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It would seem from the statistics in the office of the Clerk of the Records and Writs at Osgoode Hall, that litigation is somewhat on the increase in the Province of Ontario; a fact which may be of some interest to a profession, which, in comparison to the education, time, and intelligence devoted to it, receives less emolument than any other class in the community. The writs issued in the central office for the year 1902 up to the 30th of September of that year were 762. The number issued for the same period of the present year was 961. When we consider the number of solicitors in practice, one is tempted to say "but what are these among so many". In speaking of the emoluments of the profession, it is a fact worthy of note that while the cost of everything in the way of living is much greater than formerly, when salaries generally have been largely increased, and wages of workmen nearly doubled, the tariff of professional fees remains much as it was half a century ago. It is high time that this fact should be recognized and a proper scale of fees not only arranged, but insisted upon by practitioners in their daily business, and the interests of the profession thereby protected against those in our ranks, who, too frequently, having no proper sense of what they owe to their brethern, lower the general level of charges. We are well aware of the difficulties attending this matter, but of one thing are confident that if the profession were to pull together, with an earnest desire for the good of all, and with a proper esprit de corps most beneficial results would follow.

Meetings of representative Law Societies, and especially those of English speaking races, are always of interest as indicative of progress in the administration of law. In this regard we may regret that so far as the largest, and as we think the best, part of the North American continent is concerned, we, as a Dominion, have no association of this kind. Our attention is drawn to this subject by the proceedings of the American Bar Association and English Law Society at their recent meetings, the former held at Hot Springs, Virginia, and the latter at Liverpool. The meeting

of the American Bar Association seems to have been one of considerable interest, calling forth some strong addresses and animated discussions. The most forceful of these was in reference to the question of trusts, which, however, does not strike one as being particularly the business of a Bar Association; though the subject is one of great importance, especially in the United States. Sir Frederick Pollock also read a paper which dealt with the English system of law reporting. In reference to this the point which seemed most to interest his hearers was his view as to the discretion as to what cases should or should not be reported. Many thought that the system in common use in the United States of reporting almost everything was preferable. The suggestion for the formation of an international law association was favourably received, and a committee appointed to consider the subject. This may be desirable hereafter, if the world lasts long enough, but it seems a little Utopian at present. At the meeting of the English Law Society the subject of legal education was much in evidence. The time of holding the long vacation, the law's delays, professional misconduct and professional discourtesy also came in for a share of attention, together with various matters of reform in legal procedure. The subject of legal education headed up in a resolution that it is desirable that a general school of law should be established, and that Committees of the Inns of Court and the Council of the Law Society should prepare a detailed scheme to that end. It is refreshing to see the motherland waking up in reference to these and some other matters which are already familiar to her children on this side of the water.

Chief Justice Clark, of North Carolina, in a judgment recently pronounced in *State* v. *Cole*, 44 S.E. 391, gave some criminal statistics, and made some observations which are suggestive, and, coming from such a source, are presumably reliable. He quoted official figures to shew that for the years 1901 and 1902 there were in North Carolina 91 indictments for murder and 60 for manslaughter. He compared this record with London, England, which, with more than three times the population, last year had but 20 murders. One of our exchanges makes the following comments on these remarks of the learned Chief Justice:—"This comparison is extraordinary and almost incredible. The facts are probably no worse for North Carolina than for some other States

of the Union. The disgrace of an appalling and almost incredible list of murders belong to the whole nation. If every American official and every American citizen could be made to realize the shameful record of our country in this matter as compared with other countries they would be aroused to find a remedy. The effect of lynching on the volume of crime is also strikingly shewn by Judge Clark's opinion. The Attorney General's records shew that with all the lynchings that has taken place, the crimes for which murderers were lynched in twelve years had nearly doubled. The figures for 1889 and 1890 as compared with those for 1901 and 1902 were as follows:—Indictments for murder had increased from 96 to 191. Those for rape from 25 to 37. Those for manslaughter from 15 to 60. Figures like these indicate very clearly that lynching breeds crime."

The South African *Law Journal* (an excellent periodical, by the way) in a recent number, tells us that a Commission was appointed last January by the Lieutenant-Governor of the Transvaal to enquire into the steps to be taken "to bring into existence an institution which should form part of a teaching University" etc. It is further stated that this Commission has made a report, which, though it makes no special reference to instruction in law and jurisprudence by the proposed University, strongly advocates the establishment of a school for this learning. The writer takes this report as a text for writing an article on the study of the law in South Africa, giving some interesting information as to the condition of the profession there and making suggestions in connection therewith. In reference to legal education, which, apparently, is not in a very satisfactory condition in that country, he suggests that it would be better if the foundation of a faculty of law in the University should be preceded by the inauguration of a Law School such as exist in other countries. All this indicates an an advance in the right direction in our newly acquired territory on the dark continent. One could well imagine that in a country where the foundation of the jurisprudence is largely Roman-Dutch law, on which is a grafting of Common Law, with some admixture from other sources, a Law School would be most important. The division of lecturers he suggests are:—two on Roman-Dutch law, tracing the history of that system and discussing it from a

practical standpoint; with others to deal with South African statutes, such portions of the English law as have been adopted in the South African system of jurisprudence and the land laws peculiar to South Africa, and the practice in the Courts. The same issue of this journal contains an article giving the history and development of the Roman-Dutch law. Any person interested in that subject will find there much valuable information in a very readable form.

THE ALASKA BOUNDARY.

On the 19th ult., a memorandum embodying the decision arrived at by the majority of the Commission, was signed in London. The signatories were Lord Alverstone, Senator Lodge, Senator Turner and Secretary Root, the three latter being the American Commissioners. Sir Louis Jetté and Mr. Aylesworth refused to append their signatures on the grounds set forth in their protest. Up to the present time the Chief Justice has given no explanation of his action in reference to the allegation of his having signed an award not in accordance with the views agreed to between himself and his colleagues. But he has given to the public the reasons for his finding as to the Portland Channel.

The subject is one of such immense moment to the future of this country that opinions should not be hastily formed, or expressed without careful thought as to consequences. We deem it well, therefore, in the absence of information on various points, to withhold comment until the facts of the case and the surrounding circumstances more clearly appear. Although the British Government has, in the past, time and again, given away part of the territory of Canada, either from gross ignorance, or in a spirit of apathy, or, it may be, for the supposed necessities of the Empire, neither the present Government nor the Chief Justice of England need at present be charged with discourtesy, indifference, or possibly something worse.

The protest of the Canadian Commissioners is as follows:

"The decision of the Alaska Boundary Tribunal has been given, and in view of its character the people of Canada are, in our judgment, entitled to such explanation from us as will enable them to comprehend fully the manner in which their interests have been

dealt with. We take the points of the decision in the order in which they are presented by the treaty under which the tribunal was constituted :

"First: The Portland Canal. There are two channels parallel with each other, with four islands lying between them. The Canadian contention was that the northern channel should be adopted. The United States contended for the southern channel. If the Canadians succeeded it would give Canada the four islands which lie opposite the southern shore of Observatory Inlet and the harbour of Port Simpson. If the United States succeeded it would give them these four islands. These islands named in order as they run from the sea inward are Kannaghunut, Sitklan, Wales and Pearse Islands. When the members of the tribunal met after the argument, and considered this question, the view of the three British Commissioners was absolutely unanswerable. A memorandum was prepared and read to the Commissioners embodying our views and showing it to be beyond dispute that the Canadian contention upon this branch of the case should prevail, and that the boundary line should run northward of the four islands named, thus giving them to Canada.

"Notwithstanding these facts, members of the tribunal, other than ourselves, have now signed an award giving the two islands of Kannaghunut and Sitklan to the United States. These two islands are the outermost of the four. They command the entrance to Portland Channel, to Observatory Inlet and the ocean passage to Port Simpson. Their loss wholly destroys the strategic value to Canada of Wales and Pearse Islands. In our opinion there is no process of reasoning whereby the line thus decided upon by the tribunal can be justified. It was never suggested by counsel in the course of argument that such a line was possible. Either the four islands belong to Canada or they belong to the United States. In the award Lord Alverstone agrees with the United States Commissioners that the islands should be divided, giving the two that possess the most strategic value to the United States.

"Second: The line northward from Portland Channel. Substantially the Canadian contention on this line was that there were mountains parallel to the coast within the meaning of the treaty of 1825, and that the tops of such mountains should be declared the boundary, the mountains nearest the sea being taken. The United States contention was that there were no mountains parallel with

the coast within the meaning of the treaty, and the boundary line, therefore, must be fixed under the provision of the original treaty relating to the ten marine leagues, or 35 miles, and so run at a distance of 35 miles from shore, including the term shore heads, all inlets, bays, etc. The tribunal finds the Canadian contention correct as to the existence of mountains within the terms of the treaty, but the fruits of this victory are taken from Canada by fixing as the mountain line a row of mountains so far from the coast as to give to the United States substantially nearly all the territory in dispute. Around the head of Lynn Canal the line will follow the watershed somewhat in accordance with the present provisional boundary. We are of the opinion that the mountain line traced by Mr. King, the Dominion astronomer, along the coast should have been adopted, at least as far as the shores of Lynn Canal. If effect had been given to the contention that Great Britain had, by her acquiescence in adverse occupation, deprived herself of the right to claim the head of Lynn Canal, we should have regarded such a conclusion as perhaps open to reasonable justification. No such position can, however, be taken regarding the inlets lower down the coasts. Mr. King's line running along the coast to Lynn Canal and a line thence drawn around the head of Lynn Canal, following the watershed, would have given Canada the heads of the lower inlets, with at least one fine harbor from which access to the interior of Atlin and the Yukon country could have been had. It would not, so far as we have been made aware, taken in any territory ever actually occupied by United States citizens. It would have given to the United States the whole of Lynn Canal, including Skagway and Dyea and Pyramid Harbor, and it would have been, we think, reasonably satisfactory to Canada.

"Instead of taking the coast line of mountains, a line of mountains has been chosen far back from the coast, clearing completely all the bays, inlets and means of access to the sea, and giving the United States a complete land barrier between Canada and the sea from Portland Canal to Mount St. Elias. We have not been able to derive any understanding from our colleagues on the Commission as to the principle upon which they have selected their line of mountains, and our observations of the discussions which have resulted in the settlement of this line has led us to the

conclusion that, instead of resting upon any intelligible principle the choice of this line has been compromised between the opposing and entirely irreconcilable views as to the true meaning of the original treaty. The result of this compromise has, we think, been a distinct sacrifice of the interests of Canada. When it was shown that there were mountains parallel with the coast within the meaning of the treaty, the only logical course, in our judgment, was to adopt as the boundary the mountains in the immediate vicinity of the coast

"Third, as to the general question of inlets. The tribunal finds against the contention of Canada. We both are strongly of the opinion that this conclusion is wrong, and we have put on record at length the reason for our view in this respect

"Finally, if the six members of the tribunal had each given an individual judicial decision on each of the questions submitted, we should have conceived it our duty under the treaty of 1903, however much we might have differed from our colleagues, to have joined in signing the document which constituted the official record of answers. We do not consider the finding of the tribunal as to the islands at the entrance of Portland Channel or as to the mountain line a judicial one, and we have, therefore, declined to be parties to the award. Our position during the conference of the tribunal was an unfortunate one. We have been in entire accord between ourselves, and have severally and jointly urged our views as strongly as we were able, but we have been compelled to witness the sacrifice of the interests of Canada, powerless to prevent it, though satisfied that the course the majority determined to pursue in respect to the matters above specially referred to ignored the just rights of Canada."

L. A. JETTE.
A. B. AYLESWORTH.

The reasons given by Lord Alverstone for his finding in reference to the Portland Channel are as follows :—

"The answer to this question 'What channel is the Portland Channel?' depends upon the simple question, What did the contracting parties mean by the words 'the channel called the Portland Channel' in Article III. of the treaty of 1825? This is a pure question of identity. In order to answer it one must en-

deavor to put one's self in the position of the contracting parties, and ascertain as accurately as possible what was known to them of the geography of the district so far as relates to the channel called the Portland Channel. There are certain broad facts which, in my opinion, establish beyond any reasonable question that the negotiators had before them Vancouver's maps, the Russian map (No. 5 in the British, No. 6 in the American atlas), Arrowsmith's maps (probably the map numbered 10 in the American atlas), and Faden's maps (British Appendix, pp. 10 and 11). I have, moreover, no doubt that the negotiators were acquainted with the information contained in Vancouver's narrative. I do not think it necessary to state in detail the evidence which has led me to this conclusion beyond stating that, quite apart from the overwhelming probability that this was the case, there are passages in the documents which, in my judgment, establish it to demonstration, but, for the purpose of my reasons, it is sufficient to say that I have come to that clear conclusion after the most careful personal perusal of the documents.

"I will now endeavour to summarize the facts relating to the channel called Portland Channel, which the information afforded by the maps and documents to which I have referred establish. The first and most important is that it was perfectly well known before and at the date of the treaty that there were two channels or inlets, the one called Portland Channel, the other Observatory Inlet, both of them coming out to the Pacific Ocean. That the seaward entrance of Observatory Inlet was between Point Maskeylyne on the south and Point Wales on the north. That one entrance of Portland Channel was between the island now known as Kannagunut and Tongas Island. That the latitude of the mouth or entrance to the channel called Portland Channel, as described in the treaty and understood by the negotiators, was 54 degrees 45 minutes. The narrative of Vancouver refers to the channel between Wales Island and Sitklan Island, known as Tongas Passage, as a passage leading south southeast toward the ocean—which he passed in hope of finding a more northern and westerly communication to the sea, and describes his subsequently finding the passage between Tongas Island on the north and Sitklan and Kannagunut on the south. The narrative and the maps leave some doubt on the question whether he intended to name Portland Channel to include Tongas Passage as well as the passage

between Tongas Island on the north and Sitklan and Kannagunut Island on the south. In view of this doubt, I think, having regard to the language, that Vancouver may have intended to include Tongas Passage in that name, and looking to the relative size of the two passages, I think that the negotiators may well have thought that the Portland Channel, after passing north of Pearse and Wales Island, issued into the sea by the two passages above described.

"For the purpose of identifying the channel, commonly known as Portland Channel, the maps which were before the negotiators may be useful. This is one of the points upon which the evidence of contemporary maps as to general reputation is undoubtedly admissible. It is sufficient to say that not one of the maps which I have enumerated above in any way contradicts the precise and detailed situation of Portland Channel and Observatory Inlet given by Vancouver's narrative and the other documents to which I have referred. The Russian map of 1802 shews the two channels distinctly; and the same may be said of Faden's maps on which so much reliance was placed on the part of the United States. I do not attach particular importance to the way in which names on the maps are written or printed, and, therefore, I do not rely upon the fact that in the case of some of these contemporary maps the words 'Portland Channel' are written so as to include within the name the lower part of the channel which is in dispute. From long experience I have found that it is not safe to rely upon any such pecularities. After the most careful consideration of every document in this case I have found nothing to alter or throw any doubt on the conclusion to which I have arrived, and there are certain general considerations which strongly support it.

"Russia and Great Britain were negotiating as to the point on the coast to which Russian dominion should be conceded. It is unnecessary to refer to all the earlier negotiations, but it is distinctly established that Russia urged that her dominion should extend to 55 degrees of latitude, and it was in furtherance of this object that Portland Channel, which issues into the sea at 54 degrees 45 minutes, was conceded and ultimately agreed to by Great Britain. No claim was ever made by Russia to any of the islands south of 54 degrees 45 minutes, except Prince of Wales Island, and this is the more marked, because she did claim the

whole of Prince of Wales Island, a part of which extended to about 54 degrees 40 minutes. The islands between Observatory Inlet and the channel, to which I have referred above as the Portland Channel, are never mentioned in the whole course of the negotiations.

"It is suggested on behalf of the United States that Portland Channel included both the channels—namely, the channel coming out between Point Maskelyne and Point Wales, and that running to the north of Pearse and Wales Islands, and that, upon the doctrine of the thalweg, the larger channel must be taken as the boundary. It is sufficient to say that, in my opinion, there is no foundation for this argument. The lengths and the points of land at their entrances are given in the case of each channel by Vancouver in a way which precludes the suggestion that he intended to include both channels under the one name, and it must be remembered that he was upon a voyage of discovery, and named these channels when he had discovered and explored them.

"Inasmuch as the question submitted to us only invoives the determination of the channel described in the treaty by the words already cited, 'the channel called Portland Channel,' subsequent history can throw no light upon this question, but I think it right to say that the use in the year 1853 of the name Portland Inlet in the British Admiralty chart, upon which such reliance was placed on behalf of the United States, has, in my opinion, no bearing upon the question, and the references to Tongas Island in 1835 as being on the frontier of the Russian straits and in 1863 as being on the north side of the Portland Canal, and in 1869 as to Tongas being on the boundary between Alaska and British Columbia, are strongly confirmatory of the view at which I have arrived upon the consideration of the materials which were in existence at the date of the treaty.

"I therefore answer the second question as follows:

"The channel which runs to the north of Pearse and Wales Islands, and issues into the Pacific between Wales Island and Sitklan Island.

"Oct. 20, 1903. "ALVERSTONE."

MENS REA.

The application to English cases of the Civil Law maxim, Actio non facit reum nisi sit mens rea, has been traced in English jurisprudence as far back as the times of the first Henry, in the twelfth century. It had, however, been a guiding principle in our criminal law from the earliest times, that in order to fasten the penalty of criminal offence upon one, a guilty mind must have formed an essential ingredient.

Lord Chief Justice Kenyon says: "It is a principle of natural justice and of our laws, that the intent and the act must both concur to constitute crime." To the like effect are the words of Chief Justice Earle:—"A man cannot be said to be guilty of a delict, unless to some extent his mind goes with the act."

The introduction of this phrase into our criminal jurisprudence has been the fruitful source of conflicting opinions amongst our ablest judges. This has arisen partly from the want of a proper application of the maxim under the varying phases of facts and statutory enactments in our law. The phrase originally was made to apply to criminal offences mala in se; but it has been as frequently invoked in offences mala prohibita, for the doing or not doing of certain acts which, apart from the statute, are naturally and per se indifferent.

Cave J. designates it as a "somewhat uncouth maxim." Nor does Stephen, J., regard it with greater favor. This eminent judge calls it—"a most unfortunate phrase." He thinks it "not only likely to mislead, but actually misleading." "That it is more like the title of a treatise than a practical rule."

The difficulty in the proper application of the maxim has been greatly enhanced by the carelessness of the legislature in framing penal acts. In many cases, the scope of the Act, a careful consideration of the object sought to be attained, as well as its phraseology are all to be carefully weighed in determining whether it was intended to fix criminal responsibility upon the infringment of its provisions whether intentional or unintentional. If such in fact were its object, the presence or absence of mens rea could not enter as a determining factor of innocence or guilt. Once the infraction of the law is proved, the penalty as a necessary consequence follows. This much, however, may be said, that in all cases when the legislature chooses to dispense with the necessity

of the mens rea, and constitutes an act a crime in itself, irrespective of the mental element, it should be expressed in the clearest possible language.

Regina v. Woodrow, 15 M. & W., 404, is an authority for the principle that a penalty may be incurred under a prohibitory statute, where the offending individual had no intention of infringing its provisions. The defendant in this cause was a retailer of tobacco and was liable to a penalty of £200 imposed by statute for having in his possession adulterated tobacco. He was convicted, although he had purchased it as genuine, and had no knowledge or cause to suspect, that it was not so. The plea of the absence of mens rea did not avail as a defence with the Court on appeal, the conviction having been sustained.

On the other hand, the case of *Sherras v. DeRutzen*, (1895) 1 Q.B. 918, is an authority upholding a directly opposite doctrine. In this case a publican had been fined, under the provisions of a statute regulating the sale of liquor, for the offence of selling liquor to a constable on duty. The conviction was set aside by the Court, because the accused believed and had reasonable grounds for his belief, that the constable was not on duty at the time. In this case the absence of mens rea did avail as a defence.

The two great leading cases on the subject on mens rea are *The Queen v. Prince*, (1875) 2 C.C.R. 154, and *The Queen v. Tolson*, (1889) L.R. 23 Q.B D. 168. In the former case the defendant was convicted under s. 55 of 24 & 25 Vict. c. 100, which provides that "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the Court, to be imprisoned for any term not exceeding two years, with or without hard labor."

It was proved on the hearing that the girl was only fourteen years of age when taken from her father and without his consent by the prisoner. The jury found upon reasonable evidence, that before the defendant took her away she had told him she was eighteen years of age, and that the defendant bona fide believed her statement, and that such belief was reasonable.

The Court of Appeal reserved the case for the consideration of all the judges. By the judgment of sixteen of the judges the

conviction was affirmed. Brett, J., who was the only dissentient, delivered one of the ablest and most exhaustive judgments ever delivered on the subject.

Bramwell, B., at p 174 thus places the matter in a clear light: "The act forbidden is wrong in itself, if without lawful cause; I do not say illegal, but wrong. I have not lost sight of this, that though the statute probably principally aims at the seduction for carnal purposes, the taking may be by a female with a good motive. Nevertheless, though there may be such cases, which are not immoral in one sense, I say that the act forbidden is wrong. Let us remember what is the case supposed by the statute. It supposes that there is a girl—it does not say a woman, but a girl, something between a child and a woman; it supposes she is in the possession of her father or mother, or other person having lawful care or charge of her; and it supposes there is a taking, and that that taking is against the will of the person in whose possession she is. It is, then, a taking of a girl, in the possession of some one, against his will. I say that done without lawful cause is wrong, and that the legislature meant it should be at the risk of the taker whether or no she was under sixteen. I do not say that taking a woman of fifty from her brother's or even her father's house is wrong. She is at an age when she has a right to choose for herself; she is not a girl, nor of such tender age that she can be said to be in the possession of, or under the care or charge of any one. I am asked where I draw the line; I answer at when the female is no longer a girl in anyone's possession. But what the statute contemplates, and what I say is wrong, is the taking of a female of such tender years that she is properly called a girl, can be said to be in another's possession, and in that other's care or charge. No argument is necessary to prove this; it is enough to state the case. The legislature has enacted that if any one does this wrong act, he does it at the risk of her turning out to be under sixteen. This opinion gives full scope to the doctrine of mens rea. If the taker believed he had the father's consent, though wrongly, he would have no mens rea; so if he did not know she was in anyone's possession, nor in the care or charge of anyone. In those cases he would not know he was doing the act forbidden by the statute—an act which, if he knew she was in possession and in care or

charge of anyone, he would know was a crime or not, according as she was under sixteen or not. He would not know he was doing an act wrong in itself, whatever was his intention, if done without lawful cause. * * The same principle applies in other cases. A man was held liable for assaulting a police officer in the execution of his duty, though he did not know he was a police officer. Why? because the act was wrong in itself. So, also, in the case of burglary, could a person charged claim an acquittal on the ground that he believed it was past six when he entered, or in house-breaking, that he did not know the place broken into was a house? Take, also, the case of libel, published when the publisher thought the occasion privileged, or that he had a defence under Lord Campbell's Act, but was wrong; he could not be entitled to be acquitted because there was no mens rea. Why? because the act of publishing written defamation is wrong where there is no lawful cause."

The judgment of Denman, J., at p. 179, is no less forceful:—'By taking her, even with her own consent, he must at least have been guilty of aiding and abetting her in doing an unlawful act, viz. in escaping against the will of her natural guardian from his lawful care and charge. This, in my opinion, leaves him wholly without lawful excuse or justification for the act he did, even though he believed that the girl was eighteen, and therefore unable to allege that what he has done was not unlawfully done within the meaning of the clause. In other words, having knowingly done a wrongful act, viz. in taking the girl away from the lawful possession of her father against his will, and in violation of his rights as guardian by nature, he cannot be heard to say that he thought the girl was of an age beyond that limited by the statute for the offence charged against him. He had wrongfully done the very thing contemplated by the legislature. He had wrongfully and knowingly violated the father's rights against the father's will, and he cannot set up a legal defence by merely proving that he thought he was committing a different kind of wrong from that which in fact he was committing."

The ratio decidendi, it will be seen, rested largely upon the fact, that although there was an absence of the mens rea in the taking so far as the age of the girl was concerned, a wrongful act was done in the taking of the girl out of the lawful possession of

her parent without the color of excuse and the prisoner took the risk of the ulterior consequences when he did that wrongful act.

Brett, J., held that if the facts were as the prisoner believed them to be, he was guilty of no criminal offence at all, and therefore had no criminal intent at all. That if the girl were over sixteen, as he believed her to be, and went willingly with him, the father would seem to have no legal remedy for such taking. Nor would the act, if the facts were as the prisoner believed them, be one which has ever been a criminal offence in England. In fact he would have done no act for which, if done in the absence of the father, and done with the continuing consent of the girl, the father could have had any legal remedy. After a careful analysis of the statute and a consideration of the leading cases bearing on the point the learned judge came to the conclusion, that as the gravamen of the offence was the taking of a girl under the age of sixteen out of the possession and against the will of her father, and as the jury found the defendant bona fida believed the girl was eighteen, and that such belief was reasonable, there could be no crime in the absence of a criminal mind.

In the other great leading case, *The Queen* v. *Tolson*, L.R. 23 Q. B. D., 168, the prisoner was convicted of bigamy. She married a second time during the lifetime of her former husband, and within seven years of the time when she last knew of his being alive; but she did so believing in good faith and upon reasonable grounds that her first husband was dead. She was convicted under the statute 24 & 25 Vict., s. 57, which enacts that, "whosoever being married, shall marry any other person during the lifetime of the former husband or wife, shall be guilty of felony." It was held by Coleridge C. J., Hawkins, Stephen, Cave, Day, Smith, Wills, Grantham, and Charles, JJ. (Denman, Field, and Manisty, JJ., and Pollock and Huddleston, BB., dissenting), that a bona fide belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment, and that the conviction was wrong.

Cave, J., is thus reported at pages 181 and 182:—"At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act, has always been held to be a good defence. This doctrine is embodied in the somewhat uncouth maxim, 'actus

non facit reum, nisi mens sit rea.' Honest and reasonable mistake stands, in fact, on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. Instances of the existence of this common law doctrine will readily occur to the mind. So far as I am aware, it has never been suggested that these exceptions do not equally apply in the case of statutory offences unless they are excluded expressly or by necessary implication. In *Reg.* v. *Prince*, in which the principle of mistake underwent much discussion, it was not suggested by any of the judges that the exception of honest and reasonable mistake was not applicable to all offences, whether existing at common law or created by statute. As I understand the judgments in that case, the difference of opinion was as to the exact extent of the exception; Brett, J., the dissenting judge, holding that it applied wherever the accused honestly and reasonably believed in the existence of circumstances which, if true, would have made his act not criminal, while the majority of the judges seem to have held that, in order to make the defence available in that case, the accused must have proved the existence in his mind of an honest and reasonable belief in the existence of circumstances which, if they had really existed, would have made his act not only not criminal, but also not immoral. . . . . Now, it is undoubtedly within the competence of the legislature to enact that a man shall be branded as a felon and punished for doing an act which he honestly and reasonably believes to be lawful and right, just as the legislature may enact that a child or a lunatic shall be punished criminally for an act which he has been led to commit by the immaturity or perversion of his reasoning faculty. But such a result seems so revolting to the moral sense that we ought to require the clearest and most indisputable evidence that such is the meaning of the act."

On the minority side, Manisty, J., said, at pages 199 and 200:—"What operates strongly on my mind is this, that if the legislature intended to prohibit a second marriage in the lifetime of a former husband or wife, and to make it a crime, subject to the proviso as to seven years, I do not believe that language more apt or precise could be found to give effect to that intention than the language contained in the 57th section of the act in question. . . . . . I am absolutely unable to distinguish *Reg.* v. *Prince* from the present case, and, looking to the names of the eminent

judges who constituted the majority, and to the reasons given in their judgments, I am of opinion, upon authority as well as principle, that the conviction should be affirmed. The only observation which I wish to make is (speaking for myself only) that I agree with my learned brother Stephen in thinking that the phrases 'mens rea' and 'non est reus nisi mens sit rea' are not of much practical value, and are not only 'likely to mislead,' but are 'absolutely misleading.' Whether they have had that effect in the present case on the one side or the other it is not for me to say."

The case of *Dickson* v. *Stevens*, 31 N.B. Rep. 611, seems a particularly hard one. In this case it was decided by three of the judges of the Supreme Court of N.B. (Allen, C. J., and Palmer, J., dissenting) that a vessel was liable to seizure and the captain and owner subject to a penalty of $400.00 for having sent three shirts ashore to his home to be washed; and the person who took them, also having taken with them from the master's trunk, without his knowledge, some worthless samples of wall paper, on the ground that he had not first reported to the custom-house officer on entering port, under the Customs Act, 1 R.S.C. c. 32, s. 28. There was no pretence that duty could be collected on any of these articles, or that an attempt had been made to evade the revenue laws. It was held by a majority of the Court that these facts ought to have no weight in construing the act.

Tuck, J., at page 615, says:—"Even if it seems absurd to arrest a ship because three soiled shirts, some clothing and samples of wall paper were taken ashore before a report was made, this Court must construe the Statute according to its true meaning, though such construction leads to an absurdity. . . . . But it is contended that, to make the master liable to the penalty, or the vessel to the seizure, the offence must have been knowingly committed; there must have been a guilty mind before there could be any liability. It is laid down that, with few exceptions, a guilty mind is an essential element in a breach of a criminal or penal law. It seems to me that, under this Statute, the question of intention is not an essential element. A vessel may be seized for violation of the Customs Act although the master and owners were wholly ignorant of the illegal action. It is to be gathered from all the penal clauses that there may be liability without the offender knowing that he was committing an offence."

Palmer, J., held the articles taken on shore, before entering at the custom-house, were not goods within the true meaning of the act. At page 618 he says:—"The duty to make the entry is provided by sections 33 and 34, which make it the duty of any importer to make the entry inward. From this it is apparent that the goods to be entered must be such as are imported; and I think it would be absurd where a man who, as a master or seaman on board a vessel, has left Canada with a shirt or other wearing apparel, to say that, when it is brought back again, either on his back or in his possession, that he has imported it, and to forfeit his vessel because he has not reported it or got a permit to land it."

The custom-house officer also, it seems, told the captain the samples were of no value and he might bring them on shore.

Palmer, J., also held that the captain and the owner had a right to the application of the doctrine of de minimis non curat lex.

It is submitted the following rules and principles are deducible from a consideration of the foregoing cases:—

1. The absence of mens rea does not avail when the offence has been committed in ignorance or misapprehension of the law.

2. That the maxim as to mens rea applies whenever the facts which are present to the prisoner's mind, and which he has reasonable ground to believe, and does believe to be true, would, if true, make his act no criminal offence at all.

3. Mens rea, in the legal sense of the expression, should not be confounded with a guilty conscience or evil intention. A statute, which prohibits an act, would be violated, though the act was done without evil intention, or even under the influence of a good motive: *R.* v. *Hicklin*, L.R. 3 Q. B., 360; *Staney* v. *Chilworth Gunpowder Co.*, 24 Q. B. D., 90.

4. When an act in itself is neither illegal or immoral, but is made penal by statute, it then becomes a question of construction, whether the common law doctrine of mens rea is intended to apply to it or not. If the legislature, however, intend to dispense with this right, it ought to be expressed in clear and explicit language.

5. If a person enter upon an act, improper or immoral from its inception, he necessarily assumes the risk of any penalty that may result at any subsequent stage in carrying it into effect, and in such a case the doctrine of mens rea does not apply.

6. From a judicial standpoint it is morally wrong knowingly and intentionally to break a statute, since obedience to the law is the prime duty of citizenship. Consequently, intentionally or knowingly or negligently or carelessly or indifferently to break a statute, by-law or municipal regulation, enacted for the general good, is such an offence as in general excludes the application of the doctrine of mens rea.

7. In many cases penal statutes can only be properly construed by reference to the object sought to be accomplished, the causes which called them into existence, and the necessity of their strict observance. For example, no laws are more important, and none afford equal facilities or greater temptation for evasion than laws relating to the revenue, and, as a consequence, such laws are strictly construed, and the doctrine of mens rea is sparingly applied when their provisions are infringed.

8. When a statute simply forbids an act and imposes a penalty for non-observance, no other proof is required than its infraction. It then remains for the defendant, if he so desire, to invoke the doctrine of mens rea, and it can only avail when honesty of purpose and care, free from negligence and indifference, are found to exist.

9. If the enactment defines a mental element which must accompany its infraction, by the use of any such words as "without lawful excuse," "without due care," "knowingly," "negligently," "maliciously," or "unlawfully," then the burden of proof rests with the prosecution to shew the existence of such an element, without which no crime under the statute can arise.

10. Before a person can be convicted under a penal statute it is necessary to prove one of three things; either that the prohibited act was done knowingly, or in consequence of personal neglect, or without lawful excuse.

In general, the whole difficulty arises in the proper application of these rules and leading principles to particular offences, and in determining whether the penalty, imposed for the infraction of the act, is intended to be imposed at all events, or whether there is to be read into it the common law qualification of mens rea. How far erroneous belief or ignorance of a fact, which is of the essence of the offence, is material, has given rise to the many conflicting decisions in our reports.

SILAS ALWARD.

St. John, N. B.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

CONTRACT FOR FIXED TIME—IMPLIED AGREEMENT TO CONTINUE—CIRCUMSTANCES NECESSARY TO PERFORMANCE OF CONTRACT — IMPLIED CONDITION.

Ogdens v. *Nelson* (1903) 2 K.B. 287, was an action for goods sold and delivered, in which the defendant by way of counter claim set up that in consideration of the defendant becoming a customer of the plaintiff and agreeing to purchase goods of them, and not to sign an agreement with any other firm which would prevent his dealing with the plaintiff, the plaintiffs would for a period of four years distribute as an annual bonus among their customers, including the defendant, and in proportion to the purchases made by them respectively a certain fixed annual sum, and also the expected profits on certain goods which should be sold by the plaintiff during that period. Before the four years expired the plaintiffs sold the business to third persons; the defendant claimed damages for the breach of this agreement. Lord Alverstone, C.J., who tried the case, held that there was an implied agreement by the plaintiff to continue to carry on their business for the four years mentioned in the agreement, and their omission to do so constituted a breach which entitled the defendant to damages.

SOLICITOR—DISQUALIFIED PERSON ALLOWED TO USE SOLICITOR'S NAME—STRIKING OFF ROLL—SOLICITORS' ACT, 1843 (6 & 7 VICT., C. 73) S. 32—(R.S.O. C. 174, S. 28).

In re Burton (1903) 2 K.B. 300, may be briefly noticed inasmuch as it marks a difference between the English and Ontario Solicitors' Act. The application was to strike a solicitor off the roll for permitting a disqualified person to use his name. The Divisional Court (Lord Alverstone, C.J., and Wills, and Channell, JJ.) held that under the English Act they had no discretion as to the punishment to be inflicted, but were bound by the Act to make the order as asked. Under the Ontario Act, R.S.O. c. 174, s. 28, it seems reasonably clear that in such cases the Court has a discretion.

LANDLORD AND TENANT—SUB-LEASE IN BREACH OF COVENANT NOT TO SUB-LET—FORFEITURE—WRIT CLAIMING POSSESSION—SERVICE OF WRIT—ELECTION OF LESSOR TO DETERMINE TENANCY—SUBSEQUENT PAYMENT OF RENT BY OCCUPIER TO SUB-LESSEE—ESTOPPEL.

Serjeant v. *Nash* (1903) 2 K.B. 304, was an action to recover damages for a wrongful distress. The facts were somewhat complicated. A lessee, bound by a covenant not to assign or sub-let without leave, created a yearly tenancy in favour of the plaintiff; he also on the same day without leave mortgaged the term by way of a sub-lease The head lease contained a proviso for re-entry on breach of any of the covenants by the lessee. The lessee was subsequently adjudicated bankrupt, and the mortgage being in default a receiver wss appointed, to whom the plaintiff paid a quarter's rent. Before the next quarter's rent became due the head lessor served a writ of ejectment on the plaintiff; the writ did not specify any cause of forfeiture. After appearance in the action, but before delivery of the statement of claim specifying the cause of forfeiture, the plaintiff paid another quarter's rent to the receiver. He refused to pay the next quarter's rent and the receiver distrained, and the action was brought against the receiver for a wrongful distress. The action was tried by Darling, J., who gave judgment for the plaintiff, and the Court of Appeal (Collins, M.R., and Stirling, and Mathew, L.JJ.) affirmed his decision. On the part of the defendants it was contended by the plaintiffs that the action of the head lessor could not affect the relation of landlord and tenant between the plaintiff and the mortgagee, and that, at all events, by payment of rent after the action was commenced the plaintiff was estopped from disputing the defendants' title. On the other hand it was contended that there was a final determination of the tenancy under the lease when the head lessor commenced his action, and this the Court of Appeal held to be the correct view, and that the payment of the rent under the circumstances created no estoppel disentitling the plaintiff to shew that his landlord's title had determined when the distress was made.

EXECUTOR—ADMINISTRATOR—CONTINGENT LEGACY WITHOUT INTEREST—APPROPRIATION OF INVESTMENT TO ANSWER CONTINGENT LEGACY—LOSS ON INVESTMENT.

In re Hall, Foster v. *Metcalfe* (1903) 2 Ch. 226. In this case the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) were

unable to agree with the decision of Kekewich, J., W. N. (1902) 108, on a question of law arising on the administration of a deceased person's estate. By the will of the testator four legacies of £1,000 each were given to legatees contingent on their attaining 21 or, in the case of females, marrying before attaining that age, without interest in the meantime. The executors, without any authority from the court, had purchased certain securities which they assumed to appropriate to these legacies. Some of these securities depreciated in value, and when one of the legatees attained 21 the securities appropriated to her legacy were insufficient to pay the same in full. Kekewich, J., considered that although the executors could not have been compelled to make the appropriation, they had nevertheless a right to do so if they thought fit, and that the legatee must bear the loss. The Court of Appeal, however, hold that the executors could not be compelled to take the course they had done, neither, without the consent of the legatees, could they voluntarily take that course so as to throw the loss on the legatee, and they held that notwithstanding the depreciation in value of the securities set apart to secure the legacy, the legatee was nevertheless entitled to be paid her legacy in full. The case, of course, is different in the case of a vested legacy, which the legatee is entitled to require the executor to invest. Romer, L.J., intimates that the executor might validly make such an investment to secure even a contingent legacy either with or without the sanction of the court, so as to free himself from personal liability.

CONTRACT—VENDOR AND PURCHASER—COMMON MISTAKE—LIFE POLICY, SALE OF—DEATH OF ASSURED BEFORE SALE OF POLICY—RESCISSION AFTER COMPLETION.

In *Scott* v. *Coulson* (1903) 2 Ch. 249, the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) have affirmed the judgment of Kekewich, J. (1903) 1 Ch. 453 (noted ante, p. 401), rescinding a contract for the sale of a policy of life assurance after completion of the contract by assignment, on its being discovered by the assignor that the person insured was dead at the time of the making of the contract, which was a fact unknown at that time to either party.

COMPANY—CONTRIBUTORY—SALE OF BUSINESS TO COMPANY—CONTRACT—SHAM OR ILLUSORY CONTRACT—FULLY PAID SHARES—ALLOTMENT TO VENDORS' NOMINEES—WANT OF CONSIDERATION FOR SHARES ISSUED AS FULLY PAID—DIRECTORS—MISFEASANCE.

In re Innes & Co: (1903) 2 Ch. 254. The Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) have now reversed the judgment of Kekewich, J. (1903) 1 Ch. 674 (noted ante, p. 472.) The court thought there was no ground for the assumption that the allotment of the shares to the directors was a sham or illusory contract, but that they took as nominees of the vendor who had bargained for such fully paid shares as part of his contract price. They also came to the conclusion that there was no ground for saying that the directors had been guilty of misfeasance in making the contract at an over value of the property purchased, and on both grounds they reversed the judgment of Kekewich, J.

LANDLORD AND TENANT—TRADE FIXTURES—TENANT'S RIGHT TO REMOVE TRADE FIXTURES—LEASE—COVENANT TO YIELD UP LANDLORD'S FIXTURES AT END OF TERM—CONSTRUCTION—GENERAL WORDS—EJUSDEM GENERIS.

Lambourn v. *McLellan* (1903) 2 Ch. 268, was a case between landlord and tenant as to the right to remove trade fixtures. The lease was one of premises for carrying on a boot business, and contained a covenant on the part of the lessee to deliver up the premises and the fixtures, specifying in detail a number of landlord's fixtures, and "all other erections, buildings, improvements, fixtures, and things which are now, or which at any time during the term hereby granted shall be fixed, fastened or belong to" the demised premises. No mention was made of machinery in the fixtures specified. The tenant placed on the premises various machines for carrying on his trade, which were screwed or nailed to the floor or walls. Having become bankrupt his trustee proposed to sell the machines, which the landlord claimed. Kekewich, J. (1903) 1 Ch. 806 (see ante, p. 469) held that he was entitled thereto; but the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) have reversed his decision, holding that in construing the general words in the covenant they must be limited to fixtures of the kind specifically mentioned, and that as those specifically mentioned were only landlord's fixtures the general words would not extend it to tenant's fixtures, and therefore the trustee was entitled to remove the latter as claimed.

COMPANY—"FLOATING CHARGE."

In re Yorkshire Woolcombers' Association (1903) 2 Ch. 284, deserves a brief notice inasmuch as it contains a judicial definition of what constitutes a "floating charge" on the property of a limited company, by Romer, L.J. The learned judge says that a mortgage or charge is a "floating charge" (1) if it is a charge on a class of assets both present and future; (2) if that class is one which in the ordinary course of business would be changing from time to time, and (3) if it is contemplated by the charge that until some future step is taken by or on behalf of the mortgagee, the company may carry on business in the ordinary way so far as concerns the particular class of assets charged. The charge in question being held to come within the definition, it was held to be void for want of registration under the English Companies Act.

MORTGAGE—SECOND MORTGAGEE'S ACTION FOR A RECEIVER RENTS PAID TO RECEIVER—RIGHT OF FIRST MORTGAGEE AGAINST RECEIVER.

Preston v. *Tunbridge Wells Opera House* (1903) 2 Ch. 323, was an application by a first mortgagee to discharge a receiver appointed in an action by a second mortgagee to which the first mortgagee was not a party, and to recover rents paid to the receiver after the date of the service of the notice of the motion. Farwell, J., held that the first mortgagee was entitled to the relief claimed.

LEGACY—ADEMPTION—GIFT TO ENDOWMENT FUND.

In re Corbett, Corbett v. *Cobham* (1903) 2 Ch. 326. A testator by his will gave a legacy for the endowment fund of a hospital; in his lifetime he gave the same amount to the trustees for the endowment fund: this, Farwell, J. decided was an ademption of the legacy which was for a particular purpose.

ANCIENT LIGHTS—INJUNCTION OR DAMAGES—FUTURE INJURY—OPPRESSION LORD CAIRN'S ACT (21 & 22 VICT., C. 27) S. 3—(ONT. JUD. ACT.)

Cowper v. *Laidler* (1903) 2 Ch. 337, was an action to restrain by an injunction a threatened obstruction of ancient lights. The defendant set up that the plaintiffs had bought their house merely with a view of extorting money from any person who tried to build on the defendant's land, and that the action was oppressive

and that the injury, if any, would be trifling and that it was a case for damages and not for an injunction. Buckley, J., found that the plaintiffs' windows were ancient light, and that it was not extortion or oppression on their part to ask a price for their property, which the property for exceptional reasons in fact commanded. He also held that it was a case for an injunction. In arriving at this conclusion he discusses the rules which have been laid down as to when damages and when an injunction will be ordered, viz., (1) where a mandatory injunction is asked the court may substitute damages ; (2) where the injunction is asked to restrain a nuisance which has been committed and threatened to be continued, damages may be awarded instead of an injunction ; (3) where no act has been committed but a wrongful act is threatened there is no jurisdiction to award damages in lieu of an injunction.

TRUSTEE—BREACH OF TRUST—FOLLOWING TRUST MONEY—TRUSTEE PAYING TRUST MONEYS INTO PRIVATE ACCOUNT—INVESTMENT.

In re Oatway, Hertslet v. *Oatway* (1903) 2 Ch. 356, is a case which deals with a point of trustee law of some interest. A trustee had paid trust money into his private banking account whereby it became mixed with his own money. He subsequently drew out of the mixed fund moneys which he invested in his own name in the purchase of shares in a limited company, there being then sufficient of his own moneys at the credit of the account to pay for such shares, and he subsequently applied the balance of the fund to his own purposes. The cestuis quis trusts claimed the shares. The representatives of the deceased trustee claimed that the investment was a purchase with the trustee's own money, and that what was subsequently spent and could not be traced was the trust fund ; but Joyce, J., held that this contention ought not to prevail because the trustee was not entitled to withdraw any sum from the account until he had first restored the trust fund and duly reinstated it by proper investment in the joint names of himself and co-trustee. *Brown* v. *Adams*, L.R. 4 Ch. 764, he holds ought no longer to be followed since *In re Hallett*, 13 Ch. D. 696

VENDOR AND PURCHASER—TRUSTEE—PURCHASE OF LAND IN BREACH OF TRUST—CESTUI QUI TRUST NOT SUI JURIS—TITLE.

In re Jenkins and Randall (1903) 2 Ch. 362, was an application under the Vendors' and Purchasers' Act, and the point in question

was whether the vendors, who were trustees, could make title without the concurrence of their cestui qui trust. The property in question had been purchased by the trustee in breach of trust and the cestui qui trust was not sui juris. Eady, J., held that as the cestui qui trust was not capable of electing to take the property in its existing state, the trustee could make a good title without the concurrence of the beneficiary.

LANDLORD AND TENANT—COVENANT—"IMPOSITION"—NOTICE BY SANITARY AUTHORITY TO RECONSTRUCT DRAINS.

In re Warriner, Brayshaw v. *Ninnis* (1903) 2 Ch 367. Eady, J., holds that, where under a lease for three years, the tenant covenants to pay "all rates, taxes, assessments and impositions whatsoever, whether parliamentary, parochial or otherwise," notwithstanding the shortness of the term, the tenant is liable to pay the expense of reconstructing the drains on the premises pursuant to a notice given by a sanitary authority under an Act of Parliament.

EASEMENT—WAY—PRESCRIPTION—PAYMENT OF ANNUAL SUM—INFERENCE TO BE DRAWN FROM PAYMENT—LOST GRANT—PRESCRIPTION ACT, 1832 (c. 71) s. 2—(R.S.O. c.133, s. 34.)

In *Gardner* v. *Hodgson's Brewery* (1903) A.C. 229, the House of Lords (Lord Halsbury, L.C., and Lords Alverstone, Macnaghten, Davey, Robertson, and Lindley) have affirmed the judgment of the the Court of Appeal (1901) 2 Ch. 198. The action was to restrain the obstruction of a way in respect of which the plaintiff claimed an easement. The evidence shewed that the way in question had been used by the plaintiff and his predecessors in title for forty years, but also that they had paid an annual sum of 15 s. to the defendants and their predecessors in title. There was no precise evidence as to why, or for what, this payment was made. Their Lordships were of the opinion that the proper inference was that it had been paid for the right to use the way in question, and there was therefore no ground for presuming a lost grant of the way, and there was consequently no evidence of user as of right so as to confer a title under the Prescription Act, 1832, s. 2 (R.S.O. c. 133, s. 34.)

BANKER—CHEQUE—CONVERSION—CROSSED CHEQUE PAID INTO CUSTOMER'S ACCOUNT—FORGED INDORSEMENT—CREDIT GIVEN TO CUSTOMER FOR AMOUNT OF CHEQUE BEFORE PAYMENT—CROSSING CHEQUES—BILLS OF EXCHANGE ACT, 1882 (45 & 46 VICT., C. 61) S. 82—(50 VICT., C. 33 (D) S. 81).

Capital and Counties Bank v. *Gordon* (1903) A.C. 240, is a case previously known as *Gordon* v. *London City and Midland Bank* (1902) 1 K.B. 261 (noted ante, vol. 38, p. 293.) The plaintiff in the action claimed to recover from the defendant banks the proceeds of cheques of the plaintiff which had been deposited with the banks by the plaintiff's servant in his own name, having thereon forged indorsements of the plaintiff's name. The bankers had credited the amounts of the cheques to Jones, the depositor, and had then crossed the cheques and presented them for collection and received payment thereof. The House of Lords (Lords Macnaghten, Shand, Davey, Robertson, and Lindley) have now affirmed the decision of the Court of Appeal to the effect that a bank is not entitled to the benefit of s. 82 (s. 81 of the Canadian Act) unless they collect the cheque as agents for a customer, and where they collect it as being themselves the holders, the section affords no protection; and that the protection of that section only applies to cheques crossed before they are received by the banker, but not to cheques crossed by the bankers themselves. Their Lordships, however, held that a draft drawn by one branch of a bank on another branch of the same bank payable to order on demand is not a cheque, but is within s. 19 of the English Stamp Act of 1853, which protects bankers from liability for payment of such drafts on forged indorsements.

MORTGAGE—CLOG ON REDEMPTION—STIPULATION THAT MORTGAGEE SHALL BE APPOINTED BROKER OF THIRD PARTY.

Bradley v. *Carritt* (1903) A.C. 253. In this case we are not at all surprised to find that the House of Lords have reversed the decision of the Court of Appeal (1901) 2 K.B. 550 (noted ante, vol. 37, p. 778), but we are surprised to find that there was any difference among their Lordships as to the law. It may be remembered that the case turns upon the validity of a stipulation in a mortgage of shares of a limited company whereby the mortgagor agreed that he would always thereafter use his best endeavors to secure that the mortgagee should be appointed the company's broker. The mortgage debt having been paid off,

the mortgagee nevertheless claimed that this stipulation was a continuing liability of which he was entitled to the benefit, and the Court of Appeal decided that question in his favour. Lords Macnaghten, Davey, and Robertson held this to be erroneous, and that the case was within the principle established by *Noakes* v *Rice* (1902) A.C. 24 (noted ante, vol. 38, p. 335). In doing so they may also be taken to have practically overruled the decision of the Court of Appeal in *Santley* v. *Wilde* (1899) 2 Ch. 474, noted ante, vol. 35, p. 486.) The ground upon which the dissenting Lords base their view is that it is competent for a mortgagee to bargain not only for repayment of his principal and interest but also for some additional and collateral advantage, and they considered that the mortgagee had validly done so in this case. They considered it was not a clog or fetter on redemption, because on repayment of the loan the mortgagor was entitled to get back his shares, but they considered that he still remained liable to secure the mortgagee's appointment as broker, and to pay him damages if they failed to get him appointed. We are glad to see that this attempt to fritter away the well-established rules regulating to the relations of mortgagee and mortgagor has failed. Where borrower and lender are concerned the principle of freedom of contract may be carried too far

EXPROPRIATION ACTS—CONSTRUCTION—COMPENSATION.

The Commissioner of Public Works v. *Logan* (1903) A.C. 355, may be briefly referred to because the Judicial Committee of the Privy Council (Lords Macnaghten Davey, Robertson, and Lindley, and Sir Arthur Wilson) lay it down as a sound principle of construction, that an intention to take away property without compensation should not be imputed to a legislature unless that intention be expressed in unequivocal terms.

PAYMENT—APPROPRIATION—OPTION OF CREDITOR TO APPROPRIATE—SET OFF—STATUTE BARRED DEBT—SOLICITOR AND CLIENT.

Smith v. *Betty* (1903) 2 K.B. 317, was an action by the executor of a deceased solicitor to recover a sum claimed to be due to the deceased's estate in respect of costs, a bill of which, and a cash account, had been delivered on December 2, 1899. The bill extended from May 13, 1878, to February 6, 1899, there being, however, no items from June 3, 1889, to November 24, 1893. The defendant set up the Statute of Limitations, and paid money into

court. On the trial Wright, J., referred it to the Master to tax the bill, and take the cash account from 1893, and the plaintiff was required to give credit for all sums received on account of defendant. On the reference the defendant sought to charge the plaintiff with £66 odd received in 1894 by the deceased, and it was then claimed by the plaintiff that he was entitled to apply this sum on the statute barred items of the bill of costs. Wright, J., allowed the set off as to part of the amount, but the Court of Appeal (Collins, M.R., and Stirling, and Mathew, L.JJ.) held that no part of the statute barred claim could be so set off: in so doing they adopt the dictum of Wilde, C.J., in *Francis* v. *Dodsworth* (1847) 4 C.B. 202, at p. 220, "No debts can be used by way of set off . . . except such as are recoverable by action." And as regards the plaintiff's claim to appropriate the payment to the statute barred part of his claim, they held that he had not in fact done so before action, as in no account rendered had the £66 item appeared, and that after action it was too late for the creditor to appropriate.

NEGLIGENCE — INTERVENING ACT OF TRESPASSER—EFFECTIVE COURSE OF DAMAGE.

In *McDowall* v. *Great Western Ry.* (1903) 2 K.B. 331, we find that the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) have been able to reverse the decision of Kennedy J. (1902) 1 K.B. 618 (noted ante, vol. 485). This was the case in which the defendants' servants had left some railway cars on a siding in a condition in which no damage would have been occasioned if they had been left alone. Some boys trespassing on the siding mischievously released the brakes, causing the cars to run down an incline and thereby caused damage to the plaintiff's vehicle. The jury found that the defendants' servants knew that boys were in the habit of trespassing on the siding and took no steps to prevent it, and that the defendants were therefore guilty of negligence, and on this finding Kennedy, J., gave judgment for the plaintiff. The Court of Appeal, however, held that there was no evidence on which the jury could properly find the defendants guilty of negligence and they therefore dismissed the action.

RESTRICTIVE COVENANT—BUILDING SCHEME—ALTERATION OF CHARACTER OF NEIGHBOURHOOD—ACQUIESCENCE IN BREACHES—RIGHT TO ENFORCE RESTRICTIVE COVENANT.

Osborne v. *Bradley* (1903) 2 Ch. 446, was an action to enforce a restrictive covenant against using property otherwise than for residential purposes. The plaintiff sold a plot of land to the defendant and took the covenant in question that houses erected thereon should be for private residences only. The covenant was contained in a printed form of agreement which the plaintiff used in selling many other plots, part of the same estate; it contained a power to the vendor to waive or vary the covenants. No plan was produced to the defendant shewing what property was affected by similar covenants. The plaintiff afterwards built, or allowed to be built, a number of shops on the adjoining plots, and acquiesced in slight breaches of covenant in respect of the defendant's land. The defendant having begun to alter two houses erected on his land into shops, the action was brought. The defendant resisted the plaintiff's claim on the ground that the covenant was given as part of a building scheme, which had been departed from by other owners of land included in the scheme with the consent of the covenantee, and therefore that he (defendant) was no longer bound by the covenant, but Farwell, J., held that no building scheme had been proved to exist, and that the covenant was one for the plaintiff's own benefit and as such he was entitled to enforce it, notwithstanding the change in the character of the neighbourhood caused by his own acts or acquiescence, and his acquiescence in minor breaches of the defendant's covenant.

WILL—ABSOLUTE GIFT—GIFT OVER ON ABSOLUTE DONEE DYING INTESTATE AND CHILDLESS—REPUGNANCY.

In re Dixon, Dixon v. *Charlesworth* (1903) 2 Ch. 458, Eady, J., decided that where an absolute gift in a will is followed by a gift over in the event of the donee dying "without a will and childless" that the gift over is void for repugnancy. He says: "If the word 'childless' stood alone, then whether it meant 'without leaving' or 'without having had a child,' the gift over might be valid. But as it is annexed to the repugnant condition of dying 'without a will,' the entire gift over is void for repugnancy."

PRACTICE—MOTION FOR JUDGMENT UNDER RULE 115, (ONT. RULE 603 – LEAVE TO DEFEND ON GIVING SECURITY TO SATISFACTION OF OFFICER—APPEAL FROM MASTER'S RULING AS TO SUFFICIENCY OF SECURITY—RULE 754, (ONT. RULE 767.)

Hoare v. *Morshead* (1903) 2 K.B. 359, settles a point of practice to the effect that where on a summary application for judgment under Rule 115 (Ont. Rule 603) leave is given to defend on giving security to the satisfaction of an officer of the court, no appeal lies from that officer's ruling as to the sufficiency of the security offered. This was so held by Walton, J., and affirmed by the Court of Appeal (Mathew, and Cozens-Hardy, L.JJ.) on the ground that the officer is acting as a persona designata and his decision is final; and therefore the rules relating to appeals from officers, Rule 754, (Ont. Rule 767) does not apply.

INSURANCE—"DAYS," HOW TO BE RECKONED.

Cornfoot v. *Royal Exchange Assurance Co.* (1903) 2 K.B. 363, deserves attention. The action was on a policy of marine insurance which, inter alia, provided that the policy was to be for a voyage to a named port, "and for 30 days in port after arrival however employed." The question was, how were these 30 days to be computed. The vessel arrived at the named port and was moored at anchor in safety at 11.30 a.m. on August 2, 1902. She appears not to have been ready to discharge her cargo until 5 p.m. of that day. She remained in port until 1st September, 1902, and was totally lost through perils, insured against, at 4.30 p.m. on that day. The plaintiffs contended that the thirty days did not begin to run until midnight of August 2, or at all events not until 5 p.m. of that day when the vessel was ready to discharge her cargo, but Bigham, J., agreed with the defendants, that the 30 days meant by the policy, were thirty successive periods of twenty-four hours, commencing at 11.30 a.m. on 2 August, and, therefore, the policy had expired when the loss happened.

COMPANY—DEBENTURE—FLOATING SECURITY—RIGHT OF DEBTOR OF COMPANY TO SET OFF AS AGAINST HOLDER OF FLOATING CHARGE.

In *Nelson* v. *Faber* (1903) 2 K.B. 367, the plaintiffs were a company and a bank, the owners of a floating charge on the company's assets, and they sought to recover a debt due by the defendants to the company for goods sold and delivered—against which claim the defendants sought to set off a debenture debt due

by the company to the defendants. The debenture under which the plaintiff bank claimed was payable on August 1, 1900, and provided that the debenture was to be a first charge on all the company's assets; that such charge was to be a floating security, but so that the company was not to be at liberty to create any mortgage or charge in priority to, or upon an equality with, that debenture; and that the company, until default in payment of principal or interest thereby secured, or the appointment of a receiver, should be at liberty to carry on business, and that from and after default such liberty should cease and the debenture should be immediately enforceable. The company subsequently issued another debenture to the defendants, which was payable October 1, 1900, and expressed to be subject to the debenture held by the plaintiff bank; between July 1, 1900, and October 1, 1901, goods were sold by the plaintiff company to the defendants. The plaintiff bank took steps on October 2, 1901, to stop the company carrying on business, and then appointed a receiver. Joyce, J., on this state of facts, held that the defendants were entitled to set off their debenture debt, because the floating charge of the plaintiff bank did not interfere with the company's carrying on business until the bank actually took steps to enforce it, until then it was dormant and could not affect rights acquired by third persons during the period it was so dormant.

SHIP – BILL OF LADING – "UNSEAWORTHINESS."

Rathbone v. *MacIver* (1903) 2 K.B. 378, is useful as furnishing an authoritative pronouncement of the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) as to the meaning of the word "unseaworthiness" in a bill of lading. The bill of lading in question exempted the ship owners from liability for damage in consequence of the unseaworthiness of the ship at the commencement of, or during the voyage, provided all reasonable means were taken to guard against such unseaworthiness. It was admitted by the defendants, the ship owners, that the ship was not fit to receive the cargo at the time the goods mentioned in the bill of lading were loaded, but they claimed exemption from liability, and contended that the above mentioned clause in the bill of lading only applied to the vessel's unfitness to meet the perils of the sea and not to her unfitness to carry cargo, and Wills, J., who tried the case, so held. The Court of Appeal (Williams, Romer, and

Stirling, L.JJ.) however, disagree with him, being of opinion that the clause included unfitness of the ship to carry cargo as well as unfitness to encounter the perils of navigation, and that the defect which caused the damage being one which the defendants had not taken reasonable means to guard against, they were liable for the damage resulting therefrom, and that even if the clause in question had been omitted the defendants were nevertheless liable under this implied warranty of seaworthiness.

PRINCIPAL AND AGENT—CONTRACT MADE BY AGENT IN NAME OF PRINCIPAL BUT FOR HIS OWN BENEFIT—LIABILITY OF PRINCIPAL — UNAUTHORIZED ACT OF AGENT.

In *Honnbro* v. *Burnand* (1903) 2 K.B. 399, the defendant Burnaud was employed by certain underwriters as their agent to underwrite policies in their names and on their behalf. Purporting to act under that authority he underwrote in their names a policy guaranteeing the plaintiffs that a certain company would repay to the plaintiffs certain advances made by them to the company. At the time Burnand knew the company was insolvent, but was personally interested in keeping it afloat, and in underwriting the policy was acting in his own interests and not for the interest of his principals. The company having failed to repay the advances, the plaintiffs sought to recover on the policy. The premium was never paid to Burnand or any of his principals on whose behalf he assumed to underwrite the policy. Bigham. J., who tried the action, held that the act of Burnand did not bind his principals. In the course of an elaborate review of the authorities he refers to *North River Bank* v. *Aymar* (1842) Hill 262, an American case, and comes to the conclusion that it was wrongly decided for the reasons given by the dissenting judge, Nelson, C.J.

GAMING—WHIST PLAYED FOR PRIZES—WAGERING.

Lockwood v. *Cooper* (1903) 2 K.B. 428, will probably be read by card players with interest inasmuch as a Divisional Court (Lord Alverstone, C.J., and Wills and Channell, JJ.) there hold that a game of whist played on licensed premises for prizes given by third persons does not constitute "gaming" within the meaning of a licensing act. See *Rex* v. *Laird*, ante, p. 624.

CONTEMPT OF COURT—PUBLICATION TENDING TO PREJUDICE FAIR TRIAL—CAUSE NOT PENDING IN HIGH COURT—JURISDICTION OF HIGH COURT.

The King v. *Parke* (1903) 2 K.B. 432, is a case deserving the careful attention of newspaper men. The proceedings were instituted to attach the defendant for contempt of court for publishing statements calculated to prejudice the fair trial of the miscreant Dougal, who had been arrested for forgery and was brought before the Petty sessions on that charge and remanded. After the prisoner's remand and before his committal for trial the injurious statements were published by the defendant. A rule was obtained calling on him to shew cause why he should not be committed for contempt, and on the return of the rule the defendant's counsel objected that the King's Bench Division of the High Court had no jurisdiction, because the contempt, if any, was a contempt of the Assize Court. This objection was overruled by the Court (Lord Alverstone, C.J., and Wills, and Channell, JJ.) and the defendant fined £50 and ordered to be imprisoned until the fine was paid.

COMPANY—WINDING UP PETITION—PRACTICE—COSTS—APPEAL—CONTRIBUTORIES—CREDITOR.

In re Ibo Investment Co. (1903) 2 Ch. 373, was an application by a shareholder for the winding up of a limited company. It was opposed by the company and two sets of contributories. The petition was dismissed, and one set of costs allowed to the opposing contributories. The petitioner appealed and the appeal was dismissed with costs. As originally drawn up by the registrar, the order only allowed one set of costs to the contributories. Some of the contributories moved to vary the minutes, claiming to be allowed their full costs of the appeal. After consulting the registrar as to the practice, the Court of Appeal (Williams, Romer, and Cozens-Hardy, L.JJ.) held that as the appellant had not in any way notified the contributories that he did not seek to interfere with the disposition made by the order appealed from as to costs the contributories were entitled to, in the absence of such notice they were entitled to appear to support the order, and to get full costs, whereas if such notice had been given they might have been limited to one set of costs.

PERPETUATING TESTIMONY—ORDER FOR EXAMINATION OF WITNESSES IN ACTION TO PERPETUATE TESTIMONY—DISCRETION OF COURT—LEGITIMACY DECLARATION ACT, 1858 (21 & 22 VICT., C. 93) S. 1—(R.S.O. C. 135, S. 33)—RULE 289—(ONT. JUD. ACT, S. 57 (5)).

West v. *Sackville* (1903) 2 Ch. 378, was an action to perpetuate testimony concerning the validity of the marriage of the plaintiff's mother with a view to establishing the plaintiff's claim to be entitled, as the next tenant in tail male in remainder expectant on the death of his father, to a title and estates. The plaintiff applied to issue letters rogatory to take evidence in Spain, and also for a commission to take evidence in France. Kekewich granted the applications, but the Court of Appeal set aside both orders on the ground that the learned judge had wrongly exercised his discretion, because an action to perpetuate testimony can only be properly entertained when the testimony sought to be taken is in danger of being lost before the matter to which it relates can be made the subject of judicial investigation: and that under Rule 289, (Ont. Jud. Act, s. 57 (5)), it being now competent for the Court to make binding declarations of right without granting any specific relief, it was competent for the plaintiff to obtain a declaratory judgment, or a declaration of legitimacy under 21 & 22 Vict. c. 93, s. 1, (see Quieting Titles Act, R.S.O. c. 135, s. 38); and therefore an action to perpetuate testimony ought not to be entertained.

TIME—ENLARGING TIME FIXED BY ORDER—RULE 1002 (57)—(ONT. RULE 353.)

In re Macintosh (1903) 2 Ch. 394, appears to throw light on the construction of Ontario Rule 353. The facts of the case were as follows: A client had obtained the common order to tax his solicitor's bill of costs. The order provided that the taxing officer "is to make his certificate in a month (unless the master shall extend the time to enable him to make his certificate) or this order is to be of no effect." Under Rule 1002 (57) the taxing officer, unless the Court or judge shall otherwise direct, is empowered to extend the time, even though the time for extension is made after the appointed time. The taxing officer, after the month named in the order had expired, extended the time. Byrne, J. thought he had no jurisdiction to do this, but the Court of Appeal (Williams, Romer, and Stirling, L.JJ.) held that he had, at the same time, however, intimating that the discretion was one which ought not to be exercised freely as of course, and Romer, L.J. even going so far as to say that if he had been the taxing officer he would not have granted it in the present case.

REPORTS AND NOTES OF CASES.

Province of Ontario.

COURT OF APPEAL.

Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A., and Street, J.

From Maclennan, J.A.] [June 29.

RE NORTH GREY ELECTION.

BOYD *v.* MCKAY.

Provincial election—Presentation of petition—Copy for Returning Officer—Omission—Default under Rule 1 (2)—Extension of time—Rule 58.

Election petitions filed with Local Registrars under 62 Vict. (2nd Sess.) c. 6, s. 2 (Ont.), are received by them as Registrars of the Court of Appeal.

And although a petitioner who does not leave with the Local Registrar a copy of the petition at the time of filing the petition to be sent to the Returning Officer is in default under Election Rule 1 (2), still the time for doing so is subject to Election Rule 58 enabling the Court or a judge in a proper case to enlarge the time appointed. And where through inadvertence the solicitor for a petitioner had omitted to leave the copy and applied without delay, the time was extended and an order for the dismissal of the petition was discharged.

Judgment of MACLENNAN, J.A., reversed.

Hellmuth, K.C., for the appeal. *R. A. Grant*, contra.

From Ferguson, J.] LAISHLEY *v.* GOOLD BICYCLE CO. [Sept. 14.

Damages—Future commissions—Master and servant.

The plaintiff was engaged by the defendants to act as their selling agent for a defined term, and he was to receive a defined salary and commission at a defined rate upon sales effected. Before the expiration of the term he was dismissed without cause; sales to a large amount having up to that time been effected by him:

Held, that in estimating the damages to which he was entitled the commission on sales which there was reasonable ground to think might have been effected during the unexpired portion of the term should be taken into consideration.

Judgment of FERGUSON, J., 38 C.L.J. 646; 4 O.L.R. 350, reversed.

Watson, K.C., and *Moorhead*, for appellant. *Wallace Nesbitt*, K.C., and *H. S. Osler*, K.C., for respondents.

Moss, C.J.O., Osler, Garrow, Maclaren, JJ.A.

From Britton J.] MAJOR *v.* MCGREGOR. [Oct. 16.

Defamation—Libel—Words of abuse—Innuendo.

Decision of BRITTON, J., reported ante p. 77, and 5 O.L.R. 81, affirmed. *Shepley*, K.C., for appellant. *Maclennan*, K.C., for respondent.

From Falconbridge, C.J.K.B.] [Oct. 16.

IN RE TOBIQUE GYPSUM.
COSTIGAN *v.* LANGLEY.

Winding-up Act—Staying proceedings in another province—Setting aside sale—Summary proceedings—R.S.C., c. 129, s. 13.

There is jurisdiction under s. 13 of the Dominion Winding-up Act., R.S.C., c. 129, to restrain proceedings in any action, suit or proceeding against the company, even in actions, or suits, beyond the ordinary territorial jurisdiction of the Court; and the enforcing of an execution is a proceeding within this section and therefore there was jurisdiction for the Court in this province to make an order staying proceedings under an execution in the hands of the sheriff of the County of Victoria, in the Province of New Brunswick, as had been done in this case. But the said sheriff having notwithstanding proceeded with the sale under the execution against lands of the company, and executed a deed of the same to the purchaser,

Held, that there was no jurisdiction in the court under the Winding-up Act to make an order summarily declaring the sale void, such a case not coming within the classes of cases, which under the Act may be dealt with in a summary manner by a judge in the winding-up proceedings.

Armour, K.C., for appellant. *Foy*, K.C., for respondent.

HIGH COURT OF JUSTICE.

Master in Chambers.] [Aug. 28.

STATE SAVINGS BANK *v.* COLUMBUS IRON WORKS.

Writ of summons—Address of defendant—Foreign defendant.

The address of the defendant is a necessary part of the writ of summons and in a proper case the writ may be amended by inserting it. But where the address of a foreign defendant was omitted, no explanation of the omission being given, and no cause of action in Ontario against the foreign defendant being shewn, the writ was on his application set aside with costs.

C. A. Moss, for defendant. *W. B. Raymond*, for plaintiffs.

Ferguson, J.] ROBERT *v.* CAUGHELL. [Sept. 24.

Report on sale—No sale for want of bidders—Confirmation—Appeal—Order of foreclosure.

A report on sale though only a report that there was no sale for want of bidders is a report that may be appealed from and requires confirmation.

And an order made by a local judge confirming such a report, while it was neither confirmed under Con. Rule 769 nor appealed from and granting foreclosure in default of payment, was held to be bad.

Meek, for the appeal. *F. E. Hodgins*, K.C., contra.

Master in Chambers.] MOFFATT *v.* LEONARD. [Sept. 25.

Security for costs—Residence out of Ontario.

The plaintiff was manager of a joint stock company, carrying on business in Ontario, with its head office at Woodstock. His wife and family resided at Woodstock. He was agent of the company at Detroit, but visited his family once a fortnight, and sometimes once a month, but not as a rule for longer than a day and a half at a time.

Held, on motion for security for costs under rule 1198 (a), that the plaintiff under the above circumstances must be held to reside in Ontario.

C. A. Moss, for defendant. *Ballantyne*, for plaintiff.

Street, J.] IN RE SYDENHAM SCHOOL SECTIONS. [Oct. 8.

Public schools—Alteration of school sections—Appeal from township council—Powers of arbitrators—By-law altering school sections—Description of lots.

The arbitrators appointed by a county council on appeal from the refusal of a township council to alter school sections as asked in a petition of ratepayers have power only to grant or refuse what is asked for in the petition and have no power to direct the formation of a section differing from that asked for in the petition. *Re Southwold School Sections* (1902) 3 O.L.R. 81, applied.

In by-laws altering existing school sections or adding territory to them the lots and parts of lots dealt with must be accurately and exactly described.

Rowell, K.C., for applicants. *Tucker*, for respondents.

Master in Chambers.] CONNER *v.* DEMPSTER. [Oct. 10.

Venue—Cause of action—Con. Rule 529 (b)—Declaratory action.

"Cause of action" in Con. Rule 529 (b) means the whole cause of action, and where part of the cause of action arises in the county in which the parties reside, and another part, or the whole, in another county, the rule does not apply, and the question of venue must be determined under the general rules as to convenience.

Quære, whether an action for a declaration of right falls within the Rule?

Mickle, for defendant. *Lefroy*, for plaintiff.

UNITED STATES DECISIONS.

NEGLIGENCE.—Fright, resulting in physical injury, is held, in *Sanderson* v. *Northern P.R. Co.* (Minn.) 60 L.R.A. 403, to give no right to recovery of damages, in the absence of contemporaneous injury to the plaintiff, unless the fright is the proximate result of a legal wrong against the plaintiff by the defendant.

Physical injury or disease resulting from fright or nervous shock caused by negligent acts, where such result might with reasonable certainty have been anticipated, or the negligence was gross, is held, in *Watkins* v. *Kaolin Mfg. Co.* (N.C.) 60 L.R.A. 617, to give a right of action for damages.

LANDLORD AND TENANT.—Mere failure of a landlord to comply with his agreement to make repairs on the leased premises is held, in *Thomson* v. *Clemens* (Md.) 60 L.R.A. 580, not to render him liable for personal injuries suffered by a member of the tenant's family because of want of repair.

SUNDAY OBSERVANCE.—Forbidding a barber to exercise his trade on Sunday is held, in *State* v. *Soper* (Utah) 60 L.R.A. 468, to be a proper exercise of the police power, and not to restrain him unconstitutionally of personal liberty or deprive him of liberty or property without due process of law.

MALPRACTICE.—A physician is held, in *Burk* v. *Foster* (Ky.) 59 L.R.A. 277, not to be absolved from liability for failure to exercise proper skill in a particular case by the fact that the result is as good as is usually obtained in like cases.

Flotsam and Jetsam.

How the automobolist got even is told thus by the *Detroit Free Press:*

When you ask the automobile enthusiast about it he grins cheerfully, and then tells the following story:

"These confounded country officers seem to think that an automobile is some sort of an awful monster that eats little children, causes the potato blight and drives all the rain out of the country. Besides, I have an impression that they are aware that the owner of 'mobe is apt to have money and look upon him as a good thing. Certain is it that I have found myself continually in trouble through breaking some ridiculous law that these country towns have, simply to catch strangers unaware and get the contents of their pocketbook. Last week I was passing through a small town at a snail pace when the village constable ran out and announced that I was under arrest.

"'What for?' I asked, in amazment.

"'Exceedin' speed limit,' he answered. 'You'll have to come along with me.'

"While we were having it hot and heavy the village justice of peace came along and ordered the constable to bring me into court.

"'Guess we might as well ride there with you, mister,' said he, climbing in. 'I ain't never rid in one of these here machines, besides we need it ez evidence.'

"'Jump in,' said I, an idea suggesting itself to me.

"He did so, and then I let the 'mobe out for all she was worth, and there isn't a machine that can go any faster, if I do say it.

"Stop her, gol darn ye!" yelled the justice of the peace, 'we've gone past the court room already! Stop her or I'll have ye up for contempt of court!"

"'I can't stop her!' I shouted back, with a cheerful disregard of the truth; 'she's running away.'

"Twelve miles out of town I allowed the machine to slow down.

"You'd better jump!' I shouted, 'she's going to explode in a minute!'

"And jump they did. The justice landed on his head in a mud puddle. I didn't see how the constable made out. I hope they enjoyed the "walk home."