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THE CRIMINAL CODE OF VIRGINIA.

A new Criminal Code came into force in Virginia on the 1st July. A feature of this Code which has attracted considerable attention is the introduction of the whipping post, not for serious crimes, but for simple misdemeanors. This seems to be a step decidedly backward, and the plea which is urged on behalf of it—economy of State prison expenditure by substituting the lash for terms of imprisonment—does not mend the matter. When the lash was re-introduced in England for offenders of the worst description, those who committed robbery with violence, the law was enacted with no little misgiving. Upon the whole, however, it has worked well. But Virginia has not restricted the punishment to grave offences. It is to be imposed for trifling violations of the law, and even women are not exempt. The Courts, it is said, have large discretionary powers, so it may happen that magistrates of a humane disposition will substitute the alternative punishments, while others will be disposed to carry out the law in its utmost rigor.

A POINT OF PRACTICE.

A correspondent at Montreal has drawn our attention to a point of some interest to those practising in the Circuit Court. It appears that for many years past it has been the custom of the officials employed in the office of the Court to exact a fee of $1.40 on the filing of every preliminary exception, in cases under $60, besides the deposit of $4.00. This exaction, for which no authority could be cited, was resisted recently by our correspondent, and on the matter being referred to Mr. Prothonotary Honey, it was admitted that the charge was illegal and unwarranted. It is not the first instance of the kind which has occurred. More than one charge unjustified by authority has been levied, and practitioners, rather than have an unpleasantness over a matter which perhaps does not greatly touch their pocket, have fallen into the routine of paying the fees demanded. But it is evidently their interest that the Court House dues, which are already severe enough, should not be unnecessarily increased, and those who detect and resist illegal charges are doing a service for which they deserve the thanks of the profession.

PURCHASE OF GOODS OBTAINED BY MISTAKE AND FRAUD.

The decision of the House of Lords in *Cundy* v. *Lindsay* (38 L. T. R. N. S. 573), reported in the present issue, is of interest. A man named Blenkarn, by writing his name so as to be mistaken for Blenkiron, a responsible firm in London, obtained goods from the plaintiffs, linen manufacturers in Belfast. Blenkarn had no means of paying for the goods, and they would not have been sent to him but for the deception practised, by which the vendors were led to suppose that the purchaser was Blenkiron. The defendant bought the goods in good faith from him, and re-sold them. The action was against the defendant for conversion, the goods not having been purchased by him in market overt. The House of Lords has sustained the action, holding that the property in the goods never passed from the plaintiffs, and that the latter were entitled to recover their value from the defendant. One of the precedents referred to was *Hardman* v. *Booth*, 7 L. T. R. (N. S.) 638, where it was held that there was no real contract between the parties by whom the goods were sold and delivered, and the person who obtained possession of them by fraud, because the goods were not sold to him. For a case somewhat analogous under the Civil Code of Lower Canada, the reader may compare *Cassils & Crawford*, 21 L. C. Jurist, p. 1. In that case Crawford, in good faith, made advances on goods which had been stolen from Cassils. The goods being seized by the High Constable as stolen property, in the possession of Crawford, the latter sought to revendicate them as pledged for his advances; but the Court of Appeal at Montreal held that Crawford was not entitled to enforce his lien for advances as against the real owners, and the action in revendication was dismissed.

REPORTS AND NOTES OF CASES.

SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

FISHER et al. v. MCKNIGHT et al.

Jurisdiction—Pleading.

A plea which invokes want of jurisdiction *ratione loci*, must be pleaded by declinatory exception; and the Court therefore refused on the merits to take notice of a plea that the note sued on had been endorsed by an employee of plaintiff merely to give the Court an improper jurisdiction.

JOHNSON, J. The plaintiff sues McKnight and Hoggard on a note made by Alger to McKnight's order, and endorsed by McKnight to Hoggard, and by Hoggard to the plaintiff. This is the recital of the declaration. The plea is that Hoggard never received the note by endorsement from McKnight, but is an employee in the plaintiff's office in Montreal, and only put his name on it here to give the Court an improper jurisdiction over McKnight, who lives in Quebec. This is strictly a question of jurisdiction, and should have been pleaded as such, jurisdiction *ratione loci* merely, and which I cannot take notice of now that the party has accepted jurisdiction by pleading to the merits. The plaintiff moves to strike out the endorsers' names appearing after Hoggard's, the late Judge Dorion having declined to give judgment for the plaintiff while these endorsements remained. I hold that I must grant the plaintiff's motion and give judgment for the plaintiff against both endorsers, who are sued. Art. 2289 recognizes the plaintiff's right to do this. It refers to Roscoe and to Story, on bills, and to Kent's commentaries. I regard this article as declaratory of the English commercial law in this respect, and the motion has the effect of changing the demand or the form in which it is made *pro tanto*. In England this is done every day at the trial; and in this particular case there could be no need of a motion to amend the declaration so as to accord with the proof, because it claimed through McKnight's and Hoggard's endorsements only, and not through the subsequent ones.

On the point of jurisdiction I may add, that in June, 1874, in a case, or rather series of cases, of *Ford et al* v. *Auger et al.*, all of which were put before me at one hearing, I went very fully into the point of the effect of collusive service to give jurisdiction. There, however, there was a declinatory exception, and though it was dismissed for want of evidence to support it, the rule I followed was that where the want of jurisdiction is invoked *ratione materiæ*, the Court can take notice of it on the merits; but where it rests on the *ratio loci*, or *ratio personæ*, it must be expressly pleaded by declinatory exception.

Macmaster & Co. for plaintiff.

Lunn & Co. for defendant.

DORION v. BENOIT.

Place of Payment—Demand before suit.

Where a person made a note *en brevet* payable at his domicile, *held*, that the creditor was bound to make demand of payment at the place specified, and an application by the debtor for an extension of time was not a waiver of his right to pay at such place.

JOHNSON, J. The action was to recover the amount of a note *en brevet* with interest from 1st October and costs of suit. The note was payable in the course of September at the defendant's domicile at St. Bruno, the plaintiff residing at St. Eustache. The declaration alleged no demand of payment at the stipulated place; but it alleged that when the note came due, the money was not there. The defendant pleaded that he had had the money ready at the time and place stipulated, and no demand or presentation had been made; but he confessed judgment for the principal sum without interest or costs—which was not accepted by the plaintiff, and the case is now up for judgment, the money having been taken under an interlocutory order reserving the questions of interest and costs only. It was said that this *billet* was not stamped, but the plaintiff has got the money and is no longer interested in that—his only rights being those reserved as the condition on which he got it. From the evidence, the defendant wrote on the 8th October in answer to a lawyer's letter and asked the plaintiff for delay. This could not relieve the creditor from the antecedent obligation of asking payment at the place stipulated, and it was no admission that the money was not there at the time agreed. There is evidence on the contrary, that the money was there at the right time. It must be observed that this is not a commercial matter. The defendant is a farmer

who gives his obligation or *billet*, as it is commonly called, *sous brevet*. The arrival of the term of payment did not give rise to interest. His obligation was to pay without interest at his house; and I cannot see where he has failed in that obligation. Then it is said the suit is a demand: so it is:—but of what? not to pay the note where it was made payable by the terms of the contract; the bailiff who served the writ never presented the note. The writ was a command to comé and answer here in court, in Montreal; the debtor came, and he brought his money with him, and the creditor contesting after that, on the authority of Poulin & Prevost, has to pay costs. Judgment according to first plea, giving *acte* of confession of judgment, and condemning plaintiff to pay defendant's costs.

Champagne for plaintiff.

Longpré for defendant.

Montreal, July 9, 1878.

PAPINEAU, J.

TURCOTTE v. REGNIER.

Capias—Desistement—Jurisdiction.

Held, where an action for $67 was originated in the Superior Court by Capias ad Respondendum duly executed, but of which a *desistement* was subsequently filed by plaintiff on the return day, that such action could not be then continued before the said Court for want of jurisdiction, and must be dismissed. *Sauf recours* to plaintiff to proceed before the proper Court.

On the 18th May, 1878, plaintiff sued for $67, but took out the action in the Superior Court by *Capias*, alleging that defendant was leaving the Province of Quebec for Manitoba. On the 6th June, the day of Return, the defendant appeared by attorney, who was then served with a *desistement* of the *Capias* only, the plaintiff keeping his recourse by his action for the debt as instituted.

The defendant, by *Exception Déclinatoire*, pleaded that by such *desistement* of the Capias, the same being but the accessory and giving jurisdiction, the Superior Court had no longer jurisdiction.

The judgment of the Court was as follows:

The Court, etc., considering that the *Capias ad Respondendum* accompanying the action could alone give the right to plaintiff to institute his action before this Superior Court for the amount claimed of $67 only, and that it is not established by proof that plaintiff had returned his action in Court before making his *desistement* of the Capias, the Exception Declinatoire is maintained, and the defendant is therefore put *hors de Cour* with costs against plaintiff, the Court reserving to plaintiff the right of taking out his action before the proper Court.

Thibault & Messier for plaintiff.

A. W. Grenier for defendant.

FRAUDULENT PURCHASES OF GOODS.

HOUSE OF LORDS, MARCH 4, 1877.

CUNDY v. LINDSAY, Appl't, 38 L. T. REP. (N. S.) 573.

A purchaser of a chattel, who has not purchased in market overt, takes the chattel subject to any infirmity of title in the vendor, even if he purchase *bona fide* without notice.

A person of the name of A. Blenkarn wrote to the respondents and ordered goods of them, intentionally signing his name in such a manner as to be taken for Blenkiron. There was a respectable firm of that name, and the respondents, believing that they were dealing with that firm, forwarded the goods to Blenkarn. Blenkarn had no means of paying for the goods. The appellants afterward purchased the goods *bona fide* from Blenkarn.

Held (affirming the judgment of the court below), that the property in the goods had never passed from the respondents, and that they were entitled to recover the value of them from the appellants.

Hardman v. *Booth*, 1 H. & C. 803; 7 L.T. Rep. (N.S) 638, followed.

This was an appeal from a judgment of the Court of Appeal reported in 2 Q. B. Div. 96, and 36 L. T. Rep. (N. S.) 345, reversing a decision of the Queen's Bench Division, reported in 1 Q. B. Div. 348, and 34 L. T. Rep. (N. S.) 314, in favor of the appellants, who were the defendants below.

The plaintiffs were linen manufacturers at Belfast, and the defendants carried on business in London. The action was brought for the conversion of 250 dozen cambric handkerchiefs. The case was tried before Blackburn, J., and a special jury, in Nov., 1875.

At the trial it appeared that a person named Blenkarn ordered goods in writing from the plaintiff, giving as his address "Blenkarn & Co., 37 Wood street, and 5 Little Love Lane, Cheapside." There was a very respectable firm of Blenkiron & Sons, carrying on business in Wood street, whose name was known to the plaintiffs, and they supplied the goods, be-

lieving that they were dealing with that firm. Blenkarn had no means of paying for the goods, and on the discovery of the fraud he was prosecuted for obtaining goods by false pretenses, and was convicted. Before his conviction he had sold some of the goods to the defendants in the ordinary way of business, and the defendants had resold them before the fraud was discovered. It was admitted that they were *bona fide* purchasers for value.

The Queen's Bench Division directed the verdict to be entered for the defendants on the ground that the property in the goods had passed to Blenkarn, and from him to the defendants, but this decision was reversed as above mentioned.

The *Solicitor-General*, (Sir H. S. Giffard, Q.C.), *Benjamin*, Q.C., and *B. F. Williams*, for appellants.

Wills, Q. C., and *Fullarton*, for respondents.

The Lord Chancellor (Cairns). My Lords, you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practiced upon both of them must fall. In discharging that duty your Lordships can do no more than apply rigorously the settled and well-known rules of law. With regard to the title to personal property, those rules may, I take it, be thus expressed: By the law of our country the purchaser of a chattel takes the chattel as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner, then the purchaser will obtain a good title, even though afterward it should appear that there were circumstances connected with the contract which would enable the original owner of the goods to reduce it and to set it aside, because those circumstances will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced. The question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property from Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing the property, even though, as I have said, it might afterwards be open to a process of reduction on the ground of fraud, still in the meantime Blenkarn might have conveyed a good title for valuable consideration to the present appellants. Now there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods passed, it could only pass by way of contract, there is nothing else which could have passed the property. The second observation is this, your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever, as to conversations or as to acts done; the whole history of the transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally: everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case. Now, discharging that duty, and answering that inquiry, what the jurors have found in substance is this: they have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which in turn he was addressed by the respondents, that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well-known and solvent house of Blenkiron & Sons, doing business in the same street.

Those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case. If that is so, what is the consequence? It is that Blenkarn was acting here just in the same way as if he had forged the signature of Blenkiron & Sons to the applications for goods, and as if, when in return the goods were forwarded, and letters were sent accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods and of the letters which were addressed to and intended for, not himself, but the firm of Blenkiron & Sons. Now, stating the matter shortly in that way, I ask the question, is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn? Of him they knew nothing, and of him they never thought, with him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement, or to any contract whatever. As between him and them there was merely the one side to a contract where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Sons of course there was no contract, for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure. The result, therefore, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterward be impeached and set aside on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. That being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which it was attempted to give to the appellants was a title which could not be given to them. I, therefore, move your Lordships, that this appeal be dismissed with costs, and the judgment of the Court of Appeal be affirmed.

Lord HATHERLEY.—My Lords, I have come to the same conclusion as that which has just been expressed by my noble and learned friend on the woolsack. The real question we have to consider here is this, whether or not any contract was actually entered into between the respondents and a person named Alfred Blenkarn, who imposed upon them in the manner described by the verdict of the jury: the case that was tried being one as between the alleged vendors and a person who had purchased from Alfred Blenkarn. Now the case is simply this, as put by the learned judge in the court below; it was most carefully stated as we might expect it would be by that learned judge: "Is it made out to your satisfaction that Alfred Blenkarn, with a fraudulent intent to induce customers generally, and Mr. Thomson in particular, to give him the credit of the good character which belonged to William Blenkiron & Sons, wrote those letters in the way you have heard, and had those invoices headed as you have heard? And further than that, did he actually by that fraud induce Mr. Thomson to send the goods to 37 Wood Street?" Both these questions were answered in the affirmative by the jury. What then was the result? It was that there were letters written by a man endeavoring by contrivance and fraud, as appears upon the face of the letters themselves, to obtain the credit of the well-known firm of Blenkiron & Sons, Wood street. This was done by a falsification of the signature of the Blenkirons, writing his own name in such a manner as that it appeared to represent the signature of that firm. And, further, his letters and invoices were headed "Wood street," which was not an accurate way of heading them, for he occupied only a room on a third floor, looking into Little Love lane on one side, and into Wood street on the other. He headed them in that way in order that by these two devices he might represent himself to the respondents as Blenkiron of Wood street. He did that purposely; and it is found that he induced the respondents by that device to send the goods to Blenkiron of Wood street. I apprehend, therefore, that if there could be said to have been any sale at all, it failed for want of a purchaser. The sale, if made out upon such a transaction as this, would have been a sale to the Blenkirons of Wood street, if they had chosen to adopt it, and to no other person whatever; not to this Alfred Blenkarn, with whom the respondents had not, and with whom they did not wish to have, any dealings whatever. It appears to me that this brings the case completely within

the authority of *Hardman* v. *Booth*, 1 H. & C. 803; 7 L. T. Rep. (N. S.) 638, where it was held that there was no real contract between the parties by whom the goods were delivered and the concocter of the fraud who obtained possession of them, because they were not sold to him. Exactly in the same way here, there was no real contract whatever with Alfred Blenkarn; no goods had been delivered to anybody except for the purpose of transferring the property to Blenkiron (not Blenkarn); therefore the case really in substance is the identical case of *Hardman* v. *Booth* over again. My attention has been called to another case which seems to have been decided on exactly the same principle as *Hardman* v. *Booth*, and it is worth while referring to it as an additional authority upon that principle of law. It is the case of *Higgons* v. *Burton*, 26 L. J. 342, Ex. There one Dix, who had been the agent of a responsible firm that had had dealings with the plaintiff in the action, was dismissed by his employers; he concealed that dismissal from a customer of the firm, the plaintiff in the action, and continued to obtain goods from him still as acting for the firm. The goods were delivered to him, but it was held that that delivery was not a delivery to any person whatever who had purchased the goods. The goods, if they had been purchased at all, would have been purchased by the firm for which this man had acted as agent, but he had been dismissed from the agency, therefore there was no contract with the firm; there was no contract ever intended between the vendors of the goods and the person who had professed to purchase the goods as the agent of that firm; and the consequence was that there was no contract at all. There, as here, an innocent person purchasing the goods from the person with whom there was no contract was obliged to submit to the loss. The point of the case is put so very shortly by Pollock, C.B., that I cannot do better than adopt his reasoning: "There was no sale at all, but a mere obtaining of goods by false pretences; the property therefore did not pass out of the plaintiffs." The other judges, Martin, Bramwell, and Watson, BB., concurred in that judgment. Here, I say, exactly as in the cases of *Hardman* v. *Booth* and *Higgons* v. *Burton*, there was no sale at all; there was a false representation made by Blenkarn, by which he got goods sent to him upon applications from him to become a purchaser, but upon invoices made out to the firm of Blenkiron & Sons. But no contract was made with Blenkarn, nor was any contract made with Blenkiron & Sons, because they knew nothing at all about it, and therefore there could be no delivery of the goods with the intent to pass the property. We have been pressed very much with an ingenious mode of putting the case on the part of the counsel who have argued for the appellants in this case, namely: Suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose on his making that representation the goods had been delivered to him. Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm he could be treated in any other way than as an agent of that firm. Or suppose he had said: "I am as rich as that firm. I have transactions as large as those of that firm, I have a large balance at my bankers;" then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly have passed the property. But this case is an entirely different one. The whole case, as represented here, is this: from beginning to end the respondents believed they were dealing with Blenkiron & Sons, they made out their invoices to Blenkiron & Sons, they supposed they sold to Blenkiron & Sons; they never sold in any way to Alfred Blenkarn; and, therefore, Alfred Blenkarn cannot by so obtaining the goods have by any possibility made a good title to a purchaser as against the owners of the goods, who had never in any shape or way parted with the property, nor with anything more than the possession of it.

Lord Penzance.—My Lords, the findings of the jury in this case, coupled with the evidence, warrant your Lordships in concluding that the following are the circumstances under which the respondents parted with their goods. Whether by doing so they passed the property

in them to Alfred Blenkarn is, I conceive, the real question to be determined. The respondents had never seen, or even heard of, Alfred Blenkarn, when they received a letter, followed by several others, signed in a manner which was not absolutely clear, but which the writer intended them to take, and they did take, to be the signature of a well-known house of Blenkiron & Sons, which in fact carried on business at No. 123 Wood street. The purport of these letters was to order the goods now in question. The house of Blenkiron & Sons was known to the respondents, and it was also known that they lived in Wood street, though the respondents did not know the number. The respondents answered these letters, addressing their answers to Blenkiron & Sons in Wood street, but in place of No. 123 they directed them to No. 37, which was the number given in the letters as the address of that firm. In the result they sent off the goods now in dispute, and addressed them, as they had addressed their letters, to Blenkiron & Sons, No. 37 Wood street, London. It was not doubted or disputed that throughout this correspondence, and up to and after the time that the respondents had dispatched their goods to London, they intended to deal, and believed they were dealing, with Blenkiron & Sons, and with nobody else; nor is it capable of dispute that when they parted with the possession of their goods, they did so with the intention that the goods should pass into the hands of Blenkiron & Sons, to whom they addressed these goods. The goods, however, were not delivered to Blenkiron & Sons, to whom they were addressed, but found their way into the hands of Alfred Blenkarn, owing to the number in Wood street being given as No. 37 in place of No. 123, a mistake which had purposely been brought about by the writer of the letters, as I have before mentioned, who was no other than Alfred Blenkarn, who had an office at 37 Wood street. In this state of things it is not denied that the contract for dealing which the respondents thought they were entering into with Blenkiron & Sons, and in fulfillment of which they parted with their goods and forwarded them to what they thought was the address of that firm, was no contract at all with them, seeing that Blenkiron & Sons knew nothing of the transaction. But the appellants say it was a contract with and a good delivery to Alfred Blenkarn, so as to pass the property in the goods to him, although the goods were not addressed to him, and the respondents did not know of his existence. I am not aware that there is any decided case in which a sale and delivery intended to be made to one man has been held to be a sale and delivery so as to pass the property to another, against the intent and will of the vendor. And if this cannot be, it is difficult to see how the contention of the appellants can be maintained. It was indeed argued that, as the letters and goods were addressed to No. 37 instead of No. 123, this constituted a dealing with the person whose office was at No. 37. But to justify this argument it ought at least to be shown that the respondents knew that there was such a person, and that he had offices there, whereas the contrary is the fact, and the respondents only adopted the number because it was given as the address in eters purporting to be signed "Blenkiron & Co." I am unable to distinguish this case in principle from that of *Hardman* v. *Booth*, *ubi sup.*, to which reference has been made. In that case Edward Gandell, who obtained possession of the plaintiff's goods, pretended to have authority to order goods for Thomas Gandell & Co., which he had not, and then intercepted the goods and made away with them; the court held that there was no contract with Thomas Gandell & Co., as they had given no authority, and none with Edward Gandell, who had ordered the goods, as the plaintiffs never intended to deal with him. In the present case Alfred Blenkarn pretended that he was, and acted as if he was, Blenkiron & Sons, with whom alone the vendors meant to deal. No contract was ever intended with him, and the contract which was intended failed for want of another party to it. In principle the two cases seem to me quite alike. Another case of a similar kind is *Higgons* v. *Burton*, *ubi sup.*, to which similar reasoning was applied. Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be some one else of credit and stability, and under this belief to have actually delivered goods into his hands. I do not think it necessary to express an opinion upon the possible effect of some cases which I can

imagine to happen of this character, because none of such cases can, I think, be parallel with that which your Lordships have now to decide. For in the present case the respondents were never brought personally into contact with Alfred Blenkarn; all their letters, though received and answered by him, were addressed to Blenkiron & Sons, and were intended for that firm only; and finally the goods in dispute were not delivered to him at all, but were sent to Blenkiron & Sons, though at a wrong address. This appeal ought, therefore, in my opinion, to be dismissed.

Judgment affirmed.

A CHAPTER OF BLUNDERINGS ON AND OFF THE BENCH, AND OF THEIR CAUSES AND REMEDIES.

I. Professional Blindness as to the Rules of statutory Interpretation.
II. Mistake of Fact as an Excuse for Crime.
III. Remedies for judicial Blunderings.

I am to write of blunderings. The entire subject would be too large for an article; but something may here be given of general doctrine, and something of illustration. Let us consider: I. Professional blindness as to the rules of statutory interpretation. II. Mistake of fact as an excuse for crime. III. Remedies for judicial blunderings.

I. Professional Blindness as to the Rules of statutory Interpretation.—There are a few legal subjects on which the entire profession seem to be forsworn to ignorance. Prominent among them is the subject of the interpretation of statutes. There is not a day in the professional life of any lawyer who does a respectable amount of business in which he has not occasion to consider the interpretation of some statute. Yet, if you look into his library, you find no book on the subject; or if into the chamber of his brain, where he keeps his legal knowledge, you discover nothing on the topic there. The majority of lawyers appear not even to understand that it is a subject, or is governed by any rules. They know too little about it to comprehend their deficiencies or their needs. Good common sense, as they term the unaided speculations of their own minds, is, according to some, adequate to any emergency connected with this question; according to others, there are no rules, and any study of the subject, or the reading of any book upon it, would be a mere waste of time. A reviewer, in a legal periodical, not long ago mounted to the grand climax of the idea when, writing to instruct his readers regarding a particular book relating to the topic, he declared, after employing a few phrases to show his ignorance of the subject, and even of the book before him, that, in the nature of things, such a book could be of no permanent value, *because the statutes are constantly changing!*

All things on earth, all in the part of heaven of which we have any knowledge, and all in so much of hell as human eyes can discern, are indeed changing; but, be the statutes tinkered however much and often, the changes in them are slight compared with those in most other things. And, small or great, the rules to interpret them are to a very inconsiderable extent statutory; so that the doctrines of statutory interpretation change less than those pertaining even to real property. They are the most permanent and fixed of all the doctrines of our law—the most fit for a common-law treatise. Not only is a book on the interpretation of statutes emphatically on the common law, but it is on the most stable and least shifting part of the entire system.

No lawyer who looks into the question, or even pauses for a moment to think upon it, can fail to see that this is so. Yet how different is the common thought of the profession! This will be palpable from the following facts:

The late Theodore Sedgwick wrote two approved books on the law—the one on the "Measure of Damages," and the other on the "Interpretation of Statutes and our written Constitutions." While the former of these books was in its second edition, the latter appeared, in 1857. Not until 1874, seventeen years afterward, was there a call for a second edition of the latter book, and the former was in its sixth edition. Yet the average practitioner has, at least, a half dozen questions to answer on the interpretation of statutes to one on the measure of damages; so that the more successful book ought to be the one which is so very much the less successful. There was no American book on either subject to compete with Sedgwick's, and no English one selling to an extent varying the effect of this statement.

It shows, I repeat, that the lawyers, in general, understand too little of this common-law subject of the interpretation of statutes to be able to discern their own needs.

Further views of this topic will appear in connection with our next, namely:

II. Mistake of Fact as an Excuse for Crime.—The division of our jurisprudence into its two departments of civil and criminal reveals some marked contrasts. For example, in the civil the object is to establish what is just and expedient between private persons: hence, in various situations, one who is personally without fault is compellable to pay damages to another. On the other hand, the criminal law is for the punishment of persons who are in fault, as a means of restraining them and deterring others from evil-doing. And the universal doctrine of this department is that one whose mind is free from wrong is not to be punished. To punish such a person would be unjust, and no state can, with impunity, commit injustice. But, further than this, the proposition is, I believe, accepted among all who have reasoned on the subject that even just punishment should not be inflicted except where it may have a restraining power. Paley goes even further, without, it seems, contravening general doctrine, observing: "Punishment is an evil to which the magistrate resorts only from its being necessary to the prevention of a greater. This necessity does not exist when the end may be attained—that is, when the public may be defended from the effects of the crime—*by any other expedient.*" *

This entire doctrine pertains to our criminal law—not to our civil—the same as it does to our public ethics and economy. In the words of Lord Kenyon, as to the former of the two propositions above, "it is a principle of natural justice, *and of our law*, that *actus non facit reum nisi mens sit rea*. The intent and the act must both concur to constitute the crime." † This doctrine is as familiar as it is fundamental, and authorities to it might be piled up to fill an entire number of this Review. The precise act, to be punished, need not in all cases have been specifically meant; but in all cases it must have been the product of some sort of evil in the mind. For example, a mere indifference or carelessness where carefulness is a duty, or an intent to do one particular wrong when another follows not meant, or a voluntary incapacitating or maddening of one's self by strong drink, will, in many cases, stand in the stead of the specific criminal intent. * But without some sort of mental culpability there is no crime. If there was, another of the foregoing principles would still forbid its being punished. All that any man can do is to intend well, and to employ his faculties to the best of his ability and put forth his full exertions to prevent evil. If, in spite of all, evil unmeant comes from his act, it can restrain neither him nor any other person to punish him. Hence the state, whose will the courts expound, ought not to punish him. To illustrate:

In cities and villages where the people do not keep cows they need pure milk as much as they do in the country. Without it many an infant, and perhaps occasionally an adult, who now live with it, would die. Moreover, it is an important article of food for all classes; and he who supplies it is a benefactor. So that, in some of our states, the selling of adulterated milk is made an indictable offence. And a dealer ought to be held to a high degree of caution as to the milk he sells. But in a single instance there may be an adulteration which it is impossible he should know of or avoid, however extreme his caution may be. Suppose such an instance occurs, and the dealer is punished; if he does not leave the business, to the detriment of the public interests, the punishment can have no effect to prevent the repetition of the same thing, either by him or by any other dealer. Hence punishment should not be inflicted even if it were deserved. And when we consider, also, that it is not deserved, but is a gratuitous and wicked wrong inflicted on an innocent party, no fit word to characterize it is found in the language.

One form of the doctrine of the criminal intent is that, if a man honestly intends to obey the law, and uses due care and caution to ascertain the facts, yet is misled concerning them, then, if he does what, were the facts as he thus believes them to be, would be no violation either of the law which he intends to obey or of any other legal or social duty, he is

* Paley's Moral Phil., b. 6, ch. 9, par. 1.
† Fowler v. Padget, 7 T. R. 509, 514.

* See, for a fuller explanation, 1 Bishop's Cr. Law, 6th ed., §§ 285—355.

not punishable, though under the actual facts he would be had he known them. The purpose which prompts his actions being in accord with his whole duty, no accident beyond his control, such as occurs when he is misled concerning facts, can make a mere external act, to which nothing in the mind corresponds, a proper subject of punishment. Within this general doctrine there may be differences on minor points; but I have purposely stated it, not with exact reference to them, but in a form to excuse no one who would not be excusable by all opinions, according to the rules of the common law.

A familiar illustration of the doctrine may be seen in an old case, in which it was held that one is not punishable for killing in the night a member of his own household whom he mistakes for a burglar, "for he did it ignorantly, without intention to hurt the said Frances."*

Again, a statute in Massachusetts provided that, "if any person shall be found *in a state of intoxication* in any highway, street, or other public place, any sheriff, deputy-sheriff, constable, watchman, or police-officer shall, without any warrant, take such person into custody and detain him in some proper place until, in the opinion of such officer, he shall be so far recovered from his intoxication as to render it proper to carry him before a court of justice." Thereupon an officer, having "reasonable or probable cause to believe" that a person was thus intoxicated, arrested him, while in fact he was not; and, being indicted for this as for an assault and battery, the court held him to be justified. After stating from Blackstone the common doctrine as to mistake of fact, Hoar, J., delivering the opinion of the court, proceeded: "This principle is recognized by all the best authorities upon criminal law. Thus, in Russell on Crimes, volume 1 (7th Am. ed.), it is said that, 'without the consent of the *will* human actions cannot be considered as culpable; nor, where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences.' And in Hale's Pleas of the Crown, volume 1, page 15, the general doctrine is stated that, 'where there is no will to commit an offence, there can be no transgression.' See, also, 1 Gab. Cr. Law, 4. And, in all these writers, ignorance of fact, unaccompanied by any criminal negligence, is enumerated as one of the causes of exemption from criminal responsibility."†

Illustrations of this sort might be repeated indefinitely; but in this connection I shall simply mention one other, which I select because it bridges over the argument to my next proposition. It is that if a person is insane, not in all his faculties, but simply to the extent of having insane delusions which he accepts as facts, then, if a thing falsely believed to be true is such as would justify him in taking another's life, were it a reality, and, impelled thereby, he takes the life, he is not punishable. So it has been clearly adjudged in Massachusetts‡ and in England,§ and the doctrine is everywhere accepted as sound. "If," asked the House of Lords, questioning the common-law judges, "a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" "To which question," replied Lord Chief Justice Tindal, "the answer must, of course, depend on the nature of the delusion; but, making the assumption * * that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."‖

"It would be singular, indeed," said Hoar, J., in the Massachusetts case, wherein an officer took up a person in the streets for being drunk, when he was not, "if a man deficient in reason would be protected from criminal responsibility, and another, who was obliged to decide

* Levett's Case, stated Cro. Car. 538.

† The Commonwealth v. Presby, 14 Gray, 65, 67.

‡ The Commonwealth v. Rogers, 7 Metc. 500.

§ Opinion on Insane Criminals, 8 Scott, N. R. 505; 1 C. & K. 130, note; 10 Cl. & Fin. (in McNaghten's case) 200.

‖ *Ibid.*, at p. 135 of the report in C. & K.

upon the evidence before him, and used in good faith all the reason and faculties which he had, should be held guilty."*

This brings us to an extraordinary series of professional and judicial delusions, next to be considered.

[To be continued.]

DIGEST OF ENGLISH CASES.

The following is a digest of the principal cases reported in the English Law Reports for February, March and April, 1878.

Acceptor.—See *Bills and Notes*, 1, 3, 5.

Adjacent Support.—See *Easement.*

Advocate.—See *Attorney and Client*, 1.

Agent.—See *Principal and Agent.*

Agreement.—See *Contract.*

Ambiguity.—See *Will*, 1.

Ancient Lights.—In an action for obstruction of ancient lights, it appeared that plaintiff was entitled to access of light by prescription, and that defendant had diminished the light by erecting a high building opposite, but that there was still light enough for the business carried on in plaintiff's premises. COCKBURN, C. J., instructed the jury that they should bring in substantial damages, if they found that the light had been sensibly diminished, so as to affect the value of the premises, either for the purposes for which they had been previously used, or for any purpose for which they were likely to be used in the future. Defendants contended that the damages should be nominal, unless it appeared that the premises were injured for the purposes for which they had always been and were still used. *Held*, that the instruction of the judge was correct. *Martin* v. *Goble* (1 Camp. 320) questioned.—*Moore* v. *Hall*, 3 Q. B. D. 178.

Animus Manendi.—See *Domicile.*

Annuity.—A testator gave an annuity to his son, with cesser and gift over "if he shall do or permit any act, deed, matter, or thing whatsoever, whereby the same shall be aliened, charged or incumbered." The annuitant committed an act of bankruptcy by failing to answer to a debtor's summons. *Held*, that the annuity thereupon ceased.—*Ex parte Eyston. In re Throckmorton*, 7 Ch. D. 145.

Anticipation.—A married woman, entitled under a will to £400 a year for her separate use, without power of anticipation, joined with her husband in mortgaging her interest under the will, by perpetrating a gross fraud upon the mortgagee as to the restraint upon anticipation. The mortgagee got judgment against them, and an order to charge the wife's income as it came due. *Held*, that the restraint on anticipation could in no case be evaded or set aside, even in case of such gross fraud.—*Stanley* v. *Stanley*, 7 Ch. D. 589.

Attorney and Client.—1. Defendant, a Scotch advocate, was legal adviser and agent for two ladies, as trustees for their father's estate. Under his direction, two houses belonging to the estate were sold, nominally to defendant's brother, but in reality the defendant himself was the purchaser, though without the knowledge of his clients.—*Held*, that the purchase could not be enforced.—*McPherson* v. *Watt*, 3 App. Cas. 254.

2. During the progress of a suit, the plaintiffs mortgaged their interest in the estate concerned in the suit to the defendants therein. The plaintiffs' solicitor sanctioned the mortgage, and subsequently got his costs in the said suit charged on the plaintiffs' interest in the estate.—*Held*, that under the circumstances the mortgage must be postponed to the costs, as the defendants must be held to have known of his lien when they took the mortgage.—*Faithful* v. *Ewen*, 7 Ch. D. 495.

Bank.—See *Bills and Notes*, 4.

Bankruptcy.—See *Annuity; Composition; Fixtures*; *Lease.*

Bill of Lading.—A bill of lading for a cargo of wheat, shipped at New York for Glasgow, contained an exemption from liability for loss from perils of the sea, or loss due to the negligence of the officers or crew of the ship. The cargo was injured by sea-water admitted into the hold, as the jury found, five days after sailing, through a port-hole negligently left unfastened by the crew; but the jury did not find whether the port-hole was left unfastened before the sailing or subsequently. *Held*, that the case must be remanded for a finding on this point, the question of liability depending upon whether the implied warranty of seaworthiness at the commencement of the voyage had been complied with.—*Steel et al.* v. *The State Line Steamship Co.*, 3 App. Cas. 72.

See *Demurrage.*

Bills and Notes.—1. The plaintiff, a merchant

* The Commonwealth v. Presby, 14 Gray, 65, 68, 69.

in London, procured a loan of £15,000 of the defendant bank, on the security of a cargo of goods in transit to Monte Video, and of six bills of exchange drawn by him on S., the consignee of the goods in Monte Video, and accepted by the latter. Two of these bills having been paid and two dishonored, the defendant bank, through its branch in Monte Video, proposed to sell the goods at once, when the plaintiff wrote the defendant not to sell, and sent his check for £2,500, as additional security, adding, that when the bills were paid, "you will of course refund us the £2,500." The defendant drew the check; and, the other two bills having been dishonored, the defendant took proceedings against S., as a result of which the goods were, with plaintiff's consent, sold, and the bills without plaintiff's knowledge, delivered up to S. cancelled. The proceeds of the goods were insufficient, even with the £2,500, to satisfy the claim. *Held*, that the plaintiff could not recover the £2,500 from the defendant.—*Yglesias* v. *The Mercantile Bank of the River Plate*, 3 C. P. D. 60.

2. A bill of exchange drawn by a firm in one country upon the same firm in another country, and accepted in the latter place, is perhaps, strictly, a promissory note, but the holder may treat it either as a promissory note or as a bill of exchange; and where it appears to have been the intention that it should be negotiable in the market as a bill of exchange, it should be treated as such.—*Willans et al.* v. *Ayers et al.*, 3 App. Cas. 133.

3. By 19 & 20 Vict. c. 97, sec. 6, "no acceptance of a bill of exchange, inland or foreign, shall be sufficient to bind or charge any person, unless the same be in writing on such bill, and signed by the acceptor, or some person duly authorized by him." *Held*, that the word "accepted," written across the face of the bill, and unsigned, did not satisfy the statute.—*Hindhaugh* v. *Blakey*, 3 C. P. D. 136.

4. The plaintiffs, holders of a promissory note payable at the M. branch of the defendant bank, and drawn by parties having an account at the Y. branch of the said bank, deposited it with the S. branch of said bank, to be sent to the M. branch for collection. The M. branch, in the course of business, stamped the note as "paid," cancelled the signatures, and sent the S. branch a draft therefor in favor of the plaintiffs. The same day, the Y. branch, in its books, credited the drawers of the note with the amount thereof, but no notice of the credit was sent the drawers or holders. Two days later, the drawers becoming irresponsible, the M. branch wrote the S. branch to cancel the draft, and returned the note dishonored with the indorsement, "cancelled in error." There was no evidence as to the state of the drawers' account at the Y. branch. *Held*, that the effect of marking the note "paid," and cancelling the signatures, was rendered null by writing on it "cancelled in error," before returning it to the holders; and that the entries in the accounts between the branches of the bank as to payment of the note not having been communicated to the holders of the note, were not effectual to charge the bank with receipt of the money—*Prince* v. *Oriental Bank Corporation*, 3 App. Cas. 325.

5. An acceptor of a foreign bill of exchange subsequently dishonored, is liable by way of a charge for re-exchange for all the necessary expense incurred by the drawer in consequence of its having been dishonored by the acceptor.—*In re General South American Co.*, 7 Ch. D. 637.

Bonds.—See *Mortgage.*

Broker.—See *Factor.*

Carrier.—See *Common Carrier.*

Caveat Emptor.—See *Sale.*

Charter Party.—See *Demurrage.*

Children.—See *Devise*, 2; *Will*, 4.

Common, Rights of.—See *Pannage.*

Common Carrier.—Plaintiff signed a contract with the defendant company, by which the latter was to carry some cheeses for plaintiff at "owner's risk;" that is, the company was to be responsible only for injury resulting from the "wilful misconduct" of its servants." In consideration of this limitation of liability, a lower rate was charged. The contract further stated that the company would carry goods at a higher rate, assuming all the usual liabilities of common carriers. The plaintiff had knowledge of all the foregoing facts. The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7, permits railway companies to make such special contracts for carriage of goods as shall be adjudged "just and reasonable" by the court. The cheeses were so negligently packed by the company's servants that they were damaged; but the packers did not know that damage would result. *Held*, that the plaintiff could not recover.—*Lewis* v. *The Great Western Railway Co.*, 3 Q. B. D. 195.

[To be continued.]