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CRIMINAL LAW.

The Essentials of Crime.

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IV. The Rule under the Criminal Code.

Apart from the mere act itself the following factors are needed. There must be:—

I. An Act of the Will.

I. *Generally.*—The crime must be an act of a man's will; *will* is not a mere wish, but an emotion of mind always succeeded by motion. It is "the power of volition; *i.e.*, the offender must be able to 'help doing' what he does. Where it is absent, an immunity from criminal punishment will consequently arise." (Kenney's Crim. Law, p. 40.) "Volition is" (says Locke) "an act of the mind knowingly exerting that dominion it takes itself to have over any part of the man, by employing it in, or withholding it from, any particular action." "The *faculty* or *power* of *willing* must be recognized as something distinct from its *exercise.*"

Though to incur responsibility by a harmful act there must be an exercise of volition, that is, the actor must will the act, yet "it is not indeed necessary that the offender should have intended to commit the particular crime which he has committed; (perhaps not even that he should have intended to commit any crime at all). In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed up as consisting simply in 'intending to do what you know to be criminal.'"

Dr. Mercier (Criminal Responsibility, p. 153) in discussing the conditions of responsibility says: "To incur responsibility by a harmful act, the actor must *will* the act; *intend* the harm; *desire* primarily his own gratification. Furthermore, the act must be *unprovoked*, and the actor must *know* and appreciate the circumstances in which the act is done."

What is the rule in regard to criminal acts committed by somnambulists, and by persons under hypnotic influence?

2. *Somnambulism.*—In regard to somnambulists there would not seem to be any real volition, and therefore no criminal responsibility. "Can any one doubt," said Sir J. Stephen, "that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing. . . ." (*R.* v. *Tolson*, 23 Q.B.D. 168, p. 187.)

"It is quite possible that acts of a highly criminal character, per se, might be committed in this state of the agent, which is by some thought akin to epilepsy; the practical danger to be guarded against is the ease with which it may be feigned." An instance occurred in Paris within the last few years of a mother being nearly stabbed to death by her fifteen year old son, who is believed to have committed the deed in his sleep. The mother was awakened in the night by a terrible blow on her shoulder. On starting up she saw her son bending over her with a knife in his hand. She called for help, but the youth repeatedly stabbed her and then went quietly back to his room and went to bed. The

boy, when taxed with the crime, denied that he had done it, or knew anything about it.

3. *Hypnotism.*—Continental tribunals are, it is said, already familiar with the plea that a crime was committed under the influence of post-hypnotic "suggestion," exercised by some designing person, who had induced hypnotic sleep in the offender.

The subject has been much discussed among English, American and continental jurists, but no well-authenticated case seems to have yet come before the courts either in England or the United States; some reports to the contrary have since been explained away. It is not certain as yet that "the average individual in a hypnotic state could be made to commit crimes."

It has been stated that while for a time the will and other faculties are in abeyance, they are not wholly extinguished, and if the act commanded is very repugnant to the hypnotized subject, he will not go beyond certain limits in its execution.

Medical authorities seem to agree that it is very difficult (though perhaps not impossible) to implant criminal suggestions in innocent-minded persons.

(See Crim. Law. Mag. XVIII. 1; Medico-Legal Journal XIII., 51, 239; Juridical Review III., 51; see Med. Leg. Journal XIV., 150, for the remarkable case of Czynski; Eng. Encyc. (2nd ed.) VI., 687.)

Cyc. states the law on the subject as follows: "Proof that the accused committed the offence charged when under the influence of hynotism, so that he did not know what he was doing or was compelled to commit the offence would no doubt be a defence." (XII. 176.)[1]

II. Malice, Criminal Intention, Mens Rea.

"It is a principle of natural justice and of our law," says Lord Kenyon, "that the intent and the act must both concur to

[1]An interesting discussion and a closer analysis of *volition* is to be found in Professor E. C. Clark's Analysis of Criminal Liability, pp. 24-27, where the views of Austin and Stephen are discussed. See also Mercier's Criminal Responsibility (p. 29, etc.) for a consideration of Stephen's views, as to which reference may be made to Stephen's General View (1890), p. 68, etc. Stephen's History of the Criminal Law, II., p. 94, etc.

constitute the crime'': *Fowler* v. *Padget*, 7 T.R. 509, 514. This is expressed in the maxim familiar to English lawyers for nearly 800 years, "Actus non facit reum nisi mens sit rea." This maxim is one of "Coke's Scraps of Latin," and has been the subject occasionally of remarks by judges not complimentary in tone. For example, in the case of *The Queen* v. *Tolson*, 23 Q.B.D. 168, it is called by Cave, J., "the somewhat uncouth maxim" (p. 181), and Stephen, J., says, "Though this phrase is in common use, I think it most unfortunate and not only likely to mislead, but actually misleading" (p. 185). "It is indeed more like the title of a treatise than a practical rule" (p. 186). "I agree with my learned brother Stephen (said Manisty, J.), 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'" (p. 201).

In his History of the Criminal Law, Sir James Stephen says:

"The maxim 'actus, etc.,'' is sometimes said to be a fundamental principle of the whole criminal law, but I think that, like many other Latin sentences supposed to form part of the Roman law, the maxim not only looks more instructive than it really is, but suggests fallacies which it does not precisely state. It is frequently, though ignorantly, supposed to mean that there cannot be such a thing as *legal* guilt where there is no moral guilt, which is obviously untrue, as there is always a possibility of a conflict between law and morals. The truth is that the maxim about 'mens rea' means no more than that the definition of all or nearly all crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes." (Hist. Cr. Law., II., p. 95.)

Sir James Stephen said (p. 186) that he had tried to trace the origin of the maxim, but without success. Professor Kenney in his excellent "Outlines of Criminal Law" points out that Professor Maitland has traced the use of this aphorism in England back to the "Leges Henrici Primi," V. 28, and its origin to an echo of some words of St. Augustine, who says of perjury, "ream linguam non facit nisi mens rea." Hist. Eng. Law, II. 475. (Kenney, p. 37.)

But whatever the defects of the maxim may be when critically considered, it has for centuries stood as embodying an undoubted and most cherished principle of English criminal law that, "ordinarily speaking, a crime is not committed if the mind of the person doing the act in question be innocent." (Wills, J., *R.* v. *Tolson,* supra, p. 171.)

"In all ordinary crimes the psychological element which is thus indispensable may be fairly accurately summed up as consisting simply in intending to do what you know to be criminal." (Kenney, p. 39.)

Blackstone calls it "a vicious will." It is a mental ingredient, not one of feeling, a state of mind forbidden by law; murder from the best of motives is still murder. No one can plead, in justification of his criminal act, that he intended an ultimate good. "I think the old, sound and honest maxim, that you shall not do evil that good may come, is applicable in law as well as in morals." (*Regina* v. *Hicklin*, L.R. 3 Q.B. 360, 372, per Cockburn, C.J.)

The terms "malice" ("a term which is truly a legal enigma," Harris, 13) and "malicious" have, on account of the difficulties connected with them been discontinued in the Code, only appearing in section 499 (4) and 963 (2).

Ordinarily, therefore, mens rea is an essential ingredient of a crime. But when the legislature expressly declares an act to be criminal, the question of intention or malice need not be considered except as affecting the quantum of punishment. A statute may be so framed as to relate to such a subject-matter and make an act criminal whether there has been any intention to break the law or otherwise to do wrong or not.

The Legislature has power to make the bare doing of a particular act a crime, no matter how innocent from a mental point of view the doer of it may be; in such a case the doer must be held to be a criminal.

"The Legislature, within its jurisdiction, can do everything that is not naturally impossible, and is restrained by no rule, human or divine. If it be that the plaintiffs acquired any rights

—which I am far from finding—the Legislature had the power to take them away. The prohibition, 'Thou shalt not steal' has no legal force upon the sovereign body." (Per Riddell, J., in *Florence* v. *Cobalt*, 18 O.L.R. 279.)

Ordinarily the Legislature is assumed to recognize and act upon the great fundamental principles of the common law, and must not be assumed to do otherwise unless an express intention is shown. "Whether an enactment is to be construed in this sense or with the qualification ordinarily imported into the construction of criminal statutes, that there must be a guilty mind, must, I think, depend upon the subject-matter of the enactment, and the various circumstances that may make the one construction or the other reasonable or unreasonable." (Per Wills, J., *Reg.* v. *Tolson*, supra, p. 173.)

"All circumstances must be taken into consideration which tend to shew that the one construction or the other is reasonable, and amongst such circumstances it is impossible to disregard the consequences." (Ib., p. 175.)

In criminal law it is the ordinary rule that ignorance of fact excuses the doing of an act which, if the facts were as believed to be, would not be a wrongful act. As for example, the case of *Rex* v. *Levett*, Cro. Car. 538, which decided that a man who making a thrust with a rapier in a cupboard in his house where he reasonably supposed a burglar to be, killed a woman who was not a burglar, was held not to be guilty of manslaughter, "for he did it ignorantly without intention of hurt to the said woman."

Ordinarily a statute making a particular act a crime would, primâ facie, be supposed to be based upon that general principle. The following cases illustrate these propositions. (*a*) By the Licensing Act, 1872 (English), a publican is liable for a penalty if he "supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty." In *Sherras* v. *De Rutzen* (1895), 1 Q.B. 918, the appellant, Sherras, had been convicted under this statute, because a constable, at that time on duty, but who had removed his armlet prior to entering the appellant's

house, had been served with liquor by the appellant's daughter in the presence of her father. He was known to them as a policeman, but they made no enquiry as to whether he was on duty or not, and took it for granted in consequence of his armlet being off that he was off duty, and served him with liquor under such belief. It was held that the conviction must be quashed. "The guilty mind which is necessary, except in a few special cases, to constitute a criminal offence was absent." (Day, J.)

"In a criminal matter there must be 'mens rea,' unless it be displaced by statute or by the nature of the subject-matter. A man, for instance, may be guilty of bigamy without 'mens rea.' So also where a criminal prosecution is for a civil wrong, as a prosecution for trespass in pursuit of game. Express words in a statute dispense with a guilty intention." (Wright, J.)

(*b*) In *Derbyshire* v. *Houliston* (1897), 1 Q.B. 772, the appellant was charged, under the Sale of Food and Drugs Act, 1875, with giving a false warranty in writing to a purchaser in respect of an article of food sold by the appellant.

When the appellant sold the article he did not know and had no reason to believe, that the warranty was false. Held, that he was not liable to be convicted.

"Where it is sought to be shewn that the Legislature means to punish without requiring proof of moral guilt, such an intention must be very clearly expressed." (Hawkins, J., p. 776.)

"The general rule is that a presumption exists that mens rea is essential to every criminal offence. There are instances in which it has been held that this presumption is displaced by the words of the statute creating the offence, but where this is the case the intention must be clearly expressed." (Wright, J., p. 776:)

(*c*) In *Reg.* v. *Sleep*, 8 Cox C.C. 472, the prisoner had possession of government stores some of which were marked with the broad arrow. He was indicted under a statute which made it a criminal offence for any person to have stores or goods so marked in his "custody, possession or keeping." The jury in answer to a question whether the prisoner knew that the copper

or any part of it was marked, answered, "We have not sufficient evidence before us to shew that he knew it." Held, that it was necessary for the prosecution to shew affirmatively a possession by defendant with knowledge that the stores were marked with the broad arrow. Cockburn, C.J., said: "Actus non facit reum nisi mens sit rea is the foundation of all criminal procedure. The ordinary principle that there must be a guilty mind to constitute a guilty act applies to this case and must be imported into this statute. It is true that the statute says nothing about knowledge, but this must be imported into the statute."

These cases are illustrations of the general rule of law, but this rule is not inflexible as will be seen from the following examples.

(*a*) *Reg.* v. *Bishop*, 5 Q.B.D. 259, the defendant was indicted under a statute which made it a misdemeanour for any person to "receive two or more lunatics into any house other than a house for the time being duly licensed." Defendant advertised for patients suffering from "hysteria, nervousness and perverseness," and honestly believed, and on reasonable grounds, as the jury found, that no one of her patients was a lunatic. The learned judge directed the jury that the word "lunatic" as defined by the Act would include a person whose mind was so affected by disease that it was necessary for his own good to put him under restraint. The jury convicted the defendant. The Court of Crown Cases Reserved held that the direction of the learned judge was correct, and that the defendant's belief was immaterial. "If we were to hold that it was, the object of the statute might be frustrated." (Denman, J., p. 261.)

(*b*) By the Customs Act (R.S.C. c. 32, s. 25) the master of every vessel entering any port in Canada shall go, without delay, when such vessel is anchored or moored, to the custom house of the port where he arrives, and there make a report . . . of every package or parcel of goods on board," etc.

By s. 28: If any goods are unladen from any vessel before such report is made, the master shall incur a penalty of $400, and the vessel may be detained until such penalty is paid.

The plaintiff, the master and owner of a schooner, before reporting, sent three shirts ashore to his home to be washed, and the person who took them, also took with them from the master's trunk, without his knowledge, some worthless samples of wall paper. It was held (two judges dissenting) that the plaintiff was guilty of an offence under s. 28, and that the defendant, the collector of customs, was justified in seizing the schooner to enforce the penalty. The taking ashore by a seaman, without the master's knowledge of part of his clothing and bedding, subjects the master to the penalty under the section.

"It is clear from the whole statute that the object of the Legislature was to prevent the unlading, from a ship, of any article, however insignificant in value, or common in appearance, until a report shall have been made at the custom house. Until this has been done, nothing can be legally removed, except what is necessary to make an entry. Here there is no obscurity. No words can be plainer. There is no ambiguity here and no question of interpretation ought to arise. 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. 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. 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" (Tuck, J., 614-615, in *Dickson* v. *Stevens*, 31 N.B.R. 611.)

(c) In *Rex* v. *Chisholm*, 14 O.L.R. 183, in which the defendant sought to quash a conviction under a by-law for selling bread under weight, it was argued that there was no evidence of mens rea. Riddell, J., said: "I do not think that mens rea is essential. This must depend upon the wording and object of the enactment. There is no doubt that it is competent for any legislative authority to legislate in a matter within its jurisdiction in such a

way as to make the existence of any state of mind of the perpetrator immaterial: *Bank of New South Wales* v. *Piper* (1897) A.C. 383, at p. 389. In the present enactment we have no such words as "knowingly," "wilfully," etc. This being the case, such decisions as *Sherras* v. *De Rutzen* (1895) 1 Q.B. 918, shew that there are many cases in which there is no necessity of mens rea. In the last named report Mr. Justice Wright, at p. 922, gives instances in which this is the case, amongst them 'a class of cases which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty.' The present comes within that category."

(*d*) The last illustration is the "elaborately considered case of *Reg.* v. *Prince*, L.R. 2 C.C.R. 154, which deserves the most careful attention of the student." (Kenney, p. 41.) The discussion in this case was as to what degree of mens rea was sufficient, *e.g.*, an intention to commit some act that is wrong, even though it do not amount to a crime; and further, as to what standard of right and wrong is to be referred to—must the intended act be a breach of law, or will it be sufficient that the accepted rules of morality forbid it? (Kenney, p. 41.) The prisoner was tried upon the charge of having unlawfully taken an unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father. He was found guilty. All the facts necessary to support a conviction existed, unless the following facts constituted a defence. The girl, though proved by her father to be fourteen years old on the 6th April following, looked very much older than sixteen, and the jury found upon reasonable evidence that before the defendant took her away he had told him that she was eighteen, and that the defendant bonâ fide believed that statement, and that such belief was reasonable. All the sixteen judges, except Brett, J., concurred, though not for identical reasons, in affirming the conviction. It was held by Brett, J., that to constitute criminal mens rea there must always be an intent to commit some criminal offence. "The majority of the court, however, decided that, upon the construction of the particular statute under which the prisoner was indicted, his

conduct was not excused by the fact that he did not know, and had no reasonable grounds for supposing, that he was committing any crime at all. But here their agreement ended. One of them, Denman, J., was clearly of opinion that an intention to do anything that was legally wrong at all, even though it might be no crime, but only a tort, would be a sufficient mens rea (p. 179). And seven other judges (including Bramwell, B.) appear to have gone still further, and taken a third view, according to which there is a sufficient mens rea wherever there is an intention to do anything that is morally wrong, even though it be quite innocent legally. If this opinion be correct, the rule as to mens rea will simply be that any man who does any act which he knows to be immoral, must take the risk of its turning out, in fact, to be also criminal." (Kenney, pp. 41, 42.) But such a doctrine, says Dr. Kenney, must be considered highly questionable.

The ratio decidendi of that case, it has been said, 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 colour of excuse, and the prisoner took the risk of the ulterior consequences when he did that wrongful act.

The doctrine of mens rea has been the subject of much discussion in regard to bigamy, the leading case being *Reg.* v. *Tolson* (supra). The jury, in convicting the prisoner, stated in answer to a question put by the judge that they thought she (the prisoner) in good faith and on reasonable grounds believed her husband to be dead at the time of the second marriage. The court quashed the conviction in view of this finding, nine judges being of opinion that the conviction was wrong, while five held it to have been right.

The rule in Tolson's case has been adopted by the Criminal Code, s. 307 (3*a*).

In *Rex* v. *Brinkley*, 14 O.L.R. 434, a prosecution for bigamy, one of the grounds of defence was the fact that the wife of the defendant had obtained a divorce in the State of Michigan, under

circumstances which would prevent its being considered valid in our courts. Before the second marriage the defendant had procured a copy of this decree of divorce and had also obtained legal advice that the decree was legal and binding and that he was at liberty to marry again if he saw fit. It was argued on his behalf that these facts constituted a defence on the ground that an absence of guilty intent or mens rea was thereby established, but the Court of Appeal held otherwise. Osler, J.A., said: "Sub-section 3 (*c*) contains no exception in favour of a person who bonâ fide believes, or is advised, that the bond of marriage has been dissolved by a divorce; and this, with the express enactment as to what the act of bigamy consists in, is strong to shew that no such exception is to be implied, and that a valid divorce must be proved by the accused. That may well have been intended on grounds of public policy to prevent persons from setting up divorces 'while you wait,' which to common knowledge are so easily obtained in some of the courts of the neighbouring country."

III. An Attempt or Overt Act.

1. *Generally.*—But intention alone is never a crime, except in treason where "the crime seems to consist in a mere state of mind," the traitorous intent is the gist. But even here some "overt act" is necessary. (Crim. Code, s. 74.)

"That in treason, just as in all other crimes, a mens rea will not constitute guilt without an actus reus, is vividly shewn by a Transatlantic decision that an American citizen who meant to join the hostile British forces, but found that he had by mistake attached himself to a party of United States troops could not be convicted of treason." *Commonwealth* v. *Malin*, 1 Dallas 33.

An intention to violate the law, so long as it remains in mere contemplation, is not cognizable under the criminal law; and the person so entertaining it cannot be punished by human tribunals. "No temporal tribunal can search the heart, or fathom the intentions of the mind, otherwise than they are demonstrated by outward actions, it therefore cannot punish for what it cannot

know." In the quaint language of Brian, C.J.: "It is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man." (Year Book, 17 ed., IV. 1.) But, as Dr. Kenney says: "In ethics, of course this mental condition of intention ('a vicious will') would of itself suffice to constitute guilt. Hence on Garrick's declaring that whenever he acted Richard III. he felt like a murderer, Dr. Johnson, as a moral philosopher retorted, 'then you ought to be hanged whenever you act it.' But there is no such searching severity in the rules of law. They, whether civil or even criminal, never inflict penalties upon mere internal feeling, when it has produced no result in external conduct.

"So a merely mental condition is practically never made a crime. If a man takes an umbrella from a stand at a club, meaning to steal it, but finds that it is his own, he commits no crime." (Kenney, pp. 37-38.)

2. *What amounts to an attempt.*—There must, therefore, be something in the nature of an actual effort to carry the wrongful purpose into execution, an endeavour to commit the crime, but falling short of execution of the ultimate design; this is an attempt. It consists of some physical act which helps and helps in a sufficiently "proximate" degree towards carrying out the crime contemplated.

"The law as to what amounts to an attempt is of necessity vague. It has been said in various forms that the act must be closely connected with the actual commission of the offence, but no distinct line upon the subject has been or as I should suppose can be drawn. Some decisions have gone a long way towards treating preparation to commit a crime as an attempt. For instance, the procuring of dies for coining bad money has been treated as an attempt to coin bad money." (Stephen's Hist. Crim. Law, II., 224.)

In truth it is impossible to lay down any abstract test for determining whether an act is sufficient proximate to be considered an "attempt."

At common law every attempt to commit any crime, is itself a misdemeanour. *Reg.* v. *Heusler*, 11 Cox. 570.

3. *Some of the rules determining whether a given act is an attempt.*—The numerous decisions on this subject shew the impossibility of laying down any test to suit all cases.

One proposition in the nature of a rule was laid down by Lord Blackburn (then Blackburn, J.), in *Reg.* v. *Cheeseman*, Leigh and Cave, 140, as follows: "There is, no doubt, a difference between the preparation antecedent to the offence and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the offence." In this case the prisoner was charged with an attempt to steal a quantity of meat belonging to a contractor, who supplied meat to a military camp, whose servant he was. The prisoner and the quartermaster-sergeant proceeded to weigh out the meat to the different messes with the quartermaster-sergeant's weights, the prisoner being the person who put the weights on the scale. Before the weighing was complete, one of the messmen brought back his mess portion, with a complaint that it was short weight. It was discovered that the 14-lb. weight belonging to the quartermaster-sergeant had been removed, and concealed under a bench; and that a false 14-lb. weight had been substituted for it, and used in weighing out the thirty-four messes; and that the prisoner had absconded on the commencement of the investigation. The jury found in answer to questions that the prisoner had fraudulently substituted the false weight for the true one with intent to cheat; that his intention was to carry away and steal the surplus meat remaining after the false weighing; and that nothing remained to be done on his part, to complete the scheme, except to carry away and dispose of the meat, which he would have done had the fraud not been detected. The court were of opinion that the conviction for an attempt was correct.

The rule above referred to may be serviceable in some particular cases, as, for example, such a case as *Queen* v. *Collins*, 33 L.J. (M.C.) 177, where it was held that putting one's hand into another's pocket, with intent to steal, there being nothing in the pocket to steal, is not an attempt to steal, because though the

party was not interrupted, yet the crime of stealing could not have been completed for want of an object upon or in respect to which it could be committed.

This decision has been overruled and held to be no longer law in *Queen* v. *Ring*, 61 L.J.R. (M.C.) 116, where the prisoners were held to have been rightly convicted of an attempt to steal from unknown women at a railway station, although there was no evidence that there was anything in the pocket of the women; no one having been in communication with them. It is now settled law both in England and Canada that an attempt may be criminal though accomplishment was impossible in the nature of things. (See now Crim. Code, s. 72, to be hereafter considered.) But it is manifest that many cases might occur in which, if the party were not interrupted, he would in all probability complete the contemplated offence, and yet that fact will not enable us in the least to decide whether the particular act he has done amounts to an attempt or not. For example, it would seem that where a man bought matches with intent to commit arson that act was not an attempt; it was an ambiguous act, and yet it would at that stage be quite impossible to say that if not interrupted he would not have completed the crime. He would be just as likely to complete it as not. See as to this the charge of the Chief Baron in the case of *Regina* v. *Taylor*, 1 F. & F. 511.

Prisoner was refused work; became very abusive, and threatened to "burn up" prosecutor. He was watched by prosecutor and his servant, was seen to go to a neighbouring stack and kneeling down close to it, to strike a lucifer match; but discovering that he was watched, he blew out the match, and went away. No part of the stack was burnt. The Chief Baron told the jury that if they thought the prisoner intended to set fire to the stack, and that he would have done so had he not been interrupted, in his opinion this was in law a sufficient attempt to set fire to the stack.

That it was clear that every act committed by a person with the view of committing the felonies mentioned (in the statute)

was not within the statute; as, *e.g.*, buying a box of lucifer matches with intent to set fire to a house.

The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances that he has the power of carrying his intention into execution.

Sir James Stephen says, in reference to this case: "It has been held in one case that an attempt to commit a crime is not the less an offence because the offender voluntarily desists. This, however, rests upon the decision of a single judge." (Hist. Cr. Law, II., p. 225.)

He says further (p. 226) in regard to the principle involved: "It is not easy to say upon grounds of expediency whether it is or is not wise to lay down the rule that an attempt from which a man voluntarily desists is no crime. It would be dangerous to lay down such a rule universally. Suppose, for instance, a man voluntarily desisted from an intended and attempted murder, robbery, or rape, because he encountered more resistance than he expected, or suppose that, having lighted a match to blow up a mine under a house, or to set a stack-yard on fire he blew it out because he was or thought he was discovered?"

If, however, it were said that an act will not be deemed an attempt unless it be sufficiently near to the decisive moment to enable it to be known whether the proceedings of the party will or will not result in the completion of his object; if that were the law, the rule in question would be most valuable, even if it did not furnish a decisive test. But this is shewn not to be the law by the cases in which acts quite as incipient in their character as the purchase of the matches have been held to be attempts. For instance, in *Reg.* v. *Roberts*, Dearsley C.C. 64, 25 L.J.M.C. 17, the prisoner bought dies for coining, in England, which he intended to send to South America for the purpose of making counterfeit money in Peru. Before sending them away he intended to make a few coins in England in order to test the dies, and ascertain if they would answer the purpose. The dies alone would not enable him to do this. There were other appliances

necessary which he had not yet bought. Yet the buying of the dies was held to be an attempt to commit in England the offence of making counterfeit coins. Here, of course, there was no more and no less reason to suppose that the party, if not interrupted, would complete the offence intended than there was in the case of the matches. It was too soon to foretell. The question was not discussed; the discussion turned entirely on the question whether the act was or was not sufficiently connected with the object the defendant had in view.

The following case well illustrates the difficulties that arise in questions of this kind. The act of buying indecent pictures for the purpose of circulating them in violation of an Act of Parliament was held an attempt to violate the statute, but the fact of the defendant having such pictures in his possession with a similar intent was held not to amount to an attempt. *Dugdale* v. *The Queen*, Dearsley's C.C. I., 64. Merely to preserve such a book even with a view to publish it, is not an attempt at publication; but procuring such a book with intent to publish it, would amount to an attempt. (Kenney's Cr. Law, 81.)

How near to success the attempt must come is obviously a question of degree to be determined in each case upon the special facts of the case. Attempts have been made, as has already been seen, to find a legal test to satisfy this question. It has been suggested, for instance, that to be punishable an attempt must be the last act before success; there must remain no locus pœnitentiæ. But while such a formula may sometimes furnish a useful suggestion for determining the question, it cannot properly be regarded as a legal rule. As Holmes, C.J., said in *Commonwealth* v. *Peaslee*, 177 Mass. 267, 272: "That an overt act, though coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation becomes very near to the accomplishment of the act the intent to complete it renders the crime so probable that the act will be a misdemeanour, although

there is still a locus pœnitentiæ, in the need of a further exertion of the will to complete the crime."

In fact literal adherence to the rule suggested would probably prevent punishment in most cases charged as attempts, since the final act before complete success will seldom be accomplished without success following. Most decided cases of attempt, it will be found, are far from being the last before complete success.

The same general doctrine has been put in other forms. Thus it has been laid down that to be a punishable attempt the defendant's act, unless interrupted by natural causes outside his control, should necessarily result in the criminal act. "Unless the transaction had been interrupted as it was, the prisoner would have actually carried away the meat." (Blackburn, J., in *R.* v. *Cheeseman*, 31 L.J.M.C. 89, 90 (supra).

But this arbitrary rule must also be dismissed. Indeed, all the cases where a man is punished for attempt, though he repented and gave up his project before success are opposed to the proposed test. See, for example, *Reg.* v. *Goodman*, 22 U.C.C.P. 338.

A. was charged with attempting to set fire to a building, a dwelling house, and B. with inciting and hiring him to commit the offence.

Under B.'s directions, A. had arranged and placed pieces of blanket saturated with coal oil against the doors and sides of the house, had lighted a match, which he held in his fingers till it was burning well, and had then put the light down close to the saturated blanket with the intention of setting the house on fire; but just before the flame touched the blanket the light went out, and he threw the match away without making any further attempt. It was held that the attempt was complete.

Hagarty, C.J., said: "The fact of Waters going away, or ceasing further action after the match went out (not by any act or will of his) seems to put the matter just as if he had been interrupted, or was seized by a peace officer at the moment. It seems to me the attempt was complete, as an attempt, at that moment, and no change of mind or intention on prisoner's

part, can alter its character. It would be a reproach to the law if such acts as were here proved do not constitute an overt act towards the commission of arson."

4. *Acts done in contemplation of the object.*—When the intention to commit a crime is formed, there are two sets of acts which may be done in contemplation of the object.

(1) Preparatory Acts. For example, as was said in argument in *Reg.* v. *Cheeseman* (supra): "There is a marked difference between attempting to attain an object and the mere doing an act with intent to attain that object. A man may do an act with intent to commit some crime anywhere; for example, a man may buy a rifle in America with intent to shoot a man in England; but the buying the rifle could not be construed into an attempt to shoot the man. Again if a notorious burglar is seen to put a picklock key into a door, the jury may assume that he is attempting to break into the house. But, if he were found purchasing a picklock key ten miles from the house in question, it would be impossible, without further evidence, to say that it was bought with intent to break into that house." To this it was said by Blackburn, J.: "There is no doubt a difference between the preparation antecedent to the offence, and the actual attempt."

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offence; the attempt is the direct movement towards the commission after the preparations are made." Field, C.J., *People* v. *Murray*, 14 Cal. 159.

In the case of a man contemplating murder, the going to the place at a distance where the crime is to be committed is merely a preliminary act, no part of the crime, and does not constitute an attempt. It is merely placing himself in a position where he can commence proceedings. The buying of a revolver before going would be another preliminary step, of no particular significance to one not aware of the intent; it would not be an attempt, being too remote from the actual offence.

(2) Those acts which form successive steps in the commission of the crime, after the preliminaries are over, any one of these will be an attempt. Purchasing a revolver and going to the

place where the crime is to be committed, is a preliminary or preparatory act, as we have seen. But discharging a revolver at the intended victim and missing him would seem certainly to be an attempt. But how far back does this class of acts go? Would loading in the sight of the intended victim be an attempt if not followed up by any further step? or aiming, and stopping there in consequence of the person aimed at suddenly turning into a shop?

We must separate the act in question from all acts that follow or that might follow in order to decide whether the particular act is an attempt or not. "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces, but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head, was not aimed straight, and therefore, in the course of nature, could not hit him. Usually acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. Every question of proximity must be determined by its own circumstances and analogy is too imperfect to give much help." Holmes, J., in *Commonwealth* v. *Kennedy*, 170 Mass. 18, 20.

In the recent case of *Rex* v. *Linneker* (1906), 2 K.B. 99, it was held that the accused was rightly convicted of "feloniously attempting to discharge a revolver with intent to do grievous bodily harm" (see Criminal Code, s. 273), when he had drawn a loaded revolver from his pocket, saying to the prosecutor, "you've got to die." The prosecutor seized him and prevented him from raising his arm. During the struggle these words were said several times to the prosecutor who finally wrested the revolver from the prisoner and he was taken into custody. This was held to come under the definition in Stephen's Digest of the Criminal Law: "An attempt to commit a crime is an act done

with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted."

"It is not enough that there should be an intention or a preparation to discharge the weapon; there must be an attempt to do so." (Alverstone, L.C.J., p. 102.)

"Although an attempt implies the intent, an intent does not necessarily imply an attempt. There may be cases very near the line as regards the attempt, although there is no doubt as to the intent. It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence." (Kennedy, J., p. 103; see also *Reg.* v. *Lewis*, 9 C. & P. 523, and *Reg.* v. *Jackson*, 17 Cox C.C. 104.)

The following further cases may, perhaps, well be noticed.

In *Reg.* v. *Maddock* (reported in the *Solicitors' Journal*, 12th May, 1900, p. 444) the defendant was indicted for attempting to commit arson. It was proved that he had placed a quantity of inflammable substances on the floor of a certain house, saturated them with methylated spirits, and placed a freshly trimmed candle in the midst. Not having lighted the candle, it was argued on motion to quash the indictment, that the prisoner had merely made preparations to commit a felony and had not gone far enough in his acts to constitute an attempt in law.

Lawrance, J., held, that as something remained to be done by the prisoner, and there was no interruption, that what he did, did not amount to an attempt at law.

One cannot be convicted of an attempt to enter and break a dwelling merely because he agrees with another to do so, meets him at a saloon at the appointed time, with a revolver and slippers to be used in the house, and goes into a drug store and purchases some chloroform to use, being arrested when he comes out. *People* v. *Youngs*, 50 Cent. L.J. 69. See also *Reg.* v. *McCann*, 28 U.C.R. 514.

The provision of the Criminal Code (s. 72) is as follows:—"Everyone who, having an intent to commit an offence, does or

omits an act for the purpose of accomplishing his object is guilty of an attempt to commit the offence intended whether under the circumstances it was possible to commit such offence or not.

"2. The question whether an act done or omitted with intent to commit an offence is or is not only preparation for the commission of that offence, and too remote to constitute an attempt to commit it, is a question of law."

It will be noticed that the first part of the section embodies the law as laid down in *Reg.* v. *Ring* (supra). Clause 2 leaves it as a matter of law to the judge to say whether the act in question is or is not an attempt. This is in accordance with Sir James Stephen's view, but is opposed to that of Professor Clark, who says (p. 17): "The question would seem to me, in English law, one for a jury."

Some curious results would seem to follow from the present state of the law; the following were suggested by a distinguished member of the English Judiciary. Suppose a person should, in the dusk of the evening, fire off a gun or pistol as he supposed at A., whom he thought he saw standing in a particular spot and whom he intended to kill, when in fact no person was anywhere near, and the object aimed at was in reality a tree or some other object. Under the common law decisions such as *Reg.* v. *Collins* (supra) and *Reg.* v. *McPherson*, D. & R. 197, this would not be deemed an attempt to murder or shoot A. It would seem, however, to be so under the Code. So if A. were to shoot at B., believing him to be C., and with intent to shoot and kill C., at common law A. could be convicted of an attempt to murder B. because he intended to kill B., so intending, it is true, because he believed him to be C. In other words, he intended, and therefore attempted, to kill the man he aimed at. But that man was B.; therefore he intended and attempted to kill B., doing so because he believed him to be C. He could not be convicted of an attempt to murder C. because this was impossible at the time. But under the Code the fact that it was impossible to kill C. because he was not there is not to prevent the party from being

convicted of an attempt to kill him. The question may arise, can A. be convicted of an attempt to murder them both?

In the *Solicitors' Journal*, 20th June, 1903, p. 596, the following illustration of the present law in regard to an attempt to do what is impossible is in point. It is there said:—

"A recent case of considerable interest to lawyers is reported from the United States. It was proved that the prisoner, with the intention of killing the prosecutor, had fired through a bedroom at the bed upon which he supposed the prosecutor to be sleeping. As a matter of fact, the bed was unoccupied, and the intended victim was in another part of the house. It was held, however, that the prisoner was rightly convicted of an attempted murder.

"Before *Reg.* v. *Ring*, 17 Cox C.C. 491, this would not have been in accordance with the law as accepted here. In the present case, the prisoner had done everything in his power to murder the prosecutor; he supposed him to be in the bed and sent bullets through the bed; and he would probably have succeeded in the murder which he contemplated but for the absence of the intended victim."

A similar question to the one arising under s. 72 is discussed in an interesting article on Criminal Attempts in the *Harvard Law Review* (vol. 16, p. 491). The writer says that it is quite true that in the ordinary use of language a man attempts to bring about results as well as to do acts, and that when a murderer in intention fires a pistol he is attempting not only to put a bullet into the object aimed at, but to cause the death of his intended victim, who may be a hundred miles away. But attempt in that sense, having a merely mental connection with the intended result, is not the concern of the criminal law, which punishes physical acts only. The important question is, what is the physical act which the defendant has set out to do; for to bring about a harmless physical result in the vain hope of effecting a crime is not criminal, an attempt which is to form the subject of a criminal inquiry must therefore be a step towards a forbidden physical act. If the entire physical act which the accused has at the

time set out to perform might be accomplished without committing a substantive crime, the attempt, not being an actual step towards a criminal act, cannot be criminal. If then the criminal act intended is not a crime, the attempt to do it cannot be criminal. This principle may be made clearer by a few illustrations. The defendant wishing to kill an enemy shoots towards an imperfectly seen object which he believes to be his enemy. The object proves to be an animal or a stump. Whether the bullet misses its mark or hits it, the act is not criminal, for the thing which the actor aims to do is to bring his bullet into violent contact with the object seen. If he does so, he commits no crime; if he attempts to do so he equally commits no crime. It is immaterial that his ultimate purpose is to have his enemy die.

N. W. HOYLES.

IMMIGRATION.

Our attention has been called to a subject which, though not strictly within our province, is yet one of great national importance. We refer to the alleged cases of hardship to individuals through the administration of the law and regulations respecting immigration which have caused much unfavourable comment in quarters where it is very desirable that no unkind feeling should exist. We do not propose to criticise the details of the immigration policy adopted by the Government, which are, no doubt, the result of very careful consideration, and intended to promote the welfare of the immigrants themselves, as well as the best interests of the country at large.

But there is one fact which, in our present condition of self-sufficiency, we are apt to lose sight of altogether, though it has an important bearing upon this subject of immigration. We must not forget that Canada is a part of the British Empire, and that it became such not at our expense, and not through any effort of ours. It was British blood and British treasure that gained this land for the British races, and its soil is therefore free

to any British subject, no matter where he comes from, and to that consideration all regulations regarding immigration must be subservient. We repeat that, as Canadians, we have no more right to the soil of this country than have any other British subjects. We use no legal fiction in calling our unoccupied lands Crown lands. The term exactly expresses the fact, and we cannot ignore it, and should not try to do so. The fee simple of the land is in the Crown, and all that any of us as Canadians is entitled to is the usufruct of such portions of it as have been ceded to us by the Crown which represents the common interest of all its subjects. The Government of this country has been entrusted by Imperial authority with the control of that property, but not with any exclusive right to it, and must exercise that control with due regard to the conditions under which it was granted.

Having said this much by way of protest against false ideas which seem to prevail in some quarters, but which have a practical bearing upon the question under consideration, we return to the complaints which have been made not, as we understand, to the regulations themselves, but to the spirit in which they have sometimes been administered. One of the most important of these regulations is that which requires every immigrant, with certain exceptions, to have in their possession on landing the sum of $25. We quite admit that some rule is necessary to prevent an influx of paupers, or of men and women who could not properly be so designated, but who, not secure of obtaining immediate employment, would find themselves in landing in a state of destitution, and dependent upon charity.

But such a rule should be carried out with caution and discrimination. It should not apply to wives or children coming out to join husbands or parents able to maintain them, nor to any class of persons who can shew that they have immediate work provided for them. In both such cases it has been applied, as reported, so as to cause hardship and suffering. It must also be the case in many instances that men and women with families, very desirable as immigrants, could only with great difficulty, and

with much self-denial, gather together money enough to pay the cost of transportation, and then to be required to have such an additional sum to meet possible contingencies is absolutely to prohibit their coming, and perhaps throw them into that condition of pauperism so much to be deprecated. We say then, that admitting the necessity for such a rule, it is one that should be administered with great care, and in a spirit of charity rather than of repulsion.

The second rule to which exception is taken, limiting a certain class of assisted emigrants to those only who are willing to accept farm work, opens a wide field for discussion.

We are in this regulation immediately brought into contact with the instincts of trades unions with all their political influence, and their desire to check competition that might lower the standard of wages. Why the laws of supply and demand which, in the long run, regulate all such matters, should apply only to farm labourers, and not to mechanics and skilled labour of all kinds, is a subject upon which it is not our business to enter. We recognize that caution should be taken to discourage the incoming of men for whom no employment can be found, but the rule should be of general application, and not operated in the interests of a particular class, and without regard to the varied and varying interests of the whole community.

In conclusion, this immigration question is an Imperial one and should be treated Imperially. It is part of the Imperial burden to provide for Imperial needs, and not the least of them is to see that the resources of the Empire are made available for all Imperial subjects, and this can best be done if all parts of the Empire, especially those so richly endowed as ours, are willing to take their burdens along with their inheritance, and deal with them according to the golden rule of doing to others as we would they should do to us. This is not cant, this is not mere sentimentality. It is right, not only from a moral point of view, but also is the best way to promote our own interests, both material and social.

REVISION OF THE ONTARIO STATUTES.

The revision of the statutes at the present rate of progress bids fair to be a lengthy process. It has already been in progress over three years, but only part of the statutes in volume one of the Revised Statutes of Ontario, 1897, have yet been revised. In the meantime a very large part of the statutes in volume one have been repealed, and the current law has now to be sought in other volumes. For the purpose of shewing where the statutes as revised are to be found, we have compiled a table of the revised statutes, which appears in another place (post, p. 429). We trust it will be found useful for reference.

We find that there are about 64 chapters in volume one, 311 in volume two, and 19 in volume three, besides a multitude of other statutes scattered through the fourteen volumes of statute issued since 1897, to the present time, yet remaining to be revised, to say nothing of others which may come into existence before the revision is completed.

In a previous number (ante, p. 233), Mr. E. F. B. Johnston, K.C., gave his views at length on the art of cross-examination. A book written by Francis S. Wellman, of the United States Bar, recently published by the McMillan Company, deals with the same subject. In one of the chapters the learned author discusses the art in reference to direct examination. The general impression prevails that the direct examination of a witness requires less skill than the cross-examination. He does not seem to feel inclined to agree with this view and regrets that so little attention is paid to examinations in chief. This results possibly from the fact that a cross-examination is more engaging to the spectators and its results are much more clearly perceived by them. The subtle arts and consummate skill of examinations in chief are, in his opinion, seldom apparent to the mere spectator, though they may well be appreciated by the lawyers engaged in the case who would be able to recognize the ingenuity and tact with which the desired facts have been elicited or the weak points suppressed or at least not clearly revealed. Space does not permit to do more than refer to this interesting book. Its perusal during vacation will be much more interesting and profitable than much that is skimmed during the "dog days."

REVIEW OF CURRENT ENGLISH CASES.

COVENANT—COVENANTOR COVENANTING WITH HIMSELF AND OTHERS —RIGHT TO ENFORCE OBLIGATION.

Ellis v. *Kerr* (1910) 1 Ch. 529 presents a curious state of facts. Walter Kerr assigned to the trustees of his marriage settlement a policy of life insurance to be held on the trusts of the settlement. The trustees of the settlement were, Butler, C. J. Kerr and Chelwynd. Walter Kerr, Butler and C. J. Kerr covenanted with the trustees of the settlement that Walter Kerr would pay the premiums necessary to keep the policy afloat, or in default Butler and Kerr would do so. Ellis was subsequently substituted as a trustee of the settlement in place of Chetwynd. Walter Kerr having made default in payment of the premium and Butler and C. J. Kerr having refused to pay, the other trustee, Ellis, brought the present action against Walter Kerr, Butler and C. J. Kerr to compel them to pay the premiums under their covenant. Warrington, J., who tried the action, held that the covenant sought to be enforced being a joint covenant made by the covenantors with two of themselves was unenforceable either at law or in equity; and, without prejudice to any other remedy the plaintiff might have, the action was dismissed.

SETTLEMENT OF REAL ESTATE—CONDITION SUBSEQUENT, REQUIRING ASSUMPTION OF NAME AND ARMS—GIFT OVER ON "REFUSAL OR NEGLECT"—INFANT.

In re Edwards, Lloyd v. *Boyes* (1910) 1 Ch. 541. In this case the point decided by Warrington, J., is this: that where real estate is devised by a testator in trust for an infant subject to a condition that the infant is, within six months after becoming entitled, to assume the name and arms of the testator, subject to a devise over in case of refusal or neglect to do so, there can be no forfeiture of the estate by reason of the neglect or refusal of the devisee so long as he is an infant.

ESTATE DUTY—TESTAMENTARY EXPENSES—ORDER OF ADMINISTRATION OF ASSETS.

In re Pullen, Parker v. *Pullen* (1910) 1 Ch. 564. The question for decision here was one as to the proper order for the

administration of assets in these circumstances. Estate duty under the Finance Act of 1894 is payable in respect of personal property specifically bequeathed by a testator, this is held to be "a testamentary expense," and as such is payable in the same order as other testamentary expenses; and accordingly it was held by Warrington, J., that where the residuary personal estate is insufficient to pay the estate duty on the specifically bequeathed personality, the heir at law is not entitled to have the duty paid out of the specifically bequeathed personalty in exoneration of the undisposed of realty.

COMPANY—WINDING UP—"CONTINGENT OR PROSPECTIVE" CREDITOR—LOCUS STANDI OF PETITIONER—(R.S.C. c. 144, ss. 2(*j*), 12).

In re British Equitable Bond & Mortgage Corporation (1910) 1 Ch. 574 was an application for the compulsory winding up of a limited company, and an objection was taken to the locus standi of the petitioner, who was the owner of an investment bond issued by the company, under which on making certain periodical payments he would at a future date become entitled to the payment of a sum of money, and it was held by Neville, J., that he was a "contingent or prospective" creditor and as such entitled to apply. See R.S.C. c. 144, ss. 2(*j*), 12.

HEIRLOOMS—DIRECTION IN WILL FOR CHATTELS TO PASS WITH REAL ESTATE—DEATH OF INFANT TENANT IN TAIL IN REMAINDER WITHOUT HAVING POSSESSION—DEVOLUTION OF CHATTELS BEQUEATHED AS HEIRLOOMS.

In re Parker, Parker v. *Parkin* (1910) 1 Ch. 581. Certain chattels had been bequeathed to pass with a mansion house which was limited to Edward Parker for life with remainder to his first and other sons in tail. The chattels in question were directed to continue annexed to the house as long as the law would permit. The testator died in 1856 and Edward Parker went into possession and his eldest son, the first tenant in tail, predeceased him, an infant and unmarried. Edward Parker had two other sons, one of whom had attained twenty-one. Edward Parker now claimed as next of kin of his deceased eldest son to be absolutely entitled to the chattels, and Parker, J., held that he was right in his contention.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT—ADMIRALTY (N.S.).

Drysdale, J., Dep. Loc. Judge.] [May 28.

HEATER v. ANDERSON AND SHIP "ABEONA."

Jurisdiction—Contract made without reference or application to court—Security for return of ship.

Where the majority owners of a ship, desiring to make use of the ship, without application to the court, execute a bond under seal to the minority owners, conditioned for the safe return of the ship to a port mentioned, or, in default, payment of a fixed money penalty, such contract is not one which the court has jurisdiction to enforce, differing in this respect from a bond executed under the same circumstances in the court, which is not a contract between the parties but is a security given to the court. *The Bagnall*, 12 Jur. 1008, followed.

Rogers, K.C., and *Stairs*, for plaintiff. *Chesley*, K.C., and *Ritchie*, K.C., for defendants.

Province of Ontario.

COURT OF APPEAL.

Moss. C.J.O.] RE GOOD, ETC., COMPANY, LIMITED. [May 19.

Appeal—Application for leave to—Question of importance—Validity of by-law preventing shareholders from transferring fully paid up shares without consent of directors.

Application for leave to appeal to the Court of Appeal from an order of the Divisional Court requiring the company to transfer in its books five fully paid-up shares of stock as signed by one Isaac Good a shareholder to the applicant J. S. Good. The amount in controversy was less than the statutory sum of $1,000,

but the question at issue was important as regards joint stock companies.

It had been held in this proceeding that it was beyond the power of a company incorporated under the Dominion Joint Stock Company's Act to enact a by-law preventing shareholders from transferring any of their fully paid-up shares except with the consent of the directors. The learned Chief Justice in giving judgment on the above application said that the above holding was the first express decision to that effect, though the point had been dealt with in the following cases: *In re Smith and Canada Car Co.*, 6 P.R. 107; *In re Macdonald*, 6 P.R. 309; *In re Imperial Starch Company*, 10 O.L.R. 22; *In re Panton*, 9 O.L.R. 3.

Held, that the question was one of so much consequence to companies that it was proper to grant leave to appeal; but, having regard to the position and rights of a proposed respondent terms were imposed as to costs.

Lefroy, K.C., for company. *H. S. White*, for applicant.

HIGH COURT OF JUSTICE.

Britton, Teetzel, Riddell, JJ.] [May 12.

BROWN v. CITY OF TORONTO.

Municipal law—Negligence—Ont. Jud. Act, s. 104—Non-repair of streets—Nonfeasance and misfeasance—Jury notice.

Appeal from order of BOYD, C., restoring plaintiff's jury notice which had been struck out by the Master in Chambers. The action was for negligence on the part of the defendants in taking up an old sidewalk and not properly repairing it, whereby the plaintiff was tripped and thrown on to the roadway and thereby injured. The question was whether the action was based on nonfeasance or misfeasance. The statute applicable to the case is s. 104 of O.J. Act, which provides that "All actions against municipal corporations for damages in respect of injuries sustained through non-repair of streets, roads or sidewalks shall be tried without a jury."

Held, that "non-repair" within the meaning of the above section is an abstract noun, meaning the state or condition of a street, and not a verbal noun meaning "not repairing." "Non-repair" means only the state of being out of repair, i.e., not being in repair. This being so, such state may be occasioned by mis-

feasance as well as nonfeasance and there is nothing in the statute to shew that the legislature intended to restrict the application of the word to the case of nonfeasance. Had this been their intention it would have been easy to express it clearly. The jury notice was therefore struck out.

Bradford, K.C., for plaintiff. *Howitt,* for defendant.

Boyd, C.] STAVERT *v.* MCMILLAN. [May 23.

Promissory notes—Consideration—Transfer of bank shares—Illegal trafficking by bank in its own shares—Directors—Bond—Notes given to repair wrongdoing—Holder in due course—Notice of illegality.

Action by the curator of the Sovereign Bank of Canada on a promissory note for $33,110, made by the defendant, a director of the bank, and for interest, etc. The defendant claimed indemnity from the bank, pursuant to an alleged agreement therefor. Several other actions by the same plaintiff against different defendants were tried with this, and the judgment disposes of them all.

BOYD, C.:—That which underlies and affects the whole litigation is a series of dealings by which the money of the Sovereign Bank was used in purchasing shares of its own stock to the extent of about $40,000. The shares so acquired stood in the names of various nominees of the bank—brokers, officers of the bank, and others—who undertook no personal responsibility and whose names were in some cases used without their knowledge. The whole transaction was managed by the then general manager, Stewart, and there is no doubt that the money was illegally withdrawn from the funds of the bank and used in violation of the statute—the Bank Act, R.S.C. 1906, c. 29, s. 76. The shares were bought to be again sold, and the plan was to keep up the price of the stock and to make possible profits. This process amounted to an illegal trafficking in the shares, was ultra vires, in disregard of the public policy forbidding banks to engage in such a line of business, and placed in jeopardy the charter of the bank. . . .

The notes . . . were given for value, represented by the transfer of shares apportioned to each, and in the whole representing in value the $400,000 of the bank's money illegally expended.

This was, I think, the whole consideration as between the bank and the defendants; but, even if it was only a part, it is enough

to raise the next important question: in how far can an action to enforce payment be entertained by the court? . . .

We start with a transaction or series of transactions illegal in every sense. There was an unwarrantable misapplication of the bank's money, which was ultra vires, in the teeth of the Bank Act, and in violation of the public policy to be observed and maintained in the public interest. The Act says that an incorporated bank shall not, except as authorised by the Act, directly or indirectly purchase or deal in or lend money or make advances upon the security or pledge of any share of its own capital stock: s. 76 (2b). There was clearly a purchasing of shares, and the purchase was in order to their being again sold. That is a trafficking in its own shares, which is forbidden. For that, authority will be found in *Hope* v. *International Financial Society*, 4 Ch.D. 327, 339, and *Trevor* v. *Whitworth*, 12 App. Cas. 409, 417, 419, 428. The original acquisition of the shares was not merely voidable but void; it was a nullity, not to be validated by lapse of time or by any action of the bank or the shareholders. This was so held by Lord Shand in *General Property Investment Co.* v. *Matheson's Trustees*, 16 Rettie 282, approved by Collins, M.R., as good law in English Courts, in *Bellerby* v. *Rowland & Marwood's S. S. Co.*, [1902] 2 Ch. 14, 27; and to the same effect under our Bank Act by the Supreme Court of Canada in *Bank of Toronto* v. *Perkins*, 8 S.C.R. 603.

Then what was the transfer of these shares to the defendants, in exchange for the notes sued on, but a sale of the shares? . . .

