RECENT CASES.

ATTORNEYS—ADMISSION.—In Hooper v. Bradshow, 231 Pa. 485 (1911) the Act of May 8th, 1909, P. L. 475, which provides that admission to practice as an attorney before the Supreme Court shall of itself operate as an admission to the bar of every other court of this commonwealth, was sustained. The court decided that the statute was not a legislative interference with judicial power, in violation of Art. V, sec. 1 of the State Constitution. The opinion treats as *obiter dicta* what Paxson, C. J., said in Splane's Pet., 123 Pa. 527 (1889), as to a similar act being a legislative encroachment upon the functions of the judicial department. The effect of the principal case is to make inoperative as to members of the Supreme Court local rules of court requiring residence in the county, or registration in a local office, for admission. But to each court is expressly reserved the decision as to an applicant's moral fitness.

A long line of decisions has established that the admission of an attorney to practice before a court is a judicial act. Breckenridge v. Judges, 1 S. & R. 187 (Pa. 1814); Splane's Pet., *supra*. The court affirmed this proposition, but interpreted the Act as merely declaring "what effect is to be given to a purely judicial act of this court in directing the admission of an attorney to practice before it." It is submitted that this interpretation in effect admits the power of the legislature to regulate admissions to the lower courts, but not to the Supreme Court of the State.

A few states have flatly denied the right of the legislature to interfere in this matter. *Ex parte* Secombe, 60 U. S. 9 (1856); *Re* Day, 181 Ill. 73 (1899); *Re* Leach, 134 Ind. 665 (1893). But a greater number of courts have expressly recognized the power of the legislature to control the manner, terms, and conditions of an attorney's admission to practice. See cases cited in brief of counsel in *Re* Brauth, 70 N. J. L. 537 (1904); Weeks' Attys. (2d ed.) p. 141; 1 Pol. & Mait. His Eng. Law, p. 191, *et seq.* One case went to the extent of denying the court power to inquire into the moral character of an applicant. *Re* Applicants, 143 N. C. 1 (1906). Other courts have refused to pass upon the constitutional question. *Re* Goodell, 48 Wis. 693 (1879). And the New York cases assert that the admission of an attorney is a judicial act; but expressly recognize the power of the legislature to determine the qualifications for admission. Application of Cooper, 22 N. Y. 67 (1860).

BILLS AND NOTES—LIABILITY ON FORGED CHECK.—In First National Bank of Cottage Grove v. Bank of Cottage Grove, 117 Pac. Rep. 293 (Ore. 1911), the drawee of a check sought to recover the amount of the check from a holder in due course on the ground that the signature of the drawee was a forgery. It was held that by payment of the check, the plaintiff bank had put an end to it as a negotiable instrument and that there could be no liability on the part of the defendant as indorser to repay the amount of the check.

This case presents anew the question raised in Price v. Neal, 3 Burr 1354 (1762), over which there has been such a conflict of authority. The court goes into a careful review of the authorities showing that the doctrine of Price v. Neal is still generally followed. But it seems to err in its leniency; for some of the cases cited as supporting the contrary doctrine, upon examination, seem to affirm it. Danvers Bank v. Salem Bank, 151 Mass. 280 (1890); Tedham Bank v. Everett Bank, 177 Mass. 392 (1901). For an interesting discussion of the question involved see "The Doctrine of Price v. Neal," by James Barr Ames, 4 Harv. L. R. 297 (1891). See also 10 L. R. A. N. S. 49-74.

The Negotiable Instruments Law has succeeded in bringing about greater uniformity in the law in this particular, but even legislative expression has not been sufficient to overthrow the bias of some courts against Lord Mansfield's famous decision. See "The Uniform Negotiable Instruments Law. Is it Producing Uniformity and Certainty in the Law Merchant?" by Crawford D. Hening, 59 Am. Law. Reg. 471 (1911).

The decision of the Oregon Court seems consistent with the decision of the better jurisdictions before and after the Negotiable Instruments Law.

BILLS AND NOTES—NEGOTIABILITY.—Defendant ordered certain produce from a firm of merchants, concluding the written order with a promise to pay to the firm, or order, the full value of the goods. The firm endorsed the note to plaintiff for value. The lower court refused to charge that the note was not negotiable, but the Superior Court reversed the judgment and ordered a verdict in favor of the defendant. Neyens v. Port, 46 Pa. Sup. 428 (1911).

It is clear that it was necessary for the plaintiff to comply with the defendants' request to ship the goods ordered, before the defendants could be held on the note. Their obligation to pay was subject to a contingency on account of which the paper was rendered non-negotiable. While the question of the effect of marginal notes upon the negotiability of a written instrument is not well settled, the law in regard to time of payment, sum to be paid, and obligation to pay is well established. The decision in the case above is in line with the general law. Ernst v. Steckman, 74 Pa. 13 (1873); Killam v. Schoeps, 26 Kan. 310 (1881); Costello v. Crowell, 127 Mass. 293 (1879); Husband v. Eppling, 81 Ill. 172 (1876); Post v. R. R. Co., 171 Pa. 615 (1895).

Plaintiff in Neyens v. Port, *supra*, contended that the note was a negotiable instrument under the provisions of the Act of May 16, 1901, Art. I, sec. 3, which provides that, "An unqualified order or promise to pay is unconditional within the meaning of the Act, though coupled with a statement of the transaction which gives rise to the instrument." The court, however, held the contention not well founded, basing the decision upon the final sentence of the same section of the statute which reads: "An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect."

BREACH OF PROMISE TO MARRY—DEFENSES—MITIGATION OF DAMAGES.—In a breach of promise suit by a man against a woman, defendant pleaded that he had secured her promise to marry by false representations as to his financial standing; that he had secured money and goods from various persons upon false representations; that he had repeatedly lied to her; and that he had pawned the engagement ring she had given him. *Held*, that mere undesirable traits or objectionable characteristics will not of themselves constitute a defense. They may only be pleaded in mitigation of damages. But it does not always require such misconduct by one of the parties as would justify a divorce to justify a breach of promise to marry; and bad faith or false representations by the plaintiff will be a good defense to an action for the breach. Gross v. Hochstein, 130 N. Y. Suppl. 315 (1911).

This is in accord with the general doctrine on this subject. The plaintiff's general bad character may be shown in mitigation of damages. Van Storch v. Griffin, 71 Pa. 240 (1872). And grossness of manners and maliciousness of character, while no bar to an action for breach of promise to marry must be considered in assessing damages. Berry v. Bakeman, 44 Me. 164 (1857). So also, incompatibility of temperament and incurable repugnance. Goddard v. Westcott, 82 Mich. 180, 189 (1890).

There are a few cases that go further than this, but they have not been followed. In Morgan v. Yarborough, 5 La. Ann. 316 (1850), the bad general reputation of the plaintiff was a good defense in a breach of promise

suit; and in Baddelly v. Mortlock, Holt N. P. 151 (1816), which, like the principal case, was a suit by a man against a woman, it was held that if a woman improvidently promises to marry a man, and he turns out upon inquiry to be a man of bad character, she is not bound to perform her promise. These decisions are *contra* to the general rule.

But where there has been actual misrepresentation or fraudulent concealment of facts by the plaintiff, it is everywhere conceded that it will be a good defense if pleaded. Van Houten v. Morse, 162 Mass. 414 (1894); Di Lorenzo v. Di Lorenzo, 174 N. Y. 467 (1903).

CARRIERS—DEVIATION—CONVERSION.—In McKahan v. American Express Co., 95 N. E. Rep. 785 (Mass. 1911), the defendant contracted to carry the plaintiff's horses to their destination in thirty-six hours, and to provide free transportation for an attendant. The plaintiff by accepting this contract placed a valuation of $75 a head on his horses and exempted the defendant from liability for injury unless due to the negligence of its servants. Due to a deviation from the agreed mode of carriage the horses arrived without an attendant and were eight hours late in unloading. The injuries they suffered were due to this delay. *Held*, that the deviation does away with the express contract at the election of the shipper; and he is not bound by the exemption or valuation therein.

The numerous citations in the opinion show abundant authority for this result, which is not limited to cases where, as here, the damage is the proximate result of the deviation. Thorley v. Orchis Steamship Co., 1 K. B. (1907) 660. Under the English view the ground of recovery in such a case is a new implied contract arising from the fact of shipment. Bahair v. Joly, Victoria & Co., 6 T. L. R. 345. The court in the principal case seem doubtful about this, but consider a ground of action in trover undoubted. In thus holding, the court are perpetuating the extreme Massachusetts doctrine of conversion which originated in Wheelock v. Wheelwright, 5 Mass. 103 (1809). The doctrine has been consistently followed in Massachusetts. Rotch v. Hawes, 12 Pick. 136 (Mass. 1831); Hall v. Corcoran, 107 Mass. 251 (1871). And it is considered by some writers to be supported by the weight of authority elsewhere: 26 L. R. A. 366. It is expressly repudiated in Doolittle v. Shaw, 92 Ia. 348 (1894). Under the view of this case, it would seem, some act is necessary, inconsistent with the plaintiff's right, and showing the defendant's intent to appropriate the property temporarily or permanently to his own use.

COURTS—PLACE OF HOLDING—COURTHOUSE.—A defendant, after being convicted of murder, appealed on the ground that the grand jury which returned the indictment was not lawfully in session. A statute of the state provided that "The regular term of the several circuit courts shall be held at the county seats of the respective counties." The court had convened at the county seat of the county, at the time fixed by law, but in a building not the regular courthouse. *Held*, that the particular building in the county town, in which court is held, is not a factor in determining the validity of the court's proceedings, so long as such building is located at the county seat. Beville v. State, 55 Southern Rep. 854 (Fla. 1911).

