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THE LAWYER IN LITERATURE.

This is the subject discussed by John Marshall Gest, Judge of the Orphans' Court, Philadelphia, in a book just published by the Boston Book Co. It consists of papers read before several Law Schools and Law Clubs in the United States, originally published in the University of Pennsylvania Law Review. Those who desire some very interesting and instructive reading would do well to obtain this volume; and, after reading the introduction thereto by John H. Wigmore, Professor of Law in the North Western University, they will be more than ever impressed with the desirability of, and the pleasure to be derived from, an adequate attention to general literature which bears upon professional matters apart from the study of reports and legal text-books. Mr. Wigmore's short paper is so suggestive that we give our readers the benefit of it, as follows:—

The compliment is an agreeable one, to be allowed to figure as the Introducer of so accomplished a legal scholar as the author of these essays. When they first saw the light in the Pennsylvania Law Review, I was among those who urged that they receive a more permanent form in our literature; and it is a satisfaction to see this proper destiny now shaped for them.

Who, that has already made acquaintance with these characters of the law in Dickens and the rest, will not take pleasure in comparing notes upon them with Judge Gest? Who, that has his favourites and his aversions among them, will not be interested in the author's new points of view, his fuller survey, his keen judgment, his trenchant wit, his generous sympathies, his illuminating comments?

And yet a main use of the book ought to be to send those readers to the originals who have never been there. Can a lawyer—I mean one of self-respect, of aspiration, of devotion to his art and science,— can he afford to ignore his profession as it is glassed in the literature of life?

Why should a lawyer, *as* a lawyer, be familiar with literature, particularly the literature of the novelists?

Well, in the first place, there are episodes of fact and types of character in professional life whose descriptions by famous novelists have become classical in literature,—Serjeant Buzfuz in *Pickwick Papers;* the Chancery suit in *Bleak House;* Effie Dean's trial in *The Heart of Midlothian;* and many more. With these every lawyer must be acquainted,—not merely as a cultivated man, but as one bound to know what features of his professional life have been taken up into general thought. "The first thing we do, let's kill all the lawyers!" said Dick the Butcher to Jack Cade. If you do not know, from your Shakespeare or elsewhere, that this sentiment was once—and more than once—a rabid popular demand, then you cannot gauge the possibilities of popular thought in these very days of ours.

Then, again, there is the history of law,—that is, the scenes and movements in legal annals which history has made famous. To know the spirit of those times—to realize the operation of the old rules now gone—to feel their meaning in human life—to appreciate the bitter conflicts and their lessons for to-day—this deepest sense of reality for the past we shall get only in the novels, not in the statute books or the reports of cases. It is one thing to read the trial of Lord George Gordon in good old Howell's State Trials, but it is a different thing to read about the very same events in *Barnaby Rudge.* We must go to *Bleak House* to learn the living meaning of Chancery's delays; to *Oliver Twist* to see the actual system of police justice in London; to *Pickwick Papers* to appreciate the other side of Baron Parke's technical rulings reported in Meeson & Welsby's volumes,—those sixteen volumes of which Erle said, "It is a lucky thing that there was not a seventeenth volume,—for, if there had been, the common law itself would have disappeared altogether amidst the jeers of mankind." Read Lady Lisle's trial by the savage Jeffreys, in Howell's State Trials, and then Conan Doyle's account of it in *Micah Clarke;* read some book on the early real property statutes of New York, and then Fenimore Cooper's portrayal of them in *Satanstoe* and *Chainbearer;* read the chill technical reports of bankruptcy pro-

ceedings in the Federal Reporter, and then Balzac's story of the downfall of *César Birotteau.* The living side of the rules of law is often to be found in fiction alone.

But there is a further service, and a higher one, to be rendered to the lawyer by literature. For literature, and especially the novel, is a catalogue of life's characters. And human nature is what the lawyer *must* know. He must deal understandingly with its types, its motives. These he cannot find—all of them—close around him; life is not long enough, the variety is not broad enough for him to learn them by personal experience before he needs to use them. For this learning, then, he must go to fiction, which is the gallery of life's portraits. When Balzac's great design dawned on him, to form a complete series of characters and motives, he conceived his novels as conveying just such learning. He even enumerated the total number of characters His task was, he says:—

"To paint the three or four thousand salient figures of an epoch —for that is about the number of types presented by the generation of which this human comedy is the contemporary and the exponent, this number of figures, of characters, this multitude of portraits, needed frames. Out of this necessarily grew the classification of my work into scenes. Under these heads I have classed all those studies of manners and morals which form the general history of society . . . If the meaning of my work is understood, my readers will see that I give to the recurring events of daily life (secret or manifest), and to actions of individuals, with their hidden springs and motives, as much importance as the historian bestows on the public life of a nation."

In this view, the work of the novelist is to provide a museum of human characters, traits and motives—just as we might go to a museum of zoology to observe an animal which we desired to understand but had never yet seen alive; this was Balzac's idea:—

"There have always been, and always will be, social species, just as there are zoological species. If Buffon achieved a great work when he put together in one book the whole scheme of

zoology, is there not a work of the same kind to be done for society? . . . There are as many different men as there are species in zoology. The differences between a soldier, a workman, a merchant, a sailor, a poet, a beggar, a priest, though more difficult to decipher, are at least as marked as those which separate the wolf, the lion, the ass, the crow, the shark, the seal, the lamb, and so on."

And so the lawyer, whose highest problems call for a perfect understanding of human character and a skillful use of this knowledge, must ever expect to seek in fiction as in an encyclopedia that learning which he cannot hope to compass in his own limited experience of the humans whom chance enables him to observe at close range.

This learning has been sought, possessed and valued by many great advocates. Perhaps they have seldom openly inculcated its value. But I know of one singularly direct exposition of this theme, which must here be quoted:—

"Read the literature of human nature . . . To my mind Balzac is the greatest judge of human nature, after Shakespeare. I think I learned more of human nature (outside of my own experience) from Balzac than I have from any other author except Shakespeare. I recall especially *Eugénie Grandet*, the history of a miser. I have read that book two or three times, and this is how it profited me afterwards. I was retained in a very serious case of fraud. I studied the party on the other side. I made up my mind that if ever there was a miser out of the pages in literature, that was the man, and that Grandet was his literary father-in-law. I studied *Eugénie Grandet* again, and then I attacked that opponent. It was an eight years' task. But the image of Grandet helped me to hound that man so, that at the end of eight years there was not anything left but his hide. The greatest admirer of the work I did is that man's own lawyer; but he will not give me credit for having any legal acumen. He maintains that I knew all the facts beforehand. Yet the truth of the matter was that I did not; I drew the bill before I had the facts. I merely judged the man's character from what I had read of *Eugénie Grandet*. That experience was to me a life lesson.

"Let me allude also to another case, one that nearly broke me down with the mental and physical strain. I had bought every printed trial I could find on that particular subject. I had a year to prepare for the actual trial of the case. There were very eminent lawyers on the other side. I will not mention names, for the parties are living. But I did not receive from all these books as much light as I did from a certain classical novel, one that characterized exactly the plaintiff's object and put that party in the lime-light. With that aid I was able to follow all the ins and outs of his maneuvers, and finally to win the case. It was a work of fiction that guided me to a right solution of that person's character, and a knowledge of his character that was essential to victory.

"Still another lesson I now recall which I learned from reading —a lesson I shall never forget. It relates to a gentleman by the name of Gil Blas. Gil had various and sundry adventures, and among others he was made secretary to the Archbishop of Toledo. The Archbishop said to him one day: 'Gil, I look upon you as a very likely young man, I like your intelligence and acumen. Now I am getting old. I have to preach once a month. Make it your duty to let me know when you see any failing signs in my mental powers. I will trust you as a friend to tell me about it.' So Gil noted the character of the sermon the next month. Then he heard the ensuing sermon; and he thought the Archbishop showed signs of age and senility. At the third sermon he was more satisfied of this, and the fourth was shockingly significant. He complimented the Archbishop on the first sermon, and spoke fairly of the second, but of the others he did not. The Archbishop asked, 'Now, Gil, what is the truth?' Gil said: 'Your Eminence, your mental powers are failing rapidly.' 'Gil,' responded the Archbishop, 'I find that I am mistaken in your acumen. The treasurer will pay you and you will leave the house.' I have never forgotten the moral of that story. Such incidents of literature add to your knowledge."

And so the best literature—drama or poetry, philosophy or fiction—must always be an arsenal for the lawyer. That is why I offer the hope that this volume may whet the zest of all devoted members of our profession to follow the example of our author, and to seek in literature its manifold message to the lawyer.

TRADITIONS OF PARLIAMENT.

We received a letter from a valued correspondent who writes as follows:—

"In your editorial entitled, 'Traditions of Parliament' you ask, Why choose the stock of a company with which the Government of which they were members was actually in negotiation or had been or might be? As I understand such reports of the investigation into the Marconi case as I have seen, the American Marconi Company, whose shares were bought by Mr. Lloyd George and Sir Rufus Isaacs, was not a company with which the Government of which they were members was actually in negotiation or had been or might be, but a distinct and unrelated company whose shares might be expected to advance in synchrony with those of the English Marconi Company, because of the similarity of name, and the inducement to buy them was a broker's tip. If I am right, your insinuation is unfair; if I am mistaken, I wish you would point out to me the evidence for my correction."

It seems to us that our correspondent himself supplies the answer to his objection to our criticism. Whilst it is true that the British Government were not distinctly negotiating with the American Company in which the Attorney-General and Mr. Lloyd George had taken shares, it was nevertheless a company which would probably be indirectly affected by any action of the Government of which they are members. The better the condition of the company with which the Government was negotiating the more valuable would become the shares taken in the company which was in sympathy with it. In truth, our correspondent, without, perhaps, intending it, advances a strong argument to shew that the action of these ministers was most unfortunate; and as *The Times* said, "they made a mistake in walking into a puddle which might easily have been avoided." We agree with the opinion expressed by that writer that a frank acknowledgment of the mistake, with the procedure known as throwing yourself on the mercy of the Court, would have made a better impression on the public.

REPRESENTATION OF DEFENDANTS IN TRADE UNION ACTIONS FOR TORT.

By the Trades Union Act (R.S.C. c. 125) certain acts which at the common law were illegal as being in restraint of trade, are made lawful, but by s. 4 no legal proceedings can be taken to enforce or carry out such acts. The formation of trade unions is authorized, and associations of this kind can be legally formed, which sometimes exceed their powers, and in pretended furtherance of their objects inflict serious injuries on individuals. It is quite obvious that if the service of every member of a trade union, which has authorized and carried out a wrongful act, were a necessary preliminary to obtaining compensation at law for such injuries, the person wronged would be practically without redress, and the law would have created a legal monster which it was incapable of controlling. To make one person responsible for the wrongs done by others, to which he has not assented, is repugnant to legal principles. Where a tort is committed all who aid or counsel, direct, or join in the commission of the tort are joint tortfeasors, and as such liable to the person wronged; but how far can members of a society not formed for the commission of any unlawful act, and who do not actively aid, counsel, direct or join in the commission of the wrong, be held responsible for the acts of those members of the association who do, as members and officers of such association counsel, aid, or abet the commission of a wrongful act? It may be said all such acts are ultra vires of the association, and only those who take part in them are legally liable for the wrong done. At the same time the fact remains that the funds and organization of the association are used for the purpose of carrying out the illegal act. The wrong is done and often at the instance of persons who are individually worthless, and unless the funds of the association can be made answerable no efficient remedy can be obtained. The *Taff Vale Railway* case hereafter referred to is supposed to have established that the funds of such an association can be made liable to answer for damages so inflicted and that by means of a representative action.

The practice relating to representative actions originated in Equity, in cases where, owing to the multiplicity of parties, it would be impossible to carry on a suit if all persons interested had to be made plaintiffs or defendants. In such cases the plaintiff might sue on behalf of himself and all others in the same interest, respecting some right to property, and a defendant might be sued as representing himself and all others in the same interest. But where any relief was granted in which the unrepresented parties were individually concerned, they would ordinarily be made parties at a later stage in the suit. Administration and partition suits are familiar examples of this procedure. Any person who was required to account, or against whom any personal relief was sought, was always required to be made a defendant prior to the hearing. In suits against companies, the shareholders were never made defendants in the first instance, but where a judgment recovered against a company remained unsatisfied, and it was desired to levy execution against shareholders, sci. fa. proceedings were necessary. This procedure consisted of a writ directed to the shareholders against whom execution was sought to be issued, calling on them to shew cause why execution should not issue against them. To this writ no defence which could have been set up to the original clause of action could be made. The only question being whether or not the party served was a shareholder and whether or not, as such, he was indebted to the company, and if so, to that extent execution might be awarded against him, so far as necessary to satisfy the judgment.

The method of procedure by representation was unknown to the common law. At law all persons against whom an adjudication was sought were required to be made defendants in person, and there was no such thing known to common law practice as a suitor, whether plaintiff, or defendant, representing anybody but himself.

But the Judicature Act not only perpetuated the equity practice as regards representative actions where rights of property are concerned, but also extended it to actions of a purely common

law character, as for instance actions to recover damages for tortious acts committed by a combination of many persons.

In suing a trade union for a tort a plaintiff is met with the difficulty that the union is not a corporation and cannot be sued as such. It has a recognized legal status, and is possibly a quasi corporation to the extent that it may be sued by its name: see *Taff Vale Railway* v. *Amalgamated Society of Railway Servants* (1901) A.C. 426; 85 L. & T. 147, and yet it does not possess the legal attributes of a corporation so that it can be sued effectively by its name so as to bind its property. Very often as far as property is concerned the union is nothing but a name, "the collective name of all the members," as Lord Macnaghten said in *Taff Vale Railway* v. *Amalgamated Society of Railway Servants*, supra. Usually its property is vested in individuals as trustees, and in order to reach the property of the union it is necessary that such trustees should also be made parties to the action. In a recent case of *Robinson* v. *Lawrence*, referred to in the *Law Times*, an action was brought in England to recover damages from a certain named defendant, and against a society, for wrongfully and maliciously conspiring and combining to procure certain members of the society to commit damage. In the action the society was represented by one of its leading members, and the jury returned a general verdict against all the defendants including the society. In the same way a trade union may be sued. But the difficulty in the way of making the property of a trade union answerable for its torts is well illustrated by the *Metallic Roofing Co.* v. *Local Union No.* 30, 5 O.L.R. 424; 9 O.L.R. 171, and see S.C. 10 O.L.R. 108. The trade unions sued in that case were not registered under the Trade Unions Act, one being a general association of the metal workers of the United States and Canada, and the other a local union or branch of the general association; and it was held by the Court of Appeal that they were not corporations, nor quasi corporations, nor partnerships, and were not capable of being sued and served with process as such in the ordinary way; but it was held that both associations could be sued in respect of wrongs committed within the juris-

diction in a representative action under Rule 200. The action accordingly proceeded and a judgment for a large amount was recorded, but was subsequently set aside by the Judicial Committee of the Privy Council: *Jose* v. *Metallic Roofing Co.* (1908) A.C. 514, and a new trial ordered on the ground of misdirection, The case, we believe, was subsequently compromised; but the difficulty in the way of the plaintiffs collecting the judgment, if it had been upheld, was shewn by their unsuccessful effort to collect certain costs which were ordered to be paid them in the course of the action. Both unions and certain members of the unions were named as defendants and by an order of the court those named were ordered to represent all other members of the unions. The defendants were ordered to pay the costs of an unsuccessful appeal, and not having paid them the plaintiffs obtained an attaching order against certain moneys in a bank to the credit of one of the unions and officers of the union, but on an application to pay over the Master in Chambers refused the order; he was reversed by Anglin, J., who in turn was reversed by a Divisional Court (Meredith, C.J.C.P., and Britton, and Teetzel, JJ.). The learned chief justice who delivered the judgment of the court said: "The members of the Local Union, other than those named as defendants are not parties to the action; they are represented no doubt, by the members who are defendants, and will be found by whatever judgment may be ultimately pronounced as if they had been named as parties defendants, and as I have said that being the case *the court may be enabled to pronounce a judgment which will render the property of the Local Union answerable for the judgment debt and costs* if the respondents shall succeed in the action; but I am unable to understand how A., B. and C., being defendants and an order having been made that they shall represent all other members of a class, an order that the defendants shall pay money, whether it be for damages or costs, without more, can be enforced by execution, or process in the nature of execution, against the property of anyone but A., B. and C. In other words, how an order that A., B. and C. shall pay money, can be treated as

an order that they and the other members of a class for which they have been authorized to defend, shall pay it." The learned Chief Justice intimates that the court may be enabled in such a suit to pronounce a judgment which will find the property of the persons responsible, but how it is to be done, he does not explain. His reasons for allowing the appeal would appear to shew that all such actions are really futile, and that the order for representation is really a delusion and a snare and accomplishes nothing effective, and is merely a prelude to endless litigation; for if the parties ordered to be represented are not bound by an adjudication as to costs, it is hard to say how they could be bound by an adjudication as to damages. According to his view because they were not actually parties they were not liable to execution. The inference from his judgment appears to be, therefore, that after judgment has been obtained, then all the members of the union against whom execution should be desired, or interested in property sought to be made liable to answer the judgment, would have to be first made parties. For this the proceedings by *sci. fa.* in the case of shareholders seems to furnish some analogy.

This may possibly be the "something more" to which the learned Chief Justice refers. The parties represented are bound as the shareholders of a company are bound by a judgment against the company, but before they can be individually compelled to pay or their property be attached to answer the damages or costs, it would seem as if they must be individually brought before the court and called on to shew cause why execution should not issue against them for damages and costs incurred in the action in which they have been represented as defendants. If such is the procedure the learned Chief Justice contemplates as necessary before any person, not actually a party, can be made answerable, it will be seen that any attempt to make a trade union or its members individually liable for wrongs perpetuated by the union will generally involve an intricate, protracted and costly litigation.

In the *Taff Vale Railway* case, supra, the trade union was made a defendant, and an application to strike out its name was made,

and refused. The judgment in that case, as affirmed by the House of Lords, was for an injunction and costs. Lord Lindley said he had no doubt that if the union could not be sued in its registered name some of its members (viz. its Executive Committee) could be sued on behalf of themselves and the other members of the society, and a judgment for damages could be obtained, in a proper case in an action so framed. And that if the trustees of the property of the union were made parties an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the union. He also remarked that a judgment against a trade union could only be enforced against the property of the union and that to reach such property it may be found necessary to sue the trustees. These observations are obiter, but they are made by a judge who is a distinguished authority on partnership and company law. His view would appear to be similar to that of the learned Chief Justice of the Common Pleas, namely, that in order to make any person individually liable for a judgment recovered in a representative action he must in some way be made an actual party to the proceedings. If the property of an union is sought to be made answerable then the trustees in whom that property is vested must be made actual parties defendant. But even in this view of the matter it appears to us that the garnishee proceedings in *Metallic Roofing Co.* v. *Local Union*, 10 O.L.R. 108, ought to have succeeded on the merits.

The application may have been defective for want of parties, but if so the proper parties should have been ordered to be notified. It would appear that the money in question was standing in a bank to the credit of "The Amalgamated Sheet Metal Workers' Union, No. 30. Alex. McKay, president, W. C. Brake, recording secretary, and R. Russell, treasurer," and to the credit of the defendant William Jose—all of these parties except McKay were actually named as defendants and ordered to pay the costs in question. And they were the parties who resisted the application to pay over. As far as they were concerned they had really no defence to the motion Their objection really amounted

to no more than this, that other persons were interested in the funds; but those other persons were persons whom the defendants were ordered to represent in the action. It is difficult to understand why the order to represent absent parties was sufficient to warrant the defendants in representing the absent parties for the purpose of enabling a final judgment to be recovered which would be binding on the absent members of the class and yet not equally sufficient to enable them also to represent the absent parties for the purpose of the application to pay over the money in which it was not pretended that they had any special or different interest other than that of all other members of the union ordered to be represented by the actual defendants before the court.

The plaintiff had recovered a judgment for costs against parties who represented those whose property was sought to be attached. The only defence to that motion which appears to us to have been properly open to the defendants was whether or not the parties interested in the money sought to be attached, were members of the class represented by the defendants ordered to pay the costs in question. And the answer to what appeared to the learned Chief Justice an incomprehensible situation appears to be self-evident. The judgment for costs was against A., B. and C., representing also D. D., therefore, was liable for the judgment as well as A., B. and C., and a debt owing to D. was, therefore, properly attachable to answer the judgment on notice to A., B. and C., who represented D. If A., B. and C. could have shewn that D. was not a member of the class, A., B. and C. were authorized to represent, that would clearly have been an answer. But the answer which the court held to be good, viz., that he was not actually named as a party ordered to pay, appears in the circumstances wholly insufficient in law if a representative action for tort is to be of any practical value whatever. Such an action certainly seems to fail of its purpose, if, after judgment has been recovered for damages and costs, the plaintiff is to be told you cannot recover your damages or your costs against any one who is not actually named as a party, or made a party by some further proceeding.

EVOLUTION IN ANNOTATION.

By HENRY P. FARNHAM, M.L.

A report of a law case which makes no pretension to being annotated to-day is almost as rare as was the case which was annotated thirty-five years ago. The theory seems to prevail that the duty of a reporter is not done if he merely furnishes a correct copy of the opinion with accurate head-notes, adequate statement of facts, and helpful excerpts from briefs. He must, in addition, give the reader some additional light upon the problems solved by the court by reference to other cases in which the same or similar problems were involved. The spirit which animates this additional matter is good in all cases, and when the publication is sold, largely because of its annotation, it is necessary. While a judicial decision is now, as always, an application of a principle to a given state of facts, the modern lawyer is not satisfied with one elucidation of the principle, no matter how accurate and profound, but he wishes to know how other courts have dealt with the same question, even when he himself is capable of discerning the principle and reasoning to a proper conclusion the question of its applicability to particular states of fact. If he is not capable of thus reasoning as to principle, he insists upon knowing the various conclusions which have been reached in cases presenting similar facts, and to be given the opportunity of counting the decisions upon the respective sides so as to know what the weight of the authority is. Aids to this knowledge are, therefore, welcome and more or less helpful, according to the fullness and accuracy of the information conveyed. To furnish these aids, annotation is furnished. This is of many varieties and many degrees of excellence. That requiring the least effort, and costing the least money, is composed of references to places where cases have been gathered either in notes to other reports and text-books, or in digests. The value of this annotation depends entirely upon the quality of the work to which reference is made. If it is to a carefully prepared and exhaustive collection of cases which are fully set out, accurately

classified and distinguished, it may be very helpful in pointing the reader to the place where he will find a solution of his problem. If it is to a mere collection of cases which are not classified or distinguished, it may save a little time by relieving the reader of the necessity of searching through books of reference for himself, but he is still left to do most of the work in examining original sources and ascertaining the true force and value of the cases cited. If it is to a section of digest, it merely saves him the time which would otherwise be required to turn to the scheme of the subject in the digest to ascertain which section deals with the subject-matter under examination which, when found, is the mere crude material from which briefs, reports and annotation proper is made; for experience shews that as cases are collected in a digest section, with nothing to shew their distinguishing or harmonizing features, the material found is little better than a reference to so many cases to look up.

Another class of annotation which is of value within certain narrow and well-defined limits is that which shews where the reported case has been cited, criticized, followed, explained, distinguished, or overruled. This class of annotation has two principal values: First, it shews how the case under consideration has been treated by other courts, and, therefore, to an extent, its value as a precedent; and, second, it sometimes, in cases containing novel points, assists in finding other similar cases which might not be readily found in the ordinary reference books. If the citing cases are unclassified, the reader may have to examine a large number of references without finding anything of value to him, the citations being to minor or unimportant points in the cases. This annotation is more valuable if the citing cases are classified, but a serious objection to it is that it is likely to furnish only cases in harmony with the case under consideration, and thereby mislead by failing to disclose what there may be on the other side. If this annotation is properly classified, and its limitations are kept in view, its value is sufficient to justify its addition to the library.

Another class of annotation consists of a collection of leading

or important cases more or less in point with the case reported. This annotation is usually prepared by the judge writing the opinion, or by the official reporter of it. Its value depends upon the care with which the cases are chosen, and the fullness and accuracy with which they are set out, the value increasing as the necessity for consulting the original reports diminishes. Of slightly more value is the annotation which purports to be an exhaustive collection of the cases in point, arranged in a few general groups, with now and then an illustrating case set out fully enough to illustrate the general application of the principle involved. Experience teaches that few cases are actually on all fours with respect to the point actually decided in them. Many may be found which will lay down the same broad principle as a basis for reasoning, or as leading to the conclusion reached; and when many cases are found grouped under one proposition, examination will disclose that the reader receives little aid beyond ascertaining the general subject to which they relate, and that he must examine them, case by case, to learn what application was made of the principle involved, and whether or not it is of value in the solution of his problem. Such general grouping can be easily and quickly done, but, unfortunately, it leaves the reader to perform the real work himself, telling him only what cases to include in his examination.

Much more useful than the above is the annotation prepared by the competent text writer, based on elucidation of the principle involved in the decision under review, illustrated and fortified by well-reasoned cases. This annotation seldom purports to make an exhaustive collection of cases upon the subject, but intends to utilize the leading ones, and so illuminate and expound the principle involved that the reader will have difficulty in determining its scope and applicability, and will be able to settle his own problem whether he finds a case directly in point or not. Such work requires ability of a high order, incessant study, and a judicial temperament. Few annotators can produce satisfactory work of this kind.

The highest evolution in annotation, and that which the best

publishers are more and more nearly approaching, begins with an absolutely exhaustive collection of the cases bearing upon the subject in hand, and a search for the underlying principles which should be applied to its decision. From the cases collected is prepared an elucidation of the principles involved, so clear that the reader will have no difficulty in determining what the law is, and why, setting out each case fully enough to indicate how the principle was applied in it, and just what it is worth as a precedent, indicating the best-reasoned cases, and those decided by the strongest judges, so as to enable the lawyer or judge to examine the fewest cases possible in the preparation of brief or opinion. All cases are so classified, harmonized and distinguished that the needed one may be found in the shortest time, and if any reason exists why a particular one should or should not rule the one under consideration that reason is plainly pointed out. This gives ample scope for the profound study and constructive ability of the text-book writer, and the exhaustive and painstaking care of the case lawyer, and furnishes to the profession a combination of principle and case which is of the highest value. This is modern annotation in the true sense. By way of emphasis, this kind of annotation may be compared with the work of the digester. A digest paragraph is a mere index of the case for which it is prepared, without any thought of its relation to other cases upon the same subject. It is prepared not to shew the principle involved, but the mere accidents of the case as indicated by its facts. The result is that cases based upon the same principle may be so classified as to be found under different titles in the digest. A digest section, therefore, may not only not refer to all the cases which ought to be consulted to know the law with which it purports to deal, but even the cases which it does contain are not prepared for the purpose of shewing the law, but to shew what the decision was on a particular state of facts. One can gain little more comprehensive knowledge of a subject by reading a section of a digest than he could gain from a book by reading its index. Annotation states the law; a digest shews where one can find the law. A digest is a valuable aid in

doing one's own work; annotation does the work for him. Annotation of this last type requires experience and ability for its preparation. Twenty-five years ago the best editors in the country said it was impracticable, and could not be furnished. But when human effort was satisfied with nothing less than its ideal in other lines, progressive editors said, having seen this ideal, we will be satisfied with nothing less. To realize how far they have traveled towards this ideal, it is only necessary to compare annotation produced thirty years ago with the best produced to-day. One buying reports as such should thankfully receive such aids in the form of "annotation" as are furnished him, because he is getting therefrom much help gratuitously, but if he is buying annotation as well as reports he should select that which most nearly approaches the modern ideal above described. —*Case and Comment.*

EXTRA-TERRITORIAL CRIMES.

As appears from the report recently issued, the jurisdiction of the English courts to deal with crimes committed abroad was the subject of consideration by the Select Committee of the House of Commons on the Putumayo Atrocities. This power was found to exist to a limited extent only, and to be confined to certain special classes of crime, which by statutory enactment are made punishable if committed by British subjects. Apart from statute such a power is unknown to the law of England, which is only concerned with acts which occur within the United Kingdom. And even where Parliament has assumed to legislate in respect of matters occurring outside the kingdom, the principles of international law must be taken into consideration in fixing the limits of the particular enactment. The comity of nations would forbid any attempt by one state to claim the right to punish members of another state for crimes committed within the confines of their own country. But the same objection would not arise if a state should decide to make its own subjects amenable to its own courts for crimes committed abroad.

Thus the French code provides that a Frenchman who has rendered himself guilty abroad of a crime punishable by French law may be prosecuted and judged in France, unless he has previously been definitely judged in the foreign state. England on the other hand, only claims the right to exercise jurisdiction over British subjects in certain special cases. The principle upon which English criminal jurisdiction is founded has been well expressed by Lord Halsbury in the case of *Macleod* v. *Attorney-General for New South Wales* (65 L.T. Rep. 321; (1891) A.C., p. 458), where he says: "All crime is local. The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever." The real objection to a wide extension of the jurisdiction even over British subjects lies rather in the difficulty of procuring the attendance of witnesses from foreign countries, who after all could not be compelled to attend. And there is always a risk, which no state would willingly incur, of there being the appearance of an interference in the internal affairs of another country. The matter might well be considered to be a question of police more properly to be dealt with by the state where the crime was committed.

The exceptional cases where the English courts have the power to try British subjects for crimes committed abroad are all the result of statutory provisions carefully limited in their scope. One of the earliest instances of such a statute is the Act of 35 Hen. VIII. c. 2, which provides that a person guilty of treason outside the realm may be tried for his offence in the Court of King's Bench. The gravity of this offence, directed as it is against the state itself, and the necessity of preventing plots being hatched abroad which would endanger the safety of the realm necessitated British subjects at least being made amenable to our courts. It has not been deemed advisable to follow the example of some continental states who even claim to exercise this right against foreigners. By 51 & 52 Vict. c. 41, s. 89 (3), the venue for treasons committed abroad is in the county of London and the county of Middlesex, and this was where the venue was laid in the case of Arthur Lynch, an Irishman, who joined the

Boer forces during the South African War, and was afterwards tried at Bar: *cf. Rex* v. *Lynch*, 88 L.T. Rep. 26; (1903) 1 K.B. 444.

The trial of persons for murder or manslaughter committed on land outside the King's dominions or for being accessory thereto is now provided for by s. 9 of 24 & 25 Vict. c. 100, by which British subjects are made amenable to the English courts, whether or not the person killed was a British subject. This is a consolidating statute, which incorporates the provisions of the previous Acts, commencing with 33 Hen. VIII., c. 23, which had given the English courts this jurisdiction. By this law if two Englishmen arranged to go abroad to fight a duel and one of them were killed; the survivor could be tried for murder on his return to this country. Further, if British subjects were proved to have made themselves parties or accessories to the murders alleged to have been committed in the Putumayo or elsewhere, they would now be amenable to the English courts. Similarly under the provisions of the Acts for the suppression of the slave trade, now largely consolidated in 32 & 33 Vict. c. 2, a British subject who by any overt act made himself a party to any offence under these Acts could be tried and punished here, wherever his offence had been committed. The extensive provisions of these enactments reflect the practically unanimous determination of all civilised states to put an end to the traffic in slaves. Slave trading is treated as akin to piracy and as an offence which should be suppressed by co-operation between the nations. No doubt was felt by the committee of the House of Commons that slave-raiding and slave-driving and other forms of dealing in slaves, if indulged in by a British subject, would render him amenable to the English courts, although a restatement of the law was deemed desirable. They further recommended that the existing provisions of the law might be somewhat extended so as to cover the gravest offences against the person and any practices of forced labour which are akin to slavery. It is not clear what is meant by the expression "the gravest offences against the person." Murder and manslaughter committed abroad by a British subject are already triable here, and it can scarcely be intended to include

among offences to be made triable here assaults, however grave, which are not in some way connected with slave-dealing which is already punishable. With regard to forced labour, what the committee had in mind was a practice said to have been prevalent in the Putumayo. The Indians, having been recruited by force and "reduced to obedience," were set to collect rubber. Advances of European goods were made to them, and they were then regarded as debtors to their employers and forced to work off their debts in rubber. This system of debt bondage, known as peonage, was made an offence, triable in this country, by s. 2 of the Slave Trade Act, 1843 (6 & 7 Vict. c. 98), if practised abroad by British subjects.

This particular section of the Act was included in the schedule of the Statute Law Revision Act, 1891, and was expressed to be "repealed as to all Her Majesty's dominions." The effect of these words would seem to be to leave it remaining as an offence of committed elsewhere than in the King's dominions. For if they were not intended to qualify the extent of the repeal of the section, there would have been no need to insert the words. Piracy, which is an offence by the law of nations, was formerly triable by the Court of Admiralty as coming within its own jurisdiction whether committed by persons or ships of any or no nationality. A consideration of what amounts to piracy is to be found in the case of *Attorney-General for the Colony of Hong Kong* v. *Kwok-a-Sing*, 29 L.T. Rep. 114, L. Rep. 5 P.C. 179. This and all other offences formerly triable by the Court of Admiralty are now by the Criminal Law Consolidation Acts of 1861 brought within the jurisdiction of the ordinary criminal courts of this country.

The policy of preventing British subjects joining in expeditions against friendly states, and thus endangering our relations with them, made it necessary that the courts should have the power of punishing such acts even when committed, as might well be the case, outside the King's dominions. The provisions of the Foreign Enlistment Act, 1870, 33 & 34 Vict. c. 90, accordingly cover offences by a British subject wherever committed. A famous instance of the prosecution of British subjects under

this Act occurred after the Jameson Raid, when Dr. Jameson and others were tried in London for taking part in an expedition against the Transvaal. This is reported as *Reg.* v. *Jameson and others*, 75 L.T. Rep. 77, (1896) 2 Q.B. 425.

By 24 & 25 Vict. c. 100, s. 57, a British subject who contracts a bigamous marriage in any part of the world is triable in England for the offence. In the case of *Earl Russell* 85 L.T. Rep. 253, (1901) A.C. 446, the offence consisted in going through a form marriage in Nevada, in the United States, after the defendant had obtained from a court of that state a decree of divorce which was held invalid in England.

The Explosive Substances Act, 1883, 46 & 47 Vict. c. 3, was passed at a time when the country had been deeply stirred by the outrages of the dynamitards, and it was felt that the Act would not be completely effective if it were confined to offences committed in this country. Hence its provisions were drawn to cover offences by British subjects wherever committed, and they are made amenable to the English courts. This was, perhaps, an extension of the principles prompting the previous enactments, but the offences were probably regarded as being directed against the state, and as somewhat analogous to treason.

Similar considerations apply to the passing of the Official Secrets Act, 52 & 53 Vict. c. 52, which covers offences of espionage and breaches of official trust. British officers or subjects are amenable to the English courts for any offence under that Act, even if committed outside the King's dominions.

The provisions of the Commissioners for Oaths Act, 1889, 52 & 53 Vict. c. 10, which enable consuls and consular agents to administer oaths and take affidavits, and do any notarial acts in foreign countries, provide that perjury or forgery in connection therewith shall be punishable in the United Kingdom. These proceedings being exclusively confined to British subjects in relation to matters within the cognisance of English courts, do not in any way encroach upon the rights of foreign states in respect to offences against their own laws. See, too, s. 1 of the Perjury Act, 1911.

Similar provisions are contained in the Foreign Marriage Act, 1892, 55 & 56 Vict. c. 23, which render a British subject amenable to the English courts who makes a false oath or signs a false notice for the purpose of procuring the solemnisation of a marriage before a British representative abroad.

A review of these statutes shows the limited extent to which the Legislature has seen fit to claim jurisdiction over British subjects in respect of crimes committed abroad; nor is it likely that we shall see a departure from the settled policy so far observed, which is eminently characteristic of English views as to the proper scope of criminal law.—*Law Times.*

On a previous page (p. 438) we published Hon. Mr. Justice Middleton's introduction to the new Rules of Practice prepared by him. By proclamation of the Lieutenant-Governor, published in the *Ontario Gazette* of August 2, the Rules of Practice and Procedure so prepared by Mr. Justice Middleton, under instructions from the Attorney-General, and approved by Order in Council dated July 11, are to come into force on and from the first day of September next, and are to have the same force and effect as if they had been embodied in the Act respecting the Supreme Court of Ontario and the administration of justice in Ontario, and section 102 of that Act shall after that date no longer remain in force.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

WILL—CONSTRUCTION—GIFT OF RESIDUE TO FORTY-SIX NAMED PERSONS—CODICIL REVOKING GIFT TO TWO OF NUMBER—CONFIRMATION OF WILL—INTESTACY.

In re Whiting, Ormond v. *De Launay* (1913) 2 Ch. 1. This was a summary application for the construction of a will made in 1906, whereby the testator gave his residue to be divided equally between forty-six named persons. By a codicil he revoked the gift to two of these persons, and in other respects confirmed his will. The question was, whether as to the shares revoked, there was an intestacy. *Cheslyn* v. *Cresswell*, 3 Bro. P.C. 246, was relied on, but Joyce, J., was of opinion that the facts not being the same as in that case, it was not binding; that the effect of the confirmation of the will by the codicil was to make the will speak as of the date of the codicil, and therefore that there was no intestacy.

WILL — CONSTRUCTION — HOTCHPOT — SUPPLYING OMISSION OF HOTCHPOT CLAUSE BY INFERENCE.

In re Haygarth, Wickham v. *Haygarth* (1913) 2 Ch. 9. In this case the construction of a will was in question, whereby the testator directed three several sums which he charged upon his real estate, to be raised and held upon the ordinary trusts of a settled legacy, in favour of his five cousins, including Fredericka, Georgina, and Katharine. Subject to this charge he devised his real estate upon an ultimate trust for sale, the proceeds to be divided equally between his five cousins as should be living when the trust for sale came into operation, but subject to the following provision for hotchpot: "but so that, if 'F., G., and K.,' or any of them shall then be living, or shall have previously died, leaving issue then living, such of the said sums hereinbefore directed to be set apart for their benefit as shall have been so set apart for the benefit of the one or more of them so dying, and her issue shall be brought into hotchpot and accounted for in the division hereby directed to be made of the net proceeds of my family estate." The will contained a subsequent provision that the child or children attaining twenty-one, or, if daughters, marrying, of such of his five cousins as should be dead when the trust

for sale came into operation, should take the share in the net proceeds of his family estate, which his, her, or their parent would have taken, if such parent had not died before the trust for sale came into operation. Katharine died before the trust for sale came into operation, leaving a child still living, and the question was, whether Fredericka and Georgina, as well as Katharine's child, were bound to bring into hotchpot their settled legacies, for the purpose of the division of the proceeds of the sale of the family estate. Joyce, J., decided that they were, and that the latter portion of the hotchpot clause must be read as applying to each of the two contingencies mentioned in the introductory part of the clause.

MORTGAGE—EQUITABLE MORTGAGE BY DEPOSIT—SUBSEQUENT LEGAL MORTGAGE SUBJECT TO PRIOR CHARGE—NO NOTICE TO FIRST MORTGAGEE—FIRST MORTGAGE PAID OFF—TITLE DEEDS HANDED TO MORTGAGOR—SUBSEQUENT PLEDGE OF DEEDS—PRIORITY.

Grierson v. *National Provincial Bank of England* (1913) 2 Ch. 18. This may be regarded as an illustration of the equity doctrine that, where the equities are equal, the law must prevail. The facts were somewhat peculiar. The owner of a leasehold deposited the lease with a bank, by way of equitable mortgage; he subsequently made a legal mortgage of the lease to the plaintiff, subject to the prior charge. The legal mortgagee did not give notice of his mortgage to the prior chargee. Subsequently the mortgagor paid off the prior equitable mortgage, and obtained possession of the title deeds, these he subsequently deposited by way of equitable mortgage, with the defendants, who had no notice of the legal mortgage. The question in the action was whether, in the circumstances, the plaintiff was entitled to priority over the defendants' mortgage; and Joyce, J., held that he was.

COMPANY—WINDING-UP—COSTS OF UNSUCCESSFUL LITIGATION—PRIORITIES.

In re Pacific Coast Syndicate (1913) 2 Ch. 26. This was an application by a creditor of a company for payment by the liquidator, of certain costs out of the assets of the company, in priority to the costs of liquidation. The liquidator had brought an action in the name of the company claiming an injunction against the applicants, and failed, and had been ordered to pay

the costs. The applicants had notified the liquidator not to part with any of the assets of the company until their costs were satisfied. The costs were taxed at £300; at the date of the judgment the liquidator had on hand £500, out of which he paid to his own solicitors £375 for their costs in the action, and sent the applicants a cheque for the balance. The applicants claimed to be entitled to be paid in priority to the liquidators own solicitors, and Neville, J., upheld that contention, and held that the rule was the same both in compulsory and voluntary litigation.

INSURANCE OF MORTGAGE OWNED BY A COMPANY—CONDITION THAT POLICY SHOULD CEASE IN CASE OF ALIENATION "OTHERWISE THAN BY OPERATION OF LAW"—INSURED COMPANY IN LIQUIDATION—POWER OF LIQUIDATOR TO ASSIGN.

In re Birkbeck Building Socy., Official Receiver v. *Licenses Insurance Corporation* (1913) 2 Ch. 34. The facts of this case were as follows. The Birkbeck Building Society had advanced £9,000 on mortgage. It had insured the due payment of the mortgage money by a policy of the Licenses Insurance Corporation which, however, contained a condition that it should cease if the interest of the insured in the mortgaged property should pass from the insured "otherwise than by operation of law." The Birkbeck Building Society was ordered to be wound up, and the liquidator desired to sell the mortgage and the benefit of the policy, in order to wind up the estate. The Insurance Corporation claimed that he had no right to do this without their consent, which they declined to give. Neville, J., however, held that the words "unless by operation of law," in a condition of this kind enables a person to whom property passes by operation of law with an obligation to realize it, to assign the property, and he, therefore, held that the liquidator was competent to sell the property and assign the policy without the consent of the insurers.

VENDOR AND PURCHASER—CONDITION OF SALE NEGATIVING RIGHT TO COMPENSATION—CONVEYANCE—PLAN—FALSA DEMONSTRATIO—IMPLIED COVENANTS FOR TITLE — LIABILITY OF VENDOR — MEASURE OF DAMAGES.

Eastwood v. *Ashton* (1913) 2 Ch. 39. This was an action to recover damages for breach of an implied covenant for title—in the following circumstances. In 1911 the plaintiff became the purchaser of a property known as Bank Hey Farm, containing

84 ac. 3 r. 4 p. or thereabouts, subject to a condition that any incorrect statement in the particulars was not to annul the sale, nor was the purchaser to be allowed any compensation in respect thereof. The property was conveyed to the plaintiff according to a plan of the property which was indorsed on the deed. This plan shewed that there was included in the property purported to be conveyed a strip of land 100 feet long by 36 feet wide, which had originally been part of the farm, but as to which, to the vendor's knowledge, the adjoining proprietor had acquired a title by possession. The conveyance contained the usual implied covenants for title. Sargant, J., who tried the action, held that the inclusion of the strip in the plan could not be treated as falsa demonstratio, and that the strip was included in the parcels conveyed. He also came to the conclusion that the condition of sale above referred to could not prevent the purchaser from recovering damages under the covenants for title, for any defect of title to the property conveyed to which such covenants were applicable; and also, that the omission of the vendor to prevent the adjoining owners from acquiring a title by possession to the strip constituted a thing "omitted or knowingly suffered" by the vendor within the meaning of his covenant and that it was immaterial that the vendor was under no duty to prevent it. He also held that the proper measure of damages in such a case is the difference in value of the land purported to be conveyed and the land which actually passed by the conveyance.

MORTGAGE—FORECLOSURE PROCEEDINGS—RECEIVER — LICENSE BY MORTGAGEES TO THIRD PARTIES TO WORK PEAT ON MORTGAGED PREMISES.

Stamford Spalding Banking Co. v. *Keeble* (1913) 2 Ch. 96. This was an action for foreclosure in which a receiver had been appointed. The mortgaged property consisted of a large tract of land, principally valuable for the peat beds thereon. The plaintiffs applied, before judgment, for the sanction of the court to an exclusive license, which they proposed to grant for a term of years at a premium and royalties, to work the deposits of peat, but Sargant, J., held that the court had no jurisdiction to sanction the proposed license. He, therefore, dismissed the application, but, as he thought the question a fairly arguable one, without costs.

STAYING ACTION—FALSE IMPRISONMENT—DEFENDANT PROTECTED BY STATUTE—PERSON DETAINED AS LUNATIC—DISCRETION.

Shackleton v. *Swift* (1913) 2 K.B. 304. This was an action for false imprisonment, brought by the plaintiff against the defendant, a master of a workhouse, for having, as alleged, improperly detained her as an alleged lunatic. The plaintiff had been placed in the workhouse under an order of a relieving officer, made under a statute requiring him to receive and detain her for three days. During that period a justice visited and examined the plaintiff, but made no order regarding her; but the medical officer of the workhouse, before the expiration of the three days, gave a certificate in writing, under the Lunacy Act, for her detention for fourteen days from its date. The plaintiff was detained for six days from the date of the certificate, and was then discharged by order of the medical officer. The Lunacy Act contains a provision to the effect that a person who does anything in pursuance of the Act shall not be liable to any civil or criminal proceedings, whether on the ground of want of jurisdiction, or on any other ground, if such person acted in good faith and with reasonable care. The defendant applied to stay the proceedings, on the ground that the action was not maintainable in the absence of any allegation that the defendant had not acted in good faith and with reasonable care, and that no facts were alleged to shew that the defendant had not so acted. The Master made an order staying the action, but Rowlatt, J., thought the action ought to be tried, and reversed the order, but the Court of Appeal (Williams, and Kennedy, L.JJ.), considered that on the facts disclosed in the affidavits, there was no evidence that the defendant had acted otherwise than in good faith, and with reasonable care, even assuming that the detention of the plaintiff after the original three days was unauthorised, in the absence of an order of a justice. Kennedy, L.J., was of the opinion that the medical certificate was, under the Act, a sufficient authority for the plaintiff's detention, and Williams, L.J., although not pronouncing as to the legality of the certificate, was yet of the opinion that the defendant, after its receipt, would not have been justified in discharging the plaintiff. Although the conclusion arrived at may be correct, it nevertheless looks somewhat like trying a case on affidavits on an interlocutory application.

STREET CAR—BY-LAW REQUIRING PASSENGER TO LEAVE BY HINDERMOST END—CONSTRUCTION.

In *Monkman* v. *Stickney* (1913) 2 K.B. 377 the construction of a by-law was in question, which regulated the exit of passengers from street cars of a municipal corporation. The by-law in question required that passengers should leave by the hindermost, or conductor's end. Both ends of the car were identical in construction and form. The defendant, a passenger, on the arrival of the car at the terminus, alighted from the end which, while the car was in motion, was the driver's end, and was summoned for a breach of the by-law. On a case stated by the Magistrate, the Divisional Court (Ridley, Pickford, and Avory, JJ.), held that the accused ought to have been convicted.

LANDLORD AND TENANT—COVENANT BY LESSEE TO PAY "OUTGOINGS"—COVENANT BY LESSOR TO KEEP EXTERIOR OF PREMISES IN REPAIR—NOTICE BY SANITARY AUTHORITY TO RECONSTRUCT OUTSIDE DRAIN.

Howe v. *Botwood* (1913) 2 K.B. 387. This was an action by a lessor against a lessee, in the following circumstances: by the lease the lessee covenanted to pay to the lessor all "outgoings" which now are, or during the said term shall be charged on the premises or the landlord, in respect thereof; and the lessor on his part covenanted to keep the exterior of the premises in repair. The plaintiff was served with notice by the sanitary authority, under the Public Health Act, that a nuisance existed on the premises, arising from the defects in an outside drain, and requiring him to do certain work which involved the renewal and reconstruction of the drainage system outside the house, and an order of justices was made requiring him to do the work. The lessor accordingly did the work, and in the present action claimed to recover the cost thereof, so far as it exceeded mere repair. The County Court Judge dismissed the action, and on appeal to the Divisional Court (Channell, and Coleridge, JJ.) his decision was affirmed, the Court holding that the lessee's covenant to pay "outgoings" must be read as being subject to the performance by the lessor of his covenant to keep the exterior of the premises in repair; and that, as the work of renewal and reconstruction of the drains was necessary in order to enable the plaintiff to perform his covenant to repair, he was bound himself to bear the cost thereof, and could not recover it from the defendant.

PRACTICE—SPECIALLY INDORSED WRIT— REDUCTION OF AMOUNT CLAIMED BY PAYMENT AFTER WRIT— JUDGMENT IN DEFAULT OF APPEARANCE, FOR SUM IN EXCESS OF AMOUNT DUE—SETTING ASIDE JUDGMENT—AMENDMENT.

Muir v. *Jenks* (1913) 2 K.B. 412. In this case on 2nd May, 1912, the plaintiff issued a specially indorsed writ for £328 16s. 7d. On 8th May, 1912, £20 was paid to them in reduction of the claim. On 15th May, 1912, the plaintiff signed judgment in default of appearance, for £328 16s. 7d., the amount indorsed on the writ. The plaintiff having instituted bankruptcy proceedings, founded on the judgment, on 7th March, 1913, the defendant applied to set aside the judgment, on the ground that the writ had not been properly served upon the defendant, and at the hearing of the application, he took the objection that the judgment was in excess of the amount actually due. The Master dismissed the application, and Bucknill, J., confirmed his decision; but the Court of Appeal (Buckley, and Kennedy, L.JJ.), held that, where a plaintiff obtains a wrong judgment, it is his duty, and not that of the defendant, to get it put right, and, therefore, that the defendant was not in any way prejudiced by the delay which had taken place. And, as, on the application before the Master, the plaintiff had refused an offer to amend the judgment, because, in the bankruptcy proceedings, he had only claimed the amount actually due: the Court of Appeal held that the defendant was entitled to have the judgment set aside, with costs, which was accordingly done.

SHIP—BILL OF LADING—FREIGHT PAYABLE BEFORE DELIVERY—GOODS PLACED BY SHIPOWNER IN WAREHOUSE TO BE HELD FOR HIM—NO NOTICE GIVEN OF LIEN FOR FREIGHT—RIGHT OF CONSIGNEE TO DELIVERY ON DEPOSIT OF FREIGHT WITH WAREHOUSEMAN—MERCHANTS SHIPPING ACT, 1894 (57-58 VICT. c. 60), ss. 493-496.

Dennis v. *Cork S.S. Co.* (1913) 2 K.B. 393. In this case the plaintiffs were consignees of certain goods carried by the defendants' steamship from Antwerp to Southampton, under a bill of lading providing that the shipowner shall have a lien for freight, which was to be paid "at destination, before delivery," and that the goods should be taken from alongside by the consignee, as soon as the vessel was ready to discharge, and that otherwise they might be "landed, put into lighters, or stored by the steamer's

agent . . . at the expense of the consignee.'' The steamer arrived, but the consignee did not take delivery, or pay freight. The shipowners thereupon placed the goods in a warehouse, with written instructions not to deliver them to anyone without written instructions, accompanied by their release from freight. The endorsees of the bill of lading sent it to the warehouseman, with the amount due for freight, and asked delivery of the goods pursuant to s. 495 (2) of the Merchants Shipping Act, 1894; but delivery being refused, this action was brought. Under the Merchants Shipping Act, s. 496, where money is deposited with a warehouseman, he is to retain it 15 days, and in the meantime the consignee may give him notice as to whether he admits all or any part of it to be due to the shipowner, and if no such notice is given, he is to pay the amount deposited to the shipowner. The action was tried by Scrutton, J., who held that the goods had not been placed by the shipowners in the warehouse, under the provisions of ss. 493-496, of the Merchants Shipping Act, 1894, and that, therefore, the owners of the goods were not entitled to delivery upon depositing the freight; and he was of the opinion that the plaintiffs were attempting to alter their contract, which was to pay ''before delivery,'' by substituting a payment, subject to a right to examine the goods, and to make claims for deductions, if any, which they were not entitled to do.

NEGLIGENCE—PROXIMATE CAUSE OF DAMAGE—MALICIOUS ACT OF THIRD PARTY—REASONABLE PRECAUTIONS—OVERFLOW OF WATER FROM LAVATORY.

Richards v. *Lothian* (1913) A.C. 263. This was an action by the tenant of premises against the owner to recover damages for a loss occasioned by the overflow of water from a lavatory situate in a floor over the plaintiff's premises. The damage occurred owing to the malicious act of some third person plugging up the waste pipe and turning on the water in a basin. The basin was properly constructed and the waste pipe was sufficient for all reasonable purposes. The Judicial Committee of the Privy Council (Lord Haldane, L.C., and Lords Macnaghten, Atkinson, and Moulton) held, reversing the High Court of Australia, that in the absence of any finding by the jury, that the defendant had instigated the act, or ought reasonably to have prevented it, the defendant was not liable; and secondly, that his having on his premises a proper and reasonable supply of water was an ordinary and proper use of his house, and although

he was bound to use all reasonable care, he was not responsible for damage not due to his own default, whether caused by inevitable accident, or the wrongful acts of third persons. *Fletcher* v. *Rylands,* L.R. 1 Ex. 265; L.R. 3 H.L. 330, was invoked by the plaintiff, but their Lordships were of the opinion that the principle of the case of *Nichols* v. *Marsland,* 2 Ex.D. 1, where it was held that where water escaped from the defendants' artificial lake owing to a sudden tempest, that the defendant was not liable for the consequent injury, applied to the present case, and that water escaping through the act of God, or the King's enemies, or the malicious acts of a stranger, could not render the owner of the premises from which the water came liable to third persons. Moreover, their Lordships point out that it is not every use to which land is put that brings the principle of *Rylands* v. *Fletcher* into operation, but that it must be some special use, bringing with it increased danger to others, and that the maintenance of an ordinary water supply for a basin could not be regarded as such a special use.

BUILDING CONTRACT—ARBITRATION CLAUSE—ARCHITECT TO ACT AS ARBITRATOR—COLLUSION—DISQUALIFICATION—PAYMENTS TO BE MADE ON CERTIFICATE OF ARCHITECT—IMPROPER DELAY IN GIVING CERTIFICATE—CONDITION PRECEDENT—ACTION BEFORE CERTIFICATE.

Hickman v. *Roberts* (1913) A.C. 229. This was an action to recover balance due under a building contract. The contract provided that disputes were to be referred to the architect employed by the owners, and that payments were to be made on his certificate. Acting under a mistaken idea of his duty, the architect allowed his judgment to be improperly influenced by the owners and improperly delayed issuing his final certificate in accordance with their instructions. The action was commenced before the issue of the certificate, and two questions arose: first, Sol. J. 580, which is also reported in a note to this case, was but the Court of Appeal (Farwell and Kennedy, L.JJ.) were of the opinion that that case did not lay down any such general rule, but rested on particular circumstances, which did not exist in the present case, and the proposed interrogatory was held to be inadmissible as being a purely fishing interrogatory unsupported by any evidence.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT OF CANADA.

Audette, J.] IN RE LAPOINTE AND THE KING. [Feb. 4.

Government railway—Negligence—Fatal injury to workman—Brakesmen—Defective coupling on car—Knowledge of defect—Acceptance of risk—Unskilled workman—Standard of prudence—Liability.

T. was employed on the Intercolonial Railway as a brakesman. At the time of the accident whereby he lost his life he was one of the crew on a shunter-train working between different stations along the line of the Intercolonial Railway in the province of Quebec. The coupling device of one of the cars in this train was defective in that the chain connecting the pin and the lever was broken and disconnected, so that the device would not act automatically. It is the practice of brakesmen to uncouple cars when the train is in motion by means of this automatic device. There are no rules or regulations of the road forbidding the work being done in this way. It was shewn by the evidence that the train hands knew that the coupling on this particular car was defective. The deceased was not a permanent employee and had not acquired that skill in coupling and uncoupling cars that more experienced brakesmen have. His attention was called by one of his fellow-workmen to the fact that the coupling was defective but notwithstanding this he undertook to uncouple the car while the train was in motion. Finding that he could not accomplish this with the defective device he went between the cars and attempted to do the work of uncoupling with his hands. He fell between the cars and the wheels passed over him, injuring him fatally.

Held, that T. had accepted the risk of making the coupling under the circumstances; and that the Crown was not liable.

(2) If an inexperienced workman knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

Stein, and *Lapointe*, for suppliants. *Cimon*, for respondents.

Audette, J.] THE KING v. CRUMB. [Feb. 17.

Public land—Lease—Information to cancel—Improvidence—Knowledge of Crown officials of litigation respecting property in question.

In proceedings on behalf of the Crown to annul and cancel a certain lease of ordnance and admiralty lands, it appeared that, although there was information on their files respecting litigation at one time pending in the civil courts between the defendant's predecessor in title and other parties with respect to the property demised, the officials of the Department of the Interior issued the lease in question. It appeared, however, that at the time the lease was issued the department was not aware of a judgment in one of the civil courts which decided adversely to the rights of the defendant's predecessor in title.

Held, 1. That under all the circumstances, the lease was issued through inadvertence and improvidently and that the same should be cancelled.

2. The officers of the Crown should have satisfied themselves before issuing the lease that the litigation, of which there was knowledge in the department, had first been disposed of in favour of the applicant.

Swayze, for plaintiff. *Gorman,* for defendant.

Audette, J.] THE KING v. FALARDEAU [March 10.

Expropriation—Water lots—Prospective value—Remoteness at date of expropriation.

The Crown had expropriated for the purposes of the National Transcontinental Railway a discarded lumber cove near the city of Quebec, with all the buildings and wharves erected thereon. In the days of wooden ships, and when the lumber trade was flourishing at its best in Quebec, the property in question was worth a great deal. After that time the property had very much depreciated in value, but the defendants relied upon the prospective capabilities of the property for docking purposes when steamers in the St. Lawrence trade became too large to proceed up the river to the port of Montreal.

Held, that such a rise of the property was too contingent and remote at the date of expropriation to be regarded as an element in the market value of the property.

Flynn, K.C., and *Chapleau,* for plaintiff. *Baillargeon,* for defendants.

Audette, J.] [March 17.

CANADIAN RUBBER COMPANY *v.* COLUMBUS RUBBER COMPANY.

Trade-mark—Infringement—Similarity of mark—Injunction—Damages.

Plaintiff company was the duly registered owner of a general trade-mark consisting of an effigy of Jacques Cartier surrounded by the words "The Canadian Rubber Company of Montreal, Limited." The plaintiff, and its predecessor in title, had been for years large manufacturers of rubber footwear to which this mark was applied. It was established that so well-known was the mark in the trade that customers of merchants handling the plaintiff's goods in the province of Quebec would ask for them by the name of the "Jacques Cartier," the "Canadian" or the "Sailor." In June, 1912, the defendant company proceeded to manufacture and sell a certain class of rubber footwear with the effigy of a sailor closely resembling that of Jacques Cartier in the plaintiff's trade-mark, surrounded with the words, "Columbus Rubber Company of Montreal, Limited" in a scroll chiefly differing from the one used by the plaintiff in that it was rectangular in form while that of the plaintiff was round. Defendant's mark was not registered.

Held, that there was such a similarity between the defendant's mark and that of the plaintiff as to be calculated to deceive the public into purchasing the defendant's goods for those of the plaintiff, and that the defendant should be enjoined from placing on the market and selling rubber footwear and goods bearing the mark as above described.

2. That there should be a reference to the Registrar to ascertain what damages were sustained by the plaintiff by reason of the defendant's interference with its business.

T. C. Casgrain, K.C., and *Stairs,* for plaintiff. *A. Geoffrion,* K.C., for defendant.

Audette, J.] [April 2.

IN RE DAVID HARRISON AND THE KING.

Negligence—Public work—Ice on approach—Injury to the person—Liability.

Suppliant sustained bodily injury by falling whilst walking over the footpath on one of the approaches to the Seigneur street

bridge, over the Lachine Canal, in the city of Montreal. The place where he fell was under the care and control of the Dominion Government; and the superintendent of the canal and his assistants were charged with the duty of maintaining the footpath in question in good order. The accident happened at 11.30 o'clock of the night of the 6th of January, 1912, which date was a holiday. The footpath was in a slippery condition owing to ice, the weather at the time being very changeable. It was shewn by a witness, whose specific employment it was to spread ashes over this footpath for the purpose of preventing accidents to pedestrians, that at four o'clock on the afternoon of the day before the accident he had spread ashes on the spot where the suppliant fell; and that, although it was a holiday, he visited the footpath at two o'clock on the afternoon of the accident and found that the ashes were still there and that no more were required for safety.

Held, upon the facts, that no negligence was attributable to the superintendent of the canal or his assistants, and that the suppliant was not entitled to recover.

Curran, for suppliant. *Hackett,* for respondent.

Audette, J.] THE KING *v.* L'HEUREUX. [April 5.

Constitutional law—Seizure of liquor in possession of Dominion —Limitation to authority of provincial statute—Illegality— Notice of action—Prescription.

Held, 1. The provisions of the Quebec Liquor License Act (R.S. Quebec (1909), sec. 14, pt. 2, ch. 5, title IV.) are not binding upon the Crown in right of the Dominion of Canada. Hence, when a person enters a building of the Intercolonial Railway of Canada and seizes and carries away therefrom certain liquors constituting freight consigned to third persons he cannot justify such seizure and conversion by invoking the authority of the said Act.

2. Want of notice under art. 88 C.C.P. (P.Q.), in an action for damages against an officer, if not specially pleaded by the defendant may be raised at the trial, and evidence then adduced shewing that the requisite notice was in fact given.

3. Prescription is not a matter coming within arts. 2267, and 2188 C.C.P. (P-Q), and must be raised by the defence filed.

Newcombe, K.C., for plaintiff. *Marchand,* for defendant.

Audette, J.] [April 10.

FELT GAS COMPRESSING COMPANY *v.* FELT, WALKER, ET AL.

Patents for invention—Jurisdiction of Exchequer Court in cases not falling within the statutes—Rights of parties defendant upon contract—Validity of assignments.

The Exchequer Court has no jurisdiction at common law in actions respecting patents or invention, and where any relief is sought in respect of such matters the jurisdiction of the Court to grant the same must be found in some statute.

The Court cannot entertain proceedings to obtain a declaration of the respective rights of parties inter se arising under assignments of a patent of invention; nor for a declaration that such assignments are invalid; and that the registration thereof should be vacated.

M. G. Powell and *Caldwell,* for motion for judgment on objections in law. *Lewis,* K.C., *contra.*

Book Reviews.

Supreme Court Act (1906) *Practice and Rules.* By EDWARD ROBERT CAMERON, K.C., Registrar of the Supreme Court. 2nd edition. Toronto: Arthur Poole & Co. 1913.

This is a volume of over one thousand pages, and is a timely and welcome addition to the libraries of practising lawyers in this Dominion. It contains all the material to be found in the first edition with all the reported decisions of the court since then, including a large number of judgments not elsewhere reported. Several new features also appear which add to the value of the book.

The construction adopted by the compiler is to give the Act and rules verbatim, each section being followed by a digest of all the authorities bearing thereon or in relation thereto, under appropriate general headings.

Whilst this scheme gives the reader the judicial interpretation of the various sections of the Act and rules, it cannot be said that it produces a book of practice, in the ordinary sense of that expression. The latter mode of dealing with the subject might perhaps be preferred by some practitioners, but it is not unreasonable to suppose that Mr. Cameron may be right; at least his long experience in the position he occupies, and his

great familiarity with the subject, warrants the belief that the plan he has adopted is the one which meets the views of the majority of those who have occasion to use a work of this kind.

It will readily be seen, however, that this mode of dealing with the subject calls for an exhaustive index for the purpose of collecting under appropriate headings the great mass of information which the book contains, and which could not otherwise be grouped together. This requirement naturally leads to a closer examination of the index. In making an index it has to be remembered that men's minds do not all run in the same groove; one would look for the same information under one head and another under another head--quot homines tot sententiæ. Good index makers are few and far between, and are much rarer than might generally be supposed. There are many good lawyers who are quite incapable of doing that sort of work. This necessity of an exhaustive index amplifying the headings was not perhaps sufficiently realized by the person who prepared the one which concludes this excellent compilation.

The author gives a number of useful forms in appendix B. Appendix C gives the rules and forms in connection with appeals to the Judicial Committee of the Privy Council. Appendix D deals with exchequer appeals under the Exchequer Court Act. Other appendices give the Dominion Controverted Elections Act, appeals under the Railway Act; appeals under the Winding up Act; Criminal appeals under certain sections of the Criminal Code, followed by a copy of the Supreme Court Act as it appears in R.S.C. c. 139.

The Chief Justice of the Supreme Court speaks of "Mr. Cameron's very useful book on the practice of the Court." We concur with his lordship in the opinion thus tersely expressed.

A Short Treatise on the Law of Bills of Exchange, Cheques, Promissory Notes and Negotiable Instruments Generally. By BERTRAM JACOBS, LL.D. Barrister-at-Law. London: Sweet & Maxwell, 3 Chancery Lane. 1913.

This isa handy compendium of 266 pages on the much written about law of Bills and Notes. The author in his preface states that the object of this short treatise is to provide a clear exposition of the main principles underlying the law of negotiable instruments and of the rules illustrative of those principles. An excellent work for beginners and business men.

Federal Incorporation—the constitutional question involved. By ROWLAND CARLISLE HEISLER. Boston Book Co. 1913.

This is a handy compendium of 266 pages on the much writ-Pennsylvania Law School. The object of the university in connection therewith is to promote the scientific study of legal problems, historical and practical, and to assist in the improvement of the law. Mr. Heisler is a graduate of the Law School and a member of the Philadelphia Bar, and one of the Gowen Memorial Fellows of that school.

We commend this book to the attention of that class of the profession who are interested in such matters. It is a pity there are not a few more of them than there are.

Bench and Bar

We are asked to announce that Mr. W. E. Jopp, Barrister, etc., Swift Current, has taken Mr. R. Maulson into partnership, and the business of the firm will hereafter be carried on under the firm name of Jopp & Maulson.

Frederick John Strange Martin, of the City of Sault Ste. Marie, in the District of Algoma, Barrister-at-law, has been appointed District Crown Attorney and Clerk of the Peace in and for the District of Algoma, vice Moses McFadden, Esquire, resigned.

Flotsam and Jetsam

ARBITRATION FEES—SCOTCH LAW:—The rule recognized by the writers of the old legal text-books was that an arbiter was not entitled to remuneration unless he expressly stipulated for it, the theory being that an arbiter was one who undertook a purely friendly office for the settlement of differences between persons who did not desire to litigate. *MacIntyre Bros.* v. *Smith*, [1913] 50 S.L.R. 261, has led to a reconsideration of that principle. One of the parties to an arbitration refused to pay his share of the arbiter's fee on the ground that, as no remuneration had been stipulated for, the common law rule applied that the arbiter in such a case must be presumed to act

gratuitously. It was held, that that rule is not applicable to the modern conditions of business, and that a professional man can no longer be presumed to give professional services gratuitously.—*Law Magazine.*

TURF CUTTING—IRISH CASE:—The case of *Cronin* v. *O'Connor*, [1913] 2 Ir. R. 119, presents a curious state of facts, apparently uncovered by any previous direct authority. The owner of lands had a right of cutting and saving turf on a plot of an adjoining bog. This plot was not fenced or divided off from the rest of the bog. The man who owned the soil and freehold of the bog depastured cattle upon it; they did harm to the turf which was cut and spread upon the plot in question; the bog owner had made no provision for preventing such damage by his cattle to the turf. The person entitled to the right of turbary sued the bog owner for trespass, and it was held that the action would lie. The wrong consisted in an unreasonable use of one's own property, having regard to the dominant tenant's profit . prendre. There are, said the court, two rights in the one subject-matter: the natural right of the owner of the bog to the soil and freehold, and the incorporeal right in the nature of a profit vested in the plaintiff, in respect of the same bog; which is to give way? Evidently, if a profit à prendre is founded on an implied grant, and i: a man may not derogate from his own grant, the general rights of the servient owner must give way so far as is necessary for the due enjoyment of the particular right of the dominant owner.—*Law Magazine.*

JOINT TORT FEASORS—DIFFERENT DAMAGES.—An interesting point was decided in a recent English case of *Greenlands Limited* v. *Wilmshurst* on which the court was unanimous. A practice had arisen of allowing juries to give different damages against different defendants when sued in one action as joint tort feasors, and the Court of Appeal has now declared this to be unjustifiable. Thus, where there is a joint publication of one libel, there can be only one joint judgment against all defendants, for in the case of a joint tort each tort feasor is liable for the whole injury sustained. The effect of this where privilege is set up is well illustrated by a case recently tried by Mr. Justice Bankes of *Smith* v. *Streatfield*. In that case privilege was admitted; but the jury found express malice against one defendant but not against the other, and the learned judge then entered judgment against both defendants.