Going back to the bond given by the directors to guarantee the payment and to take over or otherwise dispose of the stock, it could not have been enforced in any court of law or equity. The reason is succinctly given by Bramwell, B., in *Greene* v. *Mare*, 2 H. & C. 339, 346: "The indenture declared on was executed as a security for the payment of a debt founded on an illegal consideration, and as the debt could not be enforced against the debtor, neither can it be enforced against the person who has executed the security for its payment." The result is the same if part of the consideration is illegal, for, as said in one of the cases, where the parties (as, e.g., the bank and the directors) have woven a web of illegality, it is not part of the duty of courts to unwind the threads.

Considered as between the bank as holder and the defendants (directors and others, their friends), the case appears to be that of the bank adopting the shares bought with its own money and selling them to strangers for a price sufficient to recoup the first illegal outlay. . . .

I think the bank has not power to transfer these shares or enforce payment for them against an unwilling purchaser. The bank has no legal title to the shares, and can confer none; so that in the hands of any one having knowledge or notice of the facts or of the violation of the statute, the notes cannot be enforced by action.

This legal result of the facts indicates the practical impossibility of the bank undertaking to indemnify the defendants in regard to their having become holders of the stock. The expenditure of the bank's money was a misfeasance in the first place, and any indemnification would be an agreement further to misuse the shareholders' money.

Upon the evidence it appears that fifteen of the notes sued on required to be indorsed to the plaintiff after the 18th January, 1908, before he would acquire title thereto or become a holder in due course. . . . My conclusion is as to these fifteen notes that he had sufficient notice of the situation as between the directors and the bank as to this stock being purchased with the bank's moneys and as to the way in which the notes sued on were given.

As to these fifteen notes, the actions fail and should be dismissed; but no costs are given where the defence is illegality.

Bicknell, K.C., and *MacKelcan*, for plaintiff. *W. Nesbitt*, K.C., *Arnoldi*, K.C., *H. S. Osler*, K.C., and *J. Wood*, for defendants. *Hellmuth*, K.C., *Anglin*, K.C., and *Boland*, for bank.

Middleton, J.] RE SOLICITOR. [May 27.

Solicitor—Retention of client's money—Delivery of bill of costs —Disobedience—Retainer—Settlement—Preparation of bill —Attachment.

Motion by client to attach a solicitor for disobedience to a order requiring him to deliver a bill, which order had not been moved against nor complied with. It appeared that on October 2, 1908, the solicitor received for the client as a result of the settlement of the suit $2,600, and paid her $625, retaining the balance presumably as costs of the litigation, but no bill had ever been delivered.

MIDDLETON, J., after referring to the facts and deciding some question in relation thereto said that the promise to pay a retainer is void: *Re Solicitor*, 14 O.L.R. 464. A retainer is a gift by the client to the solicitor, and, like all gifts, must be a voluntary act. With reference to the settlement suggested by the

copy of the cheque produced, there was no bill, and there can be no binding settlement without a bill: *Re Bayliss*, [1896] 2 Ch. 107. It is fair to assume that this retainer was a factor in the settlement, if settlement there was, and the client would not be bound by it.

As to the suggested inability of the solicitor to prepare a bill —on the material this is not proved as a fact, and, if it were, it would not afford any excuse.

Even if there had been a valid agreement, the solicitor owed a duty to his client to keep a proper record of the business done, as the preparation of a party and party bill might have been assumed to be, in the event of success, necessary in the client's interest. See *Re Ker*, 12 Beav. 390, and *Re Whiteside*, 8 Beav. 140; *Knock* v. *Owen*, 35 S.C.R. 168, 172. Order to go for attachment, but not to issue for two weeks.

R. Mackey, for applicant. *Meek*, K.C., for solicitor.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] [June 6.

WHITLA *v.* RIVERVIEW REALTY CO.

Vendor and purchaser—Agreement for sale of land—Rescission —Specific performance—Right to recover back money paid on cancelled contract.

Appeal from judgment of MACDONALD, J., noted vol. 45, at p. 573, dismissed with costs. HOWELL, C.J.A., dissenting.

KING'S BENCH.

Mathers, C.J.] MARTIN *v.* BROWN. [May 4.

Principal and agent—Implied obligation of agent—Improper use of information obtained during employment—Breach of confidence.

The plaintiff, being employed as agent of the defendants on commission to procure orders in a defined territory for the pur-

chase of the defendants' goods, agreed that he would, to the best of his ability, serve their interest. He rented an office in his own name for the purposes of the business and paid the rent himself. During his employment, the plaintiff prepared a mailing list of customers and prospective customers in his own territory for use in carrying on the defendants' business, also a card index of 500 or 600 names of such customers, and he kept a ledger containing particulars of sales made for defendants. During the last three months of his employment, the plaintiff made an agreement with another firm in the same line of business as defendants to enter their service on the expiration of his then current engagement and made use of the information in his possession to the detriment of the defendants in many ways and planned to take with him to the other firm as much as possible of the business worked up by him for the defendants. The defendants, on learning of this, dismissed the plaintiff, entered his office and took away or destroyed the mailing list, card index and ledger above referred to, and also a list the plaintiff had prepared of likely calendar buyers all over Canada chiefly outside of the plaintiff's territory.

Held, 1. The plaintiff was entitled to damages for the trespass committed by defendants in entering his office (fixed at $50) and for the destruction of the list of likely calendar buyers (fixed at $250).

2. The defendants were entitled to damages on their counterclaim against the plaintiff for breach of his agreement to serve their interest to the best of his ability on account of his conduct as above stated, fixed at $500.

3. The mailing list, card index and ledger were the property of the defendants and the plaintiff could not recover anything in respect of them. *Robb* v. *Green* (1895), 2 Q.B. 315, followed.

Plaintiff to have costs of suit, and defendants of their counterclaim, and judgment to be entered against party found indebted after set-off of results.

Trueman, for plaintiff. *Wilson*, K.C., and *J. F. Fisher*, for defendants.

NOTE.—By accident the following line was dropped out between lines 2 and 3 on p. 387: "the husband to the wife, were held to be still her property, the."

Book Reviews.

The Debentures and Debenture Stock of Trading and other Companies, with Forms. By EDWARD MANSON, Barrister-at-law. 2nd edition. London: Butterworth & Co., Temple Bar, Law Publishers. 1910.

New books giving the newest thoughts on subjects affecting the "law merchant" are always welcome; for, as Chief Justice Cockburn says in *Goodwin* v. *Roberts*, this branch of the law is not fixed and stereotyped, but is a living law, capable of expansion and enlargement to meet the requirements of trade in the varying circumstances in commerce. Hence the value of such a work as this. A professional man dealing in company law (and which of them does not in these days) needs the assistance and information given in this excellent compendium.

Revised Statutes of Ontario

TABLE REFERRED TO ANTE, PAGE 419.

	R.S.O. VOL. 1.	THE REVISED STATUTE APPEARS IN:
Ch.	1. Interpretation.	7 Edw. VII. c. 2.
"	2. (Distribution of Statute.)	7 Edw. VII. c. 3.
"	3. (Territorial Division.)	10 Edw. VII. c. 2.
"	4. (Haliburton.)	9 Edw. VII. c. 2.
"	6. Representation.	8 Edw. VII. c. 2.
"	7. Voters' Lists.	7 Edw. VII. c. 4.
"	8. Manhood Suffrage.	7. Edw. VII. c. 5.
"	9. Elections.	8 Edw. VII. c. 3.
"	10 (Personation.)	9 Edw. VII. c. 3.
"	11. (Controverted Elections.)	8 Edw. VII. c. 4.
"	12. Legislative Assembly.	8 Edw. VII. c. 5.
"	13. Lieutenant-Governor.	10 Edw. VII. c. 3.
"	14. Executive Council.	10 Edw. VII. c. 4.
"	16. Public Officers.	9 Edw. VII. c. 5.
"	17. Sheriffs.	9 Edw. VII. c. 6.
"	18. Fees of Public Officers.	10 Edw. VII. c. 5.
"	19. Inquiries Covering Public Matters.	8 Edw. VII. c. 8.
"	20. Ontario Gazette.	9 Edw. VII. c. 7.
"	21. Consolidated Revenue.	8 Edw. VII. c. 10.
"	22. Public Revenue.	9 Edw. VII. c. 22.
"	23. Auditing Public Accounts.	8 Edw. VII. c. 9.
"	24. Succession Duties.	9 Edw. VII. c. 12.
"	25. Law Stamps.	9 Edw. VII. c. 13.
"	36. Mines.	8 Edw. VII. c. 21.
"	37. Public Works.	10 Edw. VII. c. 11.
"	38. Riots near Public Works.	10 Edw. VII. c. 12.
"	39. Sale of Liquor near Public Works.	8 Edw. VII. c. 33.
"	40. Municipal Drainage Debentures.	9 Edw. VII. c. 21.

	R.S.O. Vol. 1.	The Revised Statute appears in:
Ch.	41. Tile Drainage Act.	9 Edw. VII. c. 22.
"	42. Department of Agriculture.	10 Edw. VII. c. 17.
"	44. Registration of Births, etc.	8 Edw. VII. c. 28.
"	45. Queen Victoria Niagara Park	10 Edw. VII. c. 21.
"	46. Algonquin Park.	10 Edw. VII. c. 22.
"	47. Rondeau Park.	10 Edw. VII. c. 23.
"	48. Appeals to Privy Council.	10 Edw. VII. c. 24.
"	49. Supreme Court of Canada.	10 Edw. VII. c. 25.
"	52. Judges of Supreme Court of Jud.	10 Edw. VII. c. 29.
"	54. County Judges.	9 Edw. VII. c. 29.
"	55. County Courts.	10 Edw. VII. c. 30.
"	56. General Sessions.	9 Edw. VII. c. 30.
"	57. County Judges' Criminal Courts.	9 Edw. VII. c. 31.
"	59. Surrogate Courts.	10 Edw. VII. c. 31.
"	60. Division Courts.	10 Edw. VII. c. 32.
"	61. Jurors and Juries.	9 Edw. VII. c. 34.
"	62. Arbitration.	9 Edw. VII. c. 35.
"	63. Boards of Trade Arbitrations.	9 Edw. VII. c. 36.
"	64. Boundary Disputes.	10 Edw. VII. c. 33.
"	65. Lunatics.	9 Edw. VII. c. 37.
"	66. Replevin.	9 Edw. VII. c. 38.
"	67. Dower.	9 Edw. VII. c. 39.
"	68. Libel and Slander.	9 Edw. VII. c. 40.
"	69. Seduction.	9 Edw. VII. c. 41.
"	70. Administration by Crown of Intestate Estates.	9 Edw. VII. c. 42.
"	72. Limitation.*	10 Edw. VII. c. 34.
"	73. Witnesses and Evidence.	9 Edw. VII. c. 43.
"	74. Commissioner to take Affidavits.	9 Edw. VII. c. 44.
"	75. Costs of Distress.	9 Edw. VII. c. 45.
"	76. Enforcement of Judges' Orders.	9 Edw. VII. c. 46.
"	77. Execution.	9 Edw. VII. c. 47.
"	78. Creditor's Relief.	9 Edw. VII. c. 48.
"	79. Abscounding Debtors.	9 Edw. VII. c. 49.
"	80. Arrest and Imprisonment for Debt.	9 Edw. VII. c. 50.
"	81. Indigent Debtors.	9 Edw. VII. c. 50.
"	83. Habeas Corpus.	9 Edw. VII. c. 51.
"	84. Constitutional Questions.	9 Edw. VII. c. 52.
"	85. Damage by Flooding.	9 Edw. VII. c. 53.
"	86. Qualification of Justices.	10 Edw. VII. c. 35.
"	87. Police Magistrates.	10 Edw. VII. c. 36.
"	90. Summary Convictions.	10 Edw. VII. c. 37.
"	91. Appeals in Criminal Cases.	
"	92. Appeals from Summary Convictions.	
"	93. Returns of Fires, etc.	10 Edw. VII. c. 35.
"	94. Returns by Police Magistrates.	
"	95. Fees of Justices.	
"	96. County Crown Attorneys.	9 Edw. VII. c. 55.

*This Act is not repealed, but its provisions are re-enacted, except s. 4.

R.S.O. Vol. 1.	The Revised Statute appears in:
Ch. 98. Commissioner of Police.	10 Edw. VII. c. 38.
" 99. Constables.	10 Edw. VII. c. 39.
" 100. Constables to take Bail.	10 Edw. VII. c. 40.
" 101. Fees in Administration of Justice.	10 Edw. VII. c. 41.
" 102. Payment by Counties of Expenses of Criminal Justice.	
" 103. Criminal Justice Accounts.	
" 104. Expenses of Justice in Criminal Matters.	
" 105. Crown Witnesses.	10 Edw. VII. c. 42.
" 106. Estreats.	10 Edw. VII. c. 43.
" 107. Appropriation of Fines.	7 Edw. VII. c. 26.
" 108. Remission of Penalties.	
" 109. Justice in Unorganized Districts, ss. 55-73.	10 Edw. VII. c. 32, ss. 238-9.
" 110. Government of Vicinity of Niagara Falls.	10 Edw. VII. c. 44.
" 111. Laws of England.	10 Edw. VII. c. 45.
" 112. Mortmain and Charitable Uses.	9 Edw. VII. c. 58.
" 113. Escheats and Forfeitures.	9 Edw. VII. c. 57.
" 116. Powers of Attorney.	10 Edw. VII. c. 47.
" 117. Swarms of Bees.	10 Edw. VII. c. 48.
" 118. Aliens.	10 Edw. VII. c. 49.
" 120 Petty Trespasses.	10 Edw. VII. c. 50.
" 121. Mortgages of Realty.	10 Edw. VII. c. 51.
" 122. Estates Tail.*	10 Edw. VII. c. 52.
" 124. Short Forms of Conveyances	10 Edw. VII. c. 53.
" 125. Short Forms of Leases.	10 Edw. VII. c. 54.
" 126. Short Forms of Mortgages.	10 Edw. VII. c. 55.
" 127. Devolution of Estates.†	10 Edw. VII. c. 56.
" 128. Wills.	10 Edw. VII. c. 57.
" 129. Investments by Trustees.	9 Edw. VII. c. 59.
" 133. Limitations as to Realty.	10 Edw. VII. c. 34.
" 134. Vendors and Purchasers.	10 Edw. VII. c. 58.
" 135. Quieting Titles.	10 Edw. VII. c. 59.
" 136. Registration of Deeds.	10 Edw. VII. c. 60.
" 139. Ferries.	9 Edw. VII. c. 60.
" 144. Time.	10 Edw. VII. c. 62.
" 145. Mercantile Law.	10 Edw. VII. c. 63.
" 146. Written Promises and Acknowledgments, ss. 1-5.	10 Edw. VII. c. 34, ss. 55-57.
" 147. Assignments and Preferences	10 Edw. VII. c. 64.
" 148. Chattel Mortgages.‡	10 Edw. VII. c. 65.
" 150. Goods entrusted to Agents.	10 Edw. VII. c. 66.
" 151. Limited Partnerships.	10 Edw. VII. c. 67.
" 152. Registration of Partnerships	10 Edw. VII. c. 68.
" 153. Mechanics' Liens.	10 Edw. VII. c. 69.
" 154. Woodmen's Liens.	10 Edw. VII. c. 70.
" 155. Wages of Workmen on Public Works.	10 Edw. VII. c. 71.

*Sections 17-19 are not repealed.
†Sections 22-58 are not repealed.
‡Section 41 is not repealed.

R.S.O. Vol. 1.	The Revised Statute appears in:
Ch. 156. Priority of Wages.	10 Edw. VII. c. 72.
" 157. Master and Servant.	10 Edw. VII. c. 73.
" 158. Trade Disputes.	10 Edw. VII. c. 74.
" 164. Dower.	9 Edw. VII. c. 39.
" 175. Notaries.	9 Edw. VII. c. 63.
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" 223. Municipal Act.	3 Edw. VII. c. 19 and amendments.
" 224. Assessment.	4 Edw. VII. c. 23. 10 Edw. VII. c. 28.
" 287. Game Protection.	63 Vict. c. 49 and amendments.
" 288. Fisheries.	63 Vict. c. 50 and amendments.
" 292. Public Schools.	1 Edw. VII. c. 39 and amendments.
" 293. High Schools and Collegiate Institutes.	9 Edw. VII. c. 91.
" 304. Industrial Schools.	10 Edw. VII. c. 105.
R.S.O. Vol. 3.	
" 322. Quarantine, s. 1.	9 Edw. VII. c. 39, s. 2.
" 324. Certiorari, s. 37.	8 Edw. VII. c. 34, s. 2.
Limitations, ss. 38-44.	10 Edw. VII. c. 34.
" 331. Real Property, s. 6.	9 Edw. VII. c. 39, ss. 2, 3.
Section 8.	10 Edw. VII. c. 57, s. 10.
Sections 34-35.	10 Edw. VII. c. 52.
" 332. Accumulations.	10 Edw. VII. c. 46.
" 333. Mortmain and Charitable Uses.	9 Edw. VII. c. 58.
" 335. Distribution of Estates.	10 Edw. VII. c. 56, ss. 30-32.
" 337. Executors and Administrators, ss. 1-9.	10 Edw. VII. c. 31.
" 341. Lunatics.*	9 Edw. VII. c. 37.

*Section 3 is not repealed.

Flotsam and Jetsam.

The King, on the advice of the Secretary of State for the Home Department, who is the person held responsible in the premises, as an act of clemency granted the following remission of sentence to all convicted prisoners in the United Kingdom who on the 23rd day of May, 1910, were still to serve more than one month of their sentences for penal servitude. To those who have one month or more still to serve, one week; to those who have one year or more, one month; to those who have three years or more, two months; to those who have five years or more, three months.