASE.

It is with diffidence that attention is drawn to a gross and persistent error in such an excellent work as " An Introduction to the Criminal Law in Australia " by Mr. Justice Barry, Professor Paton and Professor Sawer. Six times on pages thirty-one and thirty-two of that work reference is made to the *M'Naghten Case* and to *M'Naghten*. Strangely enough, in this fantastic spelling the learned authors are at one with the practice now being followed in the minutes of evidence of the Royal Commission on Capital Punishment, and indeed the Chairman of that Commission has publicly affirmed that for reasons of space and because he could see no good reason to the contrary (an extraordinary reason for changing a dead man's name) he would arrange that any witness before the Royal Commission " who spells the name differently will be treated as deviationist, and forced into conformity by the printer."

Some research on this subject has revealed a bewildering variety of spelling—sixteen in all, varying from *M'Naghten* (the briefest, originally perpetrated by Clark & Finelly) to *Michneachdain* (the Gaelic form).

It is respectfully submitted that continued insistence on *M'Naghten* is both high-handed and perverse: the unfortunate man himself considered his name to be *Daniel M'Naughten*, as witness a letter he personally wrote to The Times, and, what seems to have been completely disregarded, the House of Lords, when addressing the Judges on this subject in 1843, agreed with Daniel and wrote of *M'Naughten*. With such high authority behind us—the man himself and the House of Lords—it is not presumptuous to regard all other spellings as misguided and heretical.

N. M.

1. H. of L. Journal (1843) Vol. 25, p. 402.

PRIVATE INTERNATIONAL LAW.

Kenward v. Kenward[1].

The case of the Russian wives has become a *cause celebre*, and the Court of Appeal has shown some courage in invalidating the marriages. The husband, while serving in the Royal Navy, went through a ceremony of marriage with a Russian girl at Archangel. Two days later, the husband left Russia and the latter country refused permission to the wife to rejoin her husband, or for the husband to rejoin his wife. The Court of Appeal, while emphasising that the *lex loci celebrationis* must be applied to test the formal validity of the marriage, held that the Soviet officials did not intend the ceremony to be effective and intentionally omitted to comply with all the formalities laid down in the Code. Evershed M.R., considered that the subsequent action of the Soviet authorities gave the absence of formalities an importance which otherwise they might not possess.

Another question argued was whether the marriage was frustrated by the refusal of the Russian authorities to let the parties live together.

1. [1950] 2 All E.R. 297.

Evershed M.R. left this point open, but felt that if it applied to the marriage of domiciled Englishmen and foreigners, logically it should also apply to the marriage between two English domiciled persons. " If the latter, then it would appear to introduce a ground for dissolution of marriage which is not found in the statute."[2] Bucknill L.J. did not specifically discuss this point, though he agreed in general with the reasons given by Evershed M.R. for the dismissal of the appeal. Denning L.J., however, specifically rested his decision on the doctrine of frustration. If the marriage is between persons domiciled in different countries, the substantial validity of the marriage may depend on the personal law of one or other of the parties to it. A marriage, valid by the local law, may be voidable by reason of a condition imported by the personal law of one of the parties, if the parties married on the basis of that law. Here the parties intended to come to England to live and the husband married on the basis of that fundamental assumption. An essential condition of the marriage had failed and therefore the marriage was voidable in English courts. This is an interesting doctrine, but it does open up alarming possibilities. The learned Judge used the analogy of the personal law to solve the question whether the marriage was monogamous or polygamous. But the intention of the parties (a test implicit in the phrase " married on the basis of that law ") is surely quite irrelevant. We cannot test the nature of marriage by intention, race or domicil. The only criterion is the law of the place of celebration. Cheshire attacks this view, preferring the test of the matrimonial domicil, but this hardly seems supported by the cases. Victorian law recognises only monogamy so far as its forms of marriage are concerned. As the formalities of a marriage celebrated in Victoria must depend on Victorian law, does not this incidentally decide the nature of the marriage itself ? Two persons domiciled in India cannot while in Victoria enter into a polygamous marriage which will be recognised as valid by Victorian law. It seems, therefore, with respect, that the analogy of monogamous and polygamous marriages does not really assist the argument of Denning L.J. concerning frustration.

G.W.P.

2. At page 305.

PRIVATE INTERNATIONAL LAW: TESTATOR'S FAMILY MAINTENANCE LEGISLATION.

The judgment of Sholl J., in *Re Paulin*[1] is of interest because it deals, apparently for the first time in Victoria, with the question of the choice of law rules to be read into the Testator's Family Maintenance legislation contained in Part V of the *Administration and Probate Act* 1928[2].

The decision was on an application by a widow for provision to be made for her out of the estate of her deceased husband, who had failed to make any testamentary provision for her. The testator, whose last domicile was found to be Victorian, left both immovables and movables

1. [1950] A.L.R. 503.
2. As amended by Act No. 4483 (1937).