This case is directly in line with the almost universal view that where the law prescribes a "place" for holding court, but that "place" is merely a town or district, the particular building in which the court sits is immaterial. Jordan v. People, 36 Pac. 218 (Colo. 1894). As pointed out by Taylor, J., in Beville v. State, *supra*,—"Of course it is usual and best to have a regular courthouse at county seats for the holding of courts, etc.; but, if the county is temporarily without a regular courthouse, the courts may be regularly held in any building or even in a tent, at the county seat." In Litchfield Bank v. Church, 29 Conn. 137 (1860), court was adjourned from the courthouse to a hotel in the same town, where one of the jurors was sick, for the

purpose of taking the verdict. There are numerous instances of the holding of court in buildings other than the courthouse while the latter was out of repair. State v. Staley, 32 S. E. Rep. 198 (W. Va. 1899); Lee v. State, 19 S. W. Rep. 16 (Ark. 1872); Hudspeth v. State, 18 S. W. Rep. 183 (Ark. 1892).

CRIMES—HOMICIDE—JUSTIFICATION—DEFENSE OF ANOTHER.—A father, upon finding that a certain man had been having sexual intercourse with his daughter with her consent, shot and killed the man. He attempted to justify the killing as having been done in the defense of another. *Held*, that the homicide was justifiable if it was necessary in order to prevent further acts of fornication where the circumstances seemed to indicate that the illicit relationship would be continued. Miller v. State, 71 S. E. Rep. 1021 (Ga. 1911).

This most astonishing opinion sets forth distinctly new principles which cannot be supported upon precedent. The great weight of authority on the doctrine of the defense of others, is to the effect that one may not do more in defending another than that other may do in defending himself. Sherill v. States, 138 Ala. 3 (1903); Fletcher v. Com., 83 S. W. Rep. 588 (Ky. 1904); Adams v. State, 93 S. W. 116 (Tex. 1906).

Nor can the holding in the principal case be supported as a killing to prevent a felony. Fornication was not punishable at all at common law, and in the jurisdictions where it has been made a crime, it is only a misdemeanor. Furthermore, in order that the use of force to prevent the commission of a felony may be justified, the immediate commission of the crime must have been threatened. Previous Georgia cases have decided, however, that a father or a husband may kill to prevent the debauching of a child or wife where the criminal act is in progress or is just about to take place. Gossett v. State, 123 Ga. 431 (1905); Futch v. State, 90 Ga. 472 (1892).

The closest approach to the ruling in the case under consideration is Hathaway v. State, 32 Fla. 56 (1893), where it was held that a homicide could be justified if the defendant showed, from the evidence, that the surrounding circumstances made it reasonable for a cautious and prudent man to believe that his servant was in danger of losing her life or of receiving great personal injury at the hands of the deceased.

CRIMINAL PROCEDURE—EFFECT OF FAULTY INFORMATION.—In a criminal case in Colorado, in which the prisoner was already serving sentence, it was decided that the omission of the phrase, "against the peace and dignity of the people of the State," from the conclusion of the information, although required by a provision of the State Constitution, was not such a matter as to warrant the issuance of a writ of habeas corpus. Chemgas v. Tyman, Warden, 116 Pac. Rep. 1045 (Col. 1911).

The court was divided on the question; but the majority held that the omitted phrase was "a legal conclusion not entering into the charging part of the complaint," which, they said, was sufficient as it stood, to give the lower court jurisdiction. Therefore, they were of opinion that the judgment of the lower court could not be reviewed on habeas corpus proceedings. The minority thought that the lower court had exceeded its jurisdiction because of the defect in the information; that its judgment was therefore void; and that consequently the writ should not be refused.

It is conceded that if the judgment were void it might be reviewed on habeas corpus proceedings. Hurd on Habeas Corpus, Sec. Ed., p. 327; *Ex Parte* Bain, 121 U. S. 1 (1886); State v. Gray, 37 N. J. L. 368 (1875). But where the judgment is only erroneous, not void, the imprisoned person is not entitled to the writ. McLaughlin v. Etchison, 127 Ind. 474 (1890); Church on Hab. Corp., Sec. 370, and cases there cited. If the lower court had jurisdiction of the offence and the person, its judgment was only erroneous, not void. Williamson's Case, 26 Pa. 9 (1855); *Ex Parte* Bigelow, 113 U. S.

328 (1885). But a constitutional provision that an indictment or information shall conclude with the phrase in question makes its omission fatal, and the indictment void. Smith v. State, 139 Ala. 115 (1903); State v. Campbell, 210 Mo. 209 (1907); Williams v. State, 27 Wis. 402 (1871). If the indictment was void, as it appears to have been, the lower court was without jurisdiction of the person, and therefore of the case. 1 Bishop's New Crim. Pro., Sec. 651 (4). Hence it would seem that the decision in the principal case is against the weight of authority. For a good general reference on the propriety of a writ of habeas corpus, see note to Com. v. Lecky, 26 Am. Dec. 37, 40.

DISCOVERY—OBTAINING OPPONENT'S EVIDENCE.—In an action for damages for injuries caused by being bitten by defendant's dog, plaintiff alleged that the dog was, to the defendant's knowledge, in the habit of biting people. In answer to an order to give particulars, he stated the approximate dates on which the dog had bitten two different persons, and that these persons had verbally notified defendant of that fact. Defendant asked for, and obtained, an order on plaintiff to disclose the names of these two persons. From this order plaintiff appealed, and the court held that the interrogatories were inadmissible, being put merely with the object of ascertaining the names of witnesses by whom plaintiff intended to establish his case. Knapp v. Harvey, 2 K. B. 725 (1911).

The names of the persons in question were not material to the issues involved, and were apparently sought in order to make inquiries about them or to interview them. The rule under such circumstances is so clear that few cases have raised the question. In accord with the present decision, see Layton v. Nash, 2 Ch. 71 (1911); Eade v. Jacobs, 3 Ex. D. 335 (1878); and a dictum in Marriott v. Chamberlain, 17 Q. B. D. 154 (1886). But where the names of the other party's witnesses are material to the issue, aside from the fact that they are to be called to the stand, they may be obtained by interrogatories. Howe v. McKeman, 30 Beav. 547 (1862); Kelly v. Wyman, 17 W. R. 399; and Marriott v. Chamberlain, *supra*. This, however, it must be understood, is not because they are witnesses, but because of some entirely different fact which makes their identity important.

DIVORCE—GROUNDS—EXTREME CRUELTY.—A husband passed worthless checks, deceived his creditors, and in other ways conducted his commercial life so dishonestly as to cause his wife great mental anguish by heaping disgrace, publicity and humiliation upon her. She sued for divorce on the ground setting forth the above facts, but not alleging any offer by the husband to harm or annoy her directly. *Held*, mental suffering may, if sufficiently keen of "extreme cruelty," under a statute permitting a divorce on that ground, and protracted, result in physical pain that will warrant a divorce. But it must be induced by acts wilfully directed at the plaintiff. Conduct towards third parties is not sufficient, unless meant to annoy or injure the wife; or unless the third person stands in such relation to her that she will naturally be affected by such conduct, or the acts complained of were a violation of the marital relation. McClenahan v. McClenahan, 80 Atl. 677 (Del. 1911).

Although in the English Ecclesiastical Courts, and in most of the early decisions under the American statutes, mental suffering was looked upon with great suspicion when alleged as "cruelty," the law is now settled in favor of admitting it where it is so severe as to make physical cohabitation unsafe. As King, P. J., expresses it: "The cruelty is judged from its effects, not solely from the means by which these effects are produced." Butler v. Butler, 1 Parsons Eq. Cas. 329, 344 (1849). Practically nowhere must actual physical violence be proved.

It has been held in Texas that the fact that a husband committed a crime and fled to escape punishment, was not such an "outrage" upon the wife as to be ground for divorce under the statute. Lucas v. Lucas, 2 Tex. 112 (1847). But in New York, where there is no statutory provision making

conviction for crime a ground for divorce, it was held that a conviction and imprisonment for a felony was sufficient "cruelty" to the wife to warrant a divorce. Hoffmire v. Hoffmire, 2 Edw. Ch. 173 (1837). In most states conviction and imprisonment for a crime is, by statute, in itself ground for divorce. So in Pennsylvania, if the sentence be two years or more. Act of June 1, 1891 (P. L. 142).

Cases in which acts towards third parties are alleged as cruelty to the wife are infrequent. Cruelty towards the children of a wife by a former husband, and cruel and violent conduct in chastising slaves near the sick-room of the wife, were held not to be grounds for a partial divorce, if not charged as an intentional insult or indignity to her, in Everton v. Everton, 50 N. C. (5 Jones Law) 202 (1857). But cruelty to a child, for the purpose of annoying the mother, especially if she is present, has been held sufficient. Bramwell v. Bramwell, 3 Haggard Eccl. 618, 637 (1831). Friend v. Friend, 53 Mich. 534 (1884).

EVIDENCE—CRIMES—USE OF BLOODHOUNDS.—In State v. Adams, 116 Pac. Rep. 608 (Kan. 1911), bloodhounds were used in following tracks from the scene of a crime to the defendant's home and this evidence was allowed to go to the jury. There was evidence to show that the dogs had been properly trained, and that the tracks which they followed were surely those of the murderer.

This case is in line with a long list of decisions. Hodge v. State, 98 Ala. 10 (1892); Pedigo v. Comm., 103 Ky. 41 (1898); Parker v. State, 46 Lex. Crim. Rep. 461 (1904); Dickerson v. State, 82 N. E. 969 (Ohio, 1907); Wigmore on Ev., Sec. 177. The decisions agree that before the evidence of the dogs' actions can go to the jury it must be shown that the particular dog used was trained in tracking human beings; and that he was actually upon a track or trail which circumstances tended to show had been made by the guilty party. A person having personal knowledge, must testify to the reliability of the dog. State v. Dickerson, *supra*. In a few cases the evidence has been rejected because the various elements necessary to its admission were not present. State v. Moore, 129 N. C. 494 (1901). In only one case has the admissibility of bloodhound evidence been distinctly negatived. State v. Brott, 70 Neb. 395 (1905), and no precedents are therein cited. The argument of the court was based on the general unreliability of canine intelligence. Whatever may be said in favor of this point of view it does not represent the law; and the actions of reliable hounds in trailing suspects are generally admissible.

EVIDENCE—DEPOSITIONS—RULES OF COURT.—Nace v. Neff College of Oratory, 46 Pa. Sup. 237 (1911) deals with the admission in evidence of a deposition of a witness taken upon an order of court; and appears to have been decided very largely upon the authority of International Coal Co. v. P. R. R. Co., 214 Pa. 469 (1906). A rule of the court below provided that "Depositions of parties and witnesses, without regard to the circumstances of their being aged, infirm, or going witnesses, may be taken in advance of trial only upon an order of the court upon notice and cause shown." The plaintiff complied with the rule, and obtained an order of court to take the deposition. The defendant, however, objected to having it read; and the only question before the appellate court was the propriety of the lower court's order. *Held*, the order should not have been made.

Commissions to take testimony *de bene esse* could not issue in any case at common law. 3 Blk. Com. 383. However, by the Acts of May 23d, 1887, P. L. 158, and June 11, 1891, P. L. 287, "the deposition of a witness may be taken on a commission in accordance with the laws of this Commonwealth and the rules of the proper court." In addition in some states the residence of the witness at a "great distance from the place of trial will authorize the taking of his testimony by depositions. 13 Cyc. 841, and cases cited. In

other jurisdictions a prescribed distance is fixed. In Pennsylvania the practice of permitting the depositions of witnesses residing more than forty miles from the county seat is well established. Wallace v. Mease, 4 Yeates 520 (1808); 1 Tr. & H. Pr. Secs. 597, *et seq.* and 614.

It is submitted that the International Coal Co. case, *supra*, is not a parallel case. It decided that a rule of court providing that "a rule may be entered by either party to take the depositions of witnesses without regard to the circumstances of their being aged, infirm, or going witnesses, stipulating, however, eight days' notice to the adverse party is *contra* to law and void. The rule of court in the principal case expressly provides that "depositions * * * may be taken only upon an order of the court upon notice and cause shown." Here the defendant filed an answer to the plaintiff's petition, and after hearing the court made the order. See the majority opinion, p. 239. One cannot but agree with the President Judge in his dissenting opinion, that "when the court, after hearing, permits the taking of the deposition of a witness residing outside the county and beyond the forty miles limit, it is not reversible error unless abuse of discretion appear."

FRAUD—SCIENTER.—In New v. Jackson, 95 N. E. Rep. 328 (Ind. 1911) the plaintiff was induced to purchase stock in a certain farm by false representations as to its value, made by the defendant and others to whom he referred the plaintiff. The plaintiff recovered in an action for fraud, although unable to prove actual knowledge, by the defendant, that the representations were false. *Held*, that neither scienter nor reckless disregard for the truth are necessary elements of actionable fraud.

This appears to be the law of Indiana from a long line of cases beginning with Frenzel v. Miller, 37 Ind. 1, 17 (1871), and cited in the principal case. In Kirkpatrick v. Reeves, 121 Ind. 280, 282 (1889), the court said: "A belief in the truth of a statement does not always clear the person who makes it. * * * An unqualified statement that a fact exists * * * implies that the person who makes it knows it to exist. If the fact does not exist * * * the law will impute to him a fraudulent purpose." With the exception of the New England states, it would seem, Eastern jurisdictions are not in sympathy with this view, but still consider scienter a necessary component of actionable fraud. Boulder v. Stilwell, 100 Md. 343 (1905); 1 L. R. A. (N. S.) 258; Kountz v. Kennedy, 147 N. Y. 124 (1895), 29 L. R. A. 360; Lamberton v. Dunham, 165 Pa. 129 (1895). The prevalence of the view adopted by the principal case has been attributed to the influence of Massachusetts decisions denying the necessity of scienter. Chatham Furnace Co. v. Moffatt, 147 Mass. 403 (1888). The very fine distinction between certain cases of fraud and warranty of chattels has been thought responsible for this doctrine, which unfortunately has not been limited to actions by vendee against vendor. Cole v. Cassidy, 138 Mass. 437 (1885).

LIBEL—DEFAMATORY STATEMENTS—FAIR AND REASONABLE COMMENT.—The defendant, a newspaper, published a criticism of the stage and its morals in which it stated that a certain play, then being produced by the plaintiff, had been "hissed so soundly" upon its production in London that the plaintiff "had hysterics." The Supreme Court of Ohio held that these words were not actionable *per se* and could not be a ground of recovery of damages in the absence of proof of special damage. Cleveland Leader Printing Co. v. Nethersole, 95 N. E. Rep. 735 (Ohio 1911).

Defamatory words, accompanied by proof of special damage, are actionable in all jurisdictions. But there are two distinct lines of decision on the question of whether the words must, of necessity, be defamatory, if special damage is shown. In the following decisions, the courts required that the words be defamatory: Legg v. Dunlevy, 10 Mo. App. 461 (1881); Tenvillige v. Wands, 17 N. Y. 54; Wilson v. Cottman, 65 Md. 190 (1886); Kelly v. Partington, 5 B. & Ad. 645 (1833). *Contra:* Reynolds v. Bentley, 1 McMul. 16 (1840).

In the principal case, the court held that if the printed words amounted to a libel at all, it was a libel on the play and not upon the plaintiff. It has been held repeatedly that in the case of a libel upon property, in the absence of express malice there can be no recovery unless special damage is shown. Injury to the feelings of the owner of the property will not constitute such damage. In Kennedy v. Press Pub. Co., 41 Hun 422 (N. Y. 1886) libellous statements were made concerning a Coney Island saloon. It was held that this was not a libel upon the proprietor and was not, therefore, a good cause of action. In Marlin Firearms Co. v. Shields, 171 N. Y. 384 (1902), an unjust and even malicious criticism of a manufactured article was held to be not a libel upon the manufacturer. *Accord:* Tobias v. Harland, 4 Wend. 537 (N. Y. 1830).

It has always been held that fair and reasonable comments, although severe, may be published in a newspaper concerning anything which is made a subject of public exhibition by its owner. Such comments are in a sense privileged communications and no action will lie without proof of actual malice. Gott v. Pulsifer, 122 Mass. 235 (1877).

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—AS DEFENSE TO STATUTORY LIABILITY.—In Berdos v. Tremont & Suffolk Mills, 95 N. E. Rep. 876 (Mass. 1911), the plaintiff, a boy less than fourteen years old, was employed in a factory, contrary to statute, and was injured in the course of his employment. *Held,* "The ordinary rules of negligence are superimposed upon any liability claimed to grow out of the breach of the statute. * * * The statute does not deprive a defendant of the ordinary defenses, which are open to a defendant in that class of actions. There is nothing in the statute to indicate an intent that the defense of contributory negligence should be abolished."

The authority on which this part of the decision is based is Counter v. Couch, 8 Allen 436 (Mass. 1864), in which a child was injured by a sleigh which was not carrying the number of bells required by statute. It was held that the defense of contributory negligence was available. However, a different principle is involved in that case and the one under discussion. In the former, the statute infringed was a police regulation applying equally to all classes of persons, while in the latter, the statute dealt with, and was designed for the protection of, that class of persons only, of which the plaintiff was one. Marino v. Lehmaier, 173 N. Y. 530 (1903), reached a conclusion contra to that of the Massachusetts case. The view which it represents is well summarized by Brannon, J., in Nonnan v. Virginia—Pocahontas Coal Co., 69 S. E. 857 (1910). See also 59 Am. Law Reg. 412 (1911).

Owing to the fact that children under the age specified are presumably not cognizant of the dangers they encounter, it would seem that there is no midway ground between the two views presented, unless it be in the strength of the presumption. The question, like so many others in the same general class of case, is, at its base, a question of economics and the conflicting decisions represent the economic necessities of the particular jurisdictions in which they were rendered.

INSURANCE—INSURABLE INTEREST.—The Circuit Court of Appeals has decided, in Kopetovske v. Mutual Life Ins. Co., 187 Fed. 499 (1911), that a nephew who lives in the same house with his uncle and is associated with him in business, may, as a matter of law, have an insurable interest in his life; and that it is for the jury to say, as a matter of fact, whether the assignee of a policy had an insurable interest in the life of the insured.

In England this case would probably have gone the other way in view of the statute 14 Geo. III, c. 48, known as the "Gambling Act," under which the English courts require the beneficiary to have a definite pecuniary interest in the subject of the policy. Bliss, Insurance, 2nd Ed., Sec. 10. In this country the courts, recognizing the injustice of such a rule, are much more

liberal. No pecuniary interest is necessary. The American doctrine is that there may be an insurable interest in all cases where the person in whose favor the policy is made out or to whom it is assigned, may reasonably be expected to anticipate some benefit or advantage from the continuance of the life of the insurer. Warnock v. Davis, 104 U. S. 775 (1881). Some American courts, influenced by the English decisions, require a legal claim to form the basis of an insurable interest. Rambach v. Ins. Co., 35 La. Ann. 233 (1883); Stambaugh v. Blake, 22 W. N. C. 407 (1888). But the majority merely require the presumption of a wager to be rebutted, and hold that a moral obligation binding the insurer to the assignee, is enough. Cronin v. Vermont Ins. Co., 20 R. I. 570 (1898). In accordance with this tendency we find an insurable interest created between partners, Mut. Life Ins. Co. v. Luchs, 108 U. S. 498 (1884); between a young girl and one who has stood in *loco parentis* to her, Carpenter v. Ins. Co., 161 Pa. 9 (1894); between parties living as man and wife, although unmarried, Life Ins. Co. v. Paterson, 41 Ga. 338 (1870); and persons engaged to be married, Chisholm v. Capitol Life Ins. Co., 52 Mo. 213 (1873).

As to the particular relationship under discussion it is not generally a basis for allowing the interest; Prudential Co. v. Jenkins, 15 Ind. App. 297 (1895); Corson's Appeal, 113 Pa. 438 (1886); Singleton v. St. Louis Co., 66 Mo. 63 (1877); unless accompanied as in our principal case by other facts, namely, business association or pecuniary obligations. Mowry v. Home Ins. Co., 9 R. I. 346 (1869).

NEGLIGENCE—PROXIMATE CAUSE.—In Cohen & Co. v. Rittiman, 139 S. W. Rep. 59 (Tex. 1911), the plaintiff, in the court below, recovered damages for the death of his daughter on the ground that through the negligence of the appellant in maintaining a hide-curing business which created noxious odors and a poisonous atmosphere, his daughter's health had been so undermined that she was unable to resist an attack of malaria. On appeal it was held that the evidence was not sufficient to prove that the deceased had been so weakened by breathing the vitiated air that she was unable to resist the attack of malaria. The court intimates, however, that if the evidence had been sufficient to establish the allegation, the verdict of the lower court would have been upheld.

The rule is well settled that the defendant's negligence, in order to render him liable, need not be the sole cause of the plaintiff's injuries. To show that other causes contributed to the result complained of, is no defense in an action for negligence. Grand Trunk R. R. Co. v. Cummings, 106 U. S. 700 (1882); Sturgis v. Komitz, 165 Pa. 358 (1895); Powell v. Deveney, 3 Cush. 300 (Mass. 1849); Lynch v. Nardin, 1 Ad. & Ell. (N. S.) 29 (1841). Recovery must be allowed if it be shown that the defendant's act was wanting in ordinary care, and actively and directly aided in producing the injury. It need not necessarily have been the last or sole cause, but it must have been a concurring cause such as might reasonably have been expected to produce the result, under the attending circumstances. Railway v. Sweeney, 67 Tex. Civ. App. 173 (1894); Milwaukee R. R. Co. v. Kellogg, 94 U. S. 469 (1876).

If two agencies were involved, but it required both agencies to produce the result, or if both contributed thereto as concurrent forces, the presence and assistance of one does not exculpate the other, because it was also an efficient cause of the injury.

PROHIBITION—NATURE AND GROUNDS—ACT OF PUBLIC OFFICER.—In Nevada the district judge, as town-site trustee, conveys the title of town-site lots in public lands to the proper owners after they have paid the charges he is authorized to impose. If they fail to pay the charges, he may, after twelve months, sell the lots to the highest bidders. Comp. Laws Nev., Sec. 346. Respondent imposed upon certain lots charges in excess of those author-

ized by the statute, and, after the refusal of the owner to pay, was proceeding to dispose of them at public sale. *Held*, the act of the trustee in fixing the amount of the charge is an exercise of judicial power, so that a writ of prohibition will lie, to restrain him from selling the lots. State, *ex rel.* Schloss v. Stevens, 116 Pac. 605 (Nev. 1911).

The writ of prohibition is not infrequently invoked to restrain the abuse or usurpation of judicial power by an official whose duties are principally ministerial. In People v. Sherman, 66 N. Y. App. 231 (1901) the writ issued to restrain a mayor from hearing and determining charges preferred against a police commissioner. But the Nevada case is peculiar in that an administrative act, the sale of the lots, was to be performed as a consequence of a judicial act, fixing the amount of the charge, by the same official. The writ was allowed, to prohibit the administrative, not the judicial, act of the trustee, so that the case would seem to be contra to the repeatedly stated principle that the writ of prohibition will not lie to prevent the commission of a ministerial act, even of a judicial officer or body. Hockaday v. Newsom, 48 Mo. 196 (1871); State v. Gary, 33 Wis. 93 (1873). A writ of prohibition is to prevent the exercise by a tribunal possessing judicial powers, of jurisdiction in matters of which it has not cognizance, or to restrain it from exceeding its jurisdiction in matters of which it has cognizance. It will not lie to restrain a ministerial act. Thomson v. Tracy, 60 N. Y. 31 (1875).

TORTS—FORCIBLE DETAINER.—Defendant was lawfully in possession of a strip of land upon which stood a small shanty in which the plaintiff had an interest. Upon being informed that the building was an obstruction to the view of persons approaching its tracks, the defendant sought to have the plaintiff remove it. Negotiations failed, and the defendant instituted proceedings to have the pliantiff's tenant, who occupied the shanty, removed as a squatter upon the premises. In this proceeding the defendant obtained a judgment by default. A gang of men was thereupon set to work to tear down the building. Plaintiff arrived soon after the windows and roof had been removed, and demanded that the men leave the property. The men refused, insisting that they would continue to demolish the hut, and warning plaintiff of danger from a wall about to be knocked down. Plaintiff stepped out of the building to escape the falling wall. *Held,* no such force or violence as is necessary to constitute forcible detainer was shown by the plaintiff. Hollock v. N. Y. C. & H. R. R. Co., 95 N. E. Rep. 644 (N. Y. 1911).

The decision in this case follows closely the well established law of New York in regard to the elements necessary to prove forcible detainer. Fults v. Munro, 202 N. Y. 34 (1911), contains an exhaustive opinion on the subject. The old common law definition of forcible entry and detainer is incorporated in statutes in most of the states. These statutes hold, with New York, that actual violence, or threats of violence, is a necessary element. Griffin v. Griffin, 116 Ga. 754 (1902); Gipe v. Cummings, 116 Ind. 511 (1889); Shaw v. Hoffman, 25 Mich. 162 (1872); Taylor v. Scott, 10 Ore. 483 (1883). Some few jurisdictions hold, however, that actual violence amounting to a breach of the peace is not necessary. Hammond v. Doty, 184 Ill. 246 (1900); Paden v. Gibbs, 88 Miss. 274 (1906).

TRADING-STAMPS—LEGALITY.—A statute of Maryland prohibits dealing in trading-stamps for anything uncertain, or undetermined at the time of the acquisition of the stamps. The scope of this statute was recently tested in State v. Caspare, 80 Atl. Rep. 606 (Md. 1911). The facts presented an instance of the normal operations of the trading-stamp traffic. The stamp-books issued contained the following provision: "We have tried to confine this list to such articles as can be supplied indefinitely; but the styles and demands of the time are constantly changing, and it may occasionally happen

that an article shown and described is discontinued. The articles and value, however, are subject to change without notice." The State contended that because of this provision, it could be said that the article to be received by the holder of the stamps was undetermined, uncertain, and unknown to him at the time of his purchase. But the court overruled this contention. The decision went on the ground that the uncertainty, to be illegal, must be tantamount to chance, and that whatever uncertainty there might be in this case arose entirely from the exigencies of the business, and not as result of any attempt to appeal to the gaming instinct.

The decision is well in accord with the tendency of the courts. Thus, it is invariably held that trading-stamps are not rendered illegal by statutes against lotteries and gift-enterprises. State v. Shugart, 138 Ala. 86 (1902). The anti-trading-stamp acts that have been passed in many states, have, in practically every case, been held unconstitutional as violating the fourteenth amendment. People v. Gillson, 109 N. Y. 389 (1888); State v. Dalton, 22 R. I. 77 (1900). There seems, therefore, to be no doubt today but that the trading-stamp scheme is a legitimate enterprise.

TROVER AND CONVERSION—WHAT CONSTITUTES.—In Lee Tung v. Burkhart, 116 Pac. Rep. 1066 (Or. 1911), the owner of a building which she let to plaintiff for business purposes, was ordered by the municipal authorities to tear it down. Upon refusal of the tenants to remove their goods, defendant placed the goods in a warehouse, to the plaintiff's account, and gave the storage receipt to the plaintiff's attorney to be delivered to the plaintiff. This was held not to constitute conversion.

In the course of its opinion the court quoted several definitions of conversion, as follows: "A conversion is any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it." Ramsby v. Beezley, 11 Or. 49 (1883). "Wrongful force is no conversion where it is employed in recognition of the owner's right, and with no purpose to deprive him of his right, temporarily or permanently." Cooley on Torts (3d Ed.) 847. "It has never yet been held that the single act of removal of a chattel, independent of any claim over it, either in favor of the party himself or any one else, amounts to a conversion of the chattel." Fouldes v. Willoughby, 8 M. & W. 540 (1841).

On the question of manual taking the court held, in strict accordance with the authorities, that it is not necessary to a conversion that there should be a manual taking of the thing in question. Cooley on Torts (2d Ed.) 524. Neither is every manual taking of the personal property of another a conversion. There must have been, on the part of the defendant, some unlawful assumption of dominion over the personal property involved, in defiance or exclusion of the plaintiff's rights, or a withholding of the possession from the plaintiff, under a claim of right or title inconsistent with that of the plaintiff. Thweat v. Stamps, 67 Ala. 96 (1880); France v. Gibson, 101 S. W. Rep. 536 (Tex. 1907).

WILLS—MEANING OF THE WORD "HEIRS."—The decision in Wallace v. Diehl, 95 N. E. Rep. 546 (N. Y. 1911), restricts the meaning of the word "heirs" to heirs of the body or direct descendants. Although the actual conclusion reached may have been correct, it does not appear to have been reached by reasoning along the lines of preceding cases. From the mass of cases in which this word has been interpreted comes the cardinal canon of construction that the intention of the testator is the first great object of inquiry and this, of course, is to be ascertained from the context of the will itself. Webster v. Morris, 66 Wis. 366 (1886); Furenes v. Stevertson, 102 Iowa 322 (1897). When unexplained and uncontrolled by the context, the word "heirs" must be interpreted according to its strict and technical import. Jarman on Wills, 5th Am. Ed., Ch. XL., and this is the person or persons in whom real estate vests by operation of law on the death of the

one who was last seized. Dukes v. Faulk, 37 S. C. 255 (1892). In the case of personalty, the same rule applies except that the person entitled is the next of kin instead of the heir-at-law, the common-law rule being subject of course to the intestate laws. Wingfield v. Wingfield, 9 Ch. D. 650. In the case under discussion, the decision proceeded on the ground that the word heirs must be confined to issue or descendants, and that it could not be extended to include remote descendants regardless of whether they would be entitled to take under the interstate laws. The dissenting opinion, after a careful examination of the will itself, comes to the conclusion that the testatrix intended to avoid leaving her estate to the very persons whom the strict interpretation mentioned, allowed to take.