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POSSESSORY TITLE TO LAND.

In the recent case of *Devault* v. *Robinson*, 18 O.W.N. 328, the Appellate Division gave its approval to the decision of Riddell, J., in *Rooney* v. *Petry*, 22 O.L.R. 101. The apparently conflicting decision of the English Court of Appeal in *Kinlock* v. *Rowlands* (1912), 1 Ch. 527, though it was brought to the attention of the Court, does not appear to have been referred to in the judgment. In the latter case the plaintiffs and defendants were owners of adjoining lands divided by a dry ditch or channel of an ancient watercourse; the true boundary between the properties being the centre line of the ditch. In 1894 the plaintiff built a wall leaving a strip between the wall and the centre line of the ditch unenclosed. The defendant claimed to have acquired title to this strip by possession, the only evidence of which was, that his cattle had been accustomed to graze up to the wall. In 1912, therefore, there had been 18 years possession of this kind, but Joyce, J., held that there had been no abandonment of possession of the strip by the erection of the wall, and that the plaintiff was entitled to judgment, and his decision was affirmed by the Court of Appeal (Cozens-Hardy, M.R., and Moulton, and Farwell, L.JJ.). In *Devault* v. *Robinson* the lands of the plaintiff and defendant adjoined. The plaintiff's house and the defendant's house were separated by a strip of land of about 4 or 5 feet wide, the paper title to which strip was in the plaintiff, but the strip had been used by the defendant between the house and the street as a passageway. At the rear of the plaintiff's house a fence had been erected in the line of the house and a gate across the strip at this point had been erected by the defendant so as to enclose that part of the strip to the north thereof as the defendant's own property for upwards of ten years, and there was practically no dispute as to the defendant having acquired a possessory

title to that part of the strip, but between the gate at the rear of the plaintiff's house and the rest of the strip to the south was unenclosed and the main contention in the action was in regard to this part of the strip over part of which the eaves of the plaintiff's house projected. The defendant since 1899, at first as tenant of the adjoining lot, and subsequently as owner in fee thereof, had used the strip as a way to the part he had fenced off in the rear and had apparently acquired an easement therein; but the defendant in fact claimed, and the Court allowed his claim, to have a possessory title to the whole of the strip in fee simple. So far as the part of the strip abutting on the street was concerned, and which was bounded in part by the wall of the plaintiff's house, the case bore a strong resemblance in its facts to those in *Kinloch* v. *Rowlands*.

In the Canadian Case, the Divisional Court (Meredith, C.J.O., and Maclaren, Magee and Ferguson, JJ.A.) held that the defendant's possession was sufficient to extinguish the plaintiff's title to the whole of the strip, even as to that part overhung by the eaves of the plaintiff's house, but "without prejudice to any easement the plaintiff might have acquired or retained" over the land in dispute in respect of the overhanging eaves. But it is needless to say, a man cannot acquire an easement over his own land. So long as the strip remained the plaintiff's land, the eaves of his house overhung the plaintiff's own land, and consequently the right to so maintain there was in no sense an easement, but a right incident to the possession of his land. The easement could only begin where the title of the plaintiff to the underlying strip ceased to be the plaintiffs'; but in order to give him an easement, without an express grant, twenty years undisturbed enjoyment would be necessary, and in this case the enjoyment of the right to maintain the eaves as an easement only began in 1909, and consequently at the time of action the rights to an easement had not matured, but having regard to the maxim *cujus est solum ejus est usque ad cœlum*, it would perhaps be more correct to say that as to that particular portion of the column of air occupied by the eaves of the plaintiff's house the defendant had not acquired possession, a position which may perhaps be supported by the

decision of the Supreme Court of Canada in *Iredale* v. *Loudon*, 40 S.C.R. 313, where it was held that a tenant might acquire a statutory title to the possession of a room reached from the street by a stairway notwithstanding that the owner of the land had possession of all the rest of the house above and below the room in question; so that in that case the tenant acquired, according to the decision of the Court, a possessory title to a sort of a castle in the air, he had no right to the air or land beneath the room, and none to the air above the room in question, but was held to have acquired a possessory title in that particular strata wherein the room was situate. If his view of the rights of the parties is correct then the saving of the plaintiff's rights as to an easement in *Devault* v. *Robinson* was unnecessary because as to that part of the *locus in quo* occupied by his eaves he was in possession, and his ownership had not been extinguished by the defendant's possession of the surface of the underlying strip of land. According to sec. 2 (c) of the Limitations Act, land includes messuages. A house is a messuage, and the eaves of a house seem consequently included in that term as being part of a messuage; and it is clear that as to this part of the plaintiff's messuage, no promissory title had been acquired.

How far *Devault* v. *Robinson* is in conflict with *Kinloch* v. *Rowlands* it is somewhat difficult to determine. Supposing no wall had been erected in the latter case, the grazing of the defendant's cattle beyond the centre line of the ditch would have given him no title; and the Court held that the erection of the wall made no difference. In the *Devault* case it is not clear by whom the fence between the plaintiff's and defendant's properties was erected, but the strip of 4 or 5 feet between the houses of the plaintiff and defendant appears to have been used as a passageway by the defendant since 1899, it is therefore probable that he had acquired an easement therein; but we venture to doubt whether his possession, having regard to the case of *Kinloch* v. *Rowlands*, was sufficient to give him the fee in that part of the strip which was not actually enclosed. One test is, could the plaintiff have brought an action of ejectment? Would not the defendant be able to say I am not in possession of the land, it is open and

unfenced? The utmost that could be said would be that he was from time to time trespassing thereon, but an action of ejectment does not lie against an occasional or even an habitual trespasser.

RESTRAINTS ON ALIENATION.

In the recent case of *Re Gooderham*, 47 C.L.R. 178, it seems to have been concluded both by counsel and the Court that a restraint on alienation, except by will, is an invalid restraint and null and void. No authorities are cited on this point which seems strange especially as there are several decisions in Ontario to the contrary. There is for instance the decision of the Divisional Court: *In re Winstanley* (1884), 6 Ont. 315, followed by Boyd, C., *Re Northcote* (1889), 18 Ont. 107; and by Street, J., *Re Bell* (1899), 30 Ont. 318; and see *Martin* v. *Dagineau* (1906), 11 O.L.R. 349. In *Heddlestone* v. *Heddlestone* (1888), 15 Ont. 280, MacMahon, J., came to a contrary conclusion, but *Re Winstanley, supra*, was not cited to him, and he clearly had no authority to overrule a decision of a Divisional Court expressly in point; and in the subsequent case of *Re Porter* (1907), 13 O.L.R. 399, Britton, J., refused to follow the decision of MacMahon, J., and followed *Re Martin* v. *Dagineau, supra*, and his decision was affirmed by a Divisional Court. So that there appear to be two decisions of Divisional Courts, viz., *Re Winstanley* and *Re Porter* in favour of the proposition that a restraint of alienation, except by will, is a valid and effectual restraint.

In England there appear to be two fundamentally conflicting decisions, viz., *Re Macleay* (1875), L.R. 20 Eq. 186, where Sir Geo. Jessel, M.R., held that there may be a valid limited restraint on alienation; and *In re Rosher, Rosher* v. *Rosher* (1884), 26 Ch. D. 801, where Pearson, J., in effect held that all restraints against alienation are repugnant, and null and void. The Courts of Ontario as a rule have preferred the former to the latter decision.

We conclude therefore that the assumption that a restraint of alienation, except by will, can hardly be said to be so clearly invalid as not to be open to debate.

The Supreme Court of Canada in *Blackburn* v. *McCallum*, 33 S.C.R. 3, held that a restraint against all alienation cannot be made valid by limiting the time within which the restraint is to be effective; and it is possible to argue that a restraint of all alienation except by will comes within that decision, because it is virtually a restraint against all alienation limited to the lifetime of the devisee; but we are not aware that there has been any judicial decision binding on our Courts to that effect. On the other hand, it may be reasonably contended that this is not a total, but only a partial restraint against alienation, and therefore not within the rule laid down in *Blackburn* v. *McCallum*.

The question is one which, having regard to the cases, seems to be in an extemely unsatisfactory condition.

LORD DURHAM.

Among all the statesmen of England there is none to whom Canada and all our colonial possessions owe a deeper debt of gratitude than to the first Earl of Durham. The problem of how best to govern the overseas possessions of Great Britain was in his day one still awaiting a satisfactory solution and it was one that was ultimately mainly solved by the adoption of his suggestions.

In 1838, when he came to Canada to make inquiry for a report on the political conditions of the country, there had been recent rebellion against the constituted authorities, both in Upper and Lower Canada; and the great difficulty that British statesmen had to contend with was the fact that while the colonists were supremely dissatisfied with their political condition neither they nor the statesmen of Great Britain had any clear ideas as to what was the proper remedy for their discontent.

The system theretofore prevailing in both the Canadas was shortly this: the Governor of the Province was more or less autocratic, but he appointed an Executive Council whose advice he might accept or reject as he pleased. This Council was considered to be responsible solely to the Governor. The legislative authority was vested in an Upper and Lower House; the members of the

Upper House were nominated by the Crown and those of the Lower House were elected by popular vote.

In Upper Canada the Legislature had acquired a certain power over the finances, but the Government or Executive Council was not responsible to it and the Legislature therefore lacked that control over the Government which the House of Commons enjoyed in England. It was thought at that time that colonies should be governed in accordance with the views of the Home Government and not necessarily in accordance with the views of the colonists.

In Lower Canada a similar state of affairs existed. In Upper Canada the Executive Council was regarded as, and called a "family compact" and one of the chief grievances of that Province appears to have been due to the feeling that this "family compact" was prone to monopolize the offices of the Crown, and to be too intent on furthering the interests of themselves and their friends. In Upper Canada, too, the question of the Clergy Reserves had come to be warmly agitated, and the Imperial Act authorizing them was regarded very widely as making an unjustifiable appropriation of the public lands of the Province for the aggrandizement of one particular religious organization, and that not the most numerous one. While in Upper Canada the causes of discontent were mainly political, in Lower Canada it appeared to Lord Durham that the racial question was very largely the occasion of unrest, and in that Province the causes of discontent were mainly due to the efforts of French and English to gain ascendency over each other.

The disposition of the Crown Lands was also found to be a fruitful source of jobbery throughout Canada.

It was to try and find some way out of this political mess that Lord Durham was sent to Canada; and his celebrated report set forth both the results of his inquiries into the politics of the Country, and also his suggestions for overcoming the difficulties which he found to exist in the way of peace and prosperity.

His suggestions included first the application to Canada of the English system of Ministerial responsibility to the Provincial Parliament and the committing to Canadians themselves

the task of government without in any wise impairing the prerogatives of the Crown and it is along these lines that the political development of Canada has since taken place.

He also insisted that the wholesale jobbery in the Crown Lands must be put an end to, and that a system of sale should be adopted freed from the red-tape methods which had previously prevailed. But his suggestion that their administration should be confided to an Imperial authority was very properly rejected. He pointed out with fairness and justice the circumstances which rendered the Imperial Act authorizing the Clergy Reserves unfair to the population generally, and which necessitated its repeal and the leaving to the Canadian Parliament the disposition of the Reserves which had been actually made. He also pointed out the necessity of establishing a municipal system which would enable the various municipalities to legislate for themselves in matters of a purely local nature, and thus relieve the Parliament of a multitude of petty local affairs; and he declared that the establishment of municipal institutions for the whole country should be made a part of every colonial constitution. We who are accustomed to the fruition of this suggestion can well appreciate what a boon it is.

With regard to Lower Canada he was of the opinion that its best interests would be served by measures which promoted the rapid Anglicizing of its people. The Norman Conquest had proved in the Mother Country that the assimilation by the English people of the Norman conquerors was not an impossibility. To Lord Durham it may have seemed possible that a like assimilation and almalgamation of races could, and should, take place in Lower Canada. But, unfortunately for Lord Durham's views in this respect, the reverse has happened and the English, instead of absorbing the French, have themselves to a large extent been absorbed by the French, and so far as intermarriage has taken place between the two races it has rather resulted in the increase of French than English. It is of course to be remembered that in Lower Canada the French from the first were largely in the majority, and that they have proved themselves to be an extraordinarily prolific race, but notwithstanding that

Lord Durham's views have not been, nor are likely to be realized in this respect, they nevertheless appear to be sound and the segregation of the people of Quebec from the rest of the people of Canada serves to put the people of that Province in a position of disadvantage in regard to the rest of the Dominion, from which their language more or less cuts them off. At the same time the peculiar characteristics of the people of that Province, their culture, their religious devotion, their thrift, and industry are a valuable asset in the life of the Dominion not to be despised, even though not so beneficial for the common good as they might be, if exercised in a wider field than the limits of one Province.

Lord Durham was strongly impressed with the desirability of a federal union of all the British North American Provinces, though on maturer considerations he came to the conclusion that such a step would be premature, he therefore limited his suggestion in that respect to the reunion of the Canadas under one Government, but with power to the other colonies to come into the union which was the course immediately adopted, but it was not until 1867 that the wider project was accomplished.

He also insisted that no money votes should be allowed to originate without the previous consent of the Crown. The adoption of which suggestion has put a stop to the wholesale waste of public funds which previously prevailed.

Although Lord Durham very ably accomplished the task for which he was sent out, his mission ended unfavourably for himself. In order to get rid of some political offenders in Upper Canada in as mild and gentle a matter as possible these men, about six in all, who admitted their guilt, and put themselves on the mercy of the Crown, were sentenced to banishment to the Island of Bermuda. This mild and gentle sentence however was *ultra vires* of the Governor. He might have sentenced them to transportation to a penal colony, but he had no authority to send them to Bermuda, nor had the Governor of Bermuda any authority to detain them there as prisoners. This objection when raised might easily have been overcome by the British Government had it been so disposed, but instead of standing by their servant they suffered him to be condemned for acting illegally in his office

and as a necessary consequence he resigned, and immediately returned to England. Notwithstanding his treatment by his superiors he nevertheless completed and delivered his report, which has ever since been regarded as setting forth the true principles regarding the government of colonies. He did not long survive his great work, for which in his lifetime he received little praise, and no reward whatever. He died in 1840 at the early age of forty-eight.

In the Province of Ontario we have in the Counties of Lambton and Durham, and in Lambton Mills and the Lambton Golf Club kept alive his family name and title, but while we have commemorated lesser men by erecting statues to their memory this great disinterested and able man we seem to have forgotten; and yet his spirit if conversant with things of earth, may well say with Sir Christopher Wren: *Si quæris monumentum circumspice.* For this broad Dominion is in a measure his everlasting monument.

CANADIAN BAR ASSOCIATION

PROGRAMME OF ANNUAL MEETING

September 1, 2 and 3; Chateau Laurier, Ottawa.

We are glad to be able to give to our readers the programme (subject to revision) of the proceedings at the Annual Meeting of the Association to be held in Ottawa on September 1, 2, 3.

It will be seen that it is one of more than usual interest and excellence. The Executive, under the able guidance of our Veteran President, Hon. Sir James Aikins, K.C., to whom we all owe a great debt of gratitude, has spared neither time nor labour in providing for the profession the following most inviting Bill of Fare:—

WEDNESDAY, SEPTEMBER 1ST.

10.00 a.m.—Opening Session.

Chairman—M. F. Ludwig, K.C., Vice-President for Ontario.

Address—His Excellency the Governor-General of Canada, The Duke of Devonshire, K.G.

Reply—Hon. W. F. A. Turgeon, K.C., Attorney-General of Saskatchewan.

President's Address—Sir James Aikins, K.C., LL.D.
Report of Council.
Appointment of Nominating and Resolutions Committees.
Paper—"Incorporation of the Association," Hon. John B. M. Baxter, K.C., D.C.L.
Discussion.

1.00 p.m.—Luncheon.

Address—Hon. William H. Taft, Representative of the American Bar Association.

2.30 p.m.—Afternoon Session.

Chairman—L. G. McPhillips, K.C., Vice-President for British Columbia.
Report on Legal Education by sub-committee on Standard Curriculum in the Common Law Provinces—D. A. MacRae, K.C., D.C.L., Dean of Faculty of Law, Dalhousie University, Vice-Chairman of Committee on Legal Education.
Discussion.

8.30 p.m.– Evening Session.

Chairman—Right Honourable Charles J. Doherty, K.C., LL.D., Minister of Justice.
Address—Right Honourable Viscount Cave.
Resolution proposed by Hon. W. E. Raney, K.C., Attorney-General of Ontario.

THURSDAY, SEPTEMBER 2ND.

10.00 a.m.—Morning Session.

Chairman—Colonel J. L. Ralston, K.C., D.C.L., Vice-President for Nova Scotia.
Company Law—Paper on "Constitutional Conflict Between the Dominion and the Provinces with Respect to Company Law," Thomas Mulvey, K.C., Under-Secretary of State.
Discussion.

1.00 p.m.—Luncheon.

Address—Right Honourable Sir Auckland Geddes, British Ambassador to the United States.

2.30 p.m.—Afternoon Session.

Chairman—R. B. Bennett, K.C., LL.D., Vice-President for Alberta.
Address—Louis S. St. Laurent, K.C., LL.D.
Legal Ethics—Report of sub-committee to prepare draft statement of principles of legal ethics—Hon. T. G. Mathers, Chief Justice of the Court of King's Bench of Manitoba.
Discussion.

Report of Nominating Committee.
Election of Officers and Council.

7.00 p.m.—Annual Dinner.

Chairman—The President.

Speakers—List not yet complete. It is expected that addresses will be made by Rt. Hon. Viscount Cave, Hon. William H. Taft, Hon. Arthur Meighen, Sir Lomer Gouin, Rt. Hon. Sir Robert Borden, F. Roy, K.C., E. W. Beatty, K.C., and others.

FRIDAY, SEPTEMBER 3RD.

10.00 a.m.—Morning Session.

Chairman—The Vice-President for Quebec.

Report of Committee on Uniform Legislation and Law Reform

Report of Committee on Administration of Justice—W. J. McWhinney, K.C., Convener.

1.00 p.m.—Luncheon.

Address—"Government of Laws, not of Men," Hon. Henry B. F. Macfarland, of Washington.

2.30 p.m.—Afternoon Session.

Chairman—The Vice-President for Prince Edward Island.
Report of Resolutions Committee.
Unfinished Business.
Social.

Further information for the guidance of those attending is given in the official circular issued by the Executive with the names of the three leading hotels and their rates.

A very attractive Programme of Entertainment is being arranged by the Ottawa Committee for the members and the ladies who may accompany them. Detailed announcements concerning this will be made in the final draft of the programme.

It is desirable that hotel accommodation should be reserved as far in advance of the meeting as possible.

The following are leading hotels in Ottawa:—Chateau Laurier, Russell Hotel, The Alexandra.

Further information may be obtained from E. H. Coleman, Esq. Acting Secretary and Treasurer of the Association, P.O. Box 124, Winnipeg.

It is expected that there will be a very large attendance of the Bar from all parts of the Dominion.

LIABILITY OF BANK FOR FAILING TO DETECT FORGERIES WHEN DEPOSITOR DOES NOT VERIFY BANK STATEMENT.

Does the fact that a depositor fails to verify his bank statement each month and examine his cancelled checks release a bank from liability for forgeries committed by an employe? The U.S. Circuit Court of Appeals (2nd Cir.) recently held that it does. *Hammerschlag Mfg. Co.* v. *Importers and Traders National Bank*, 262 Fed. Rep. 266. In this case it appeared that defendant permitted its bookkeeper to make out all checks which were then signed by the vice-president. Some of these checks were payable to bearer and intended to compensate the bookkeeper for petty cash items. These checks, after signing, were raised by the bookkeeper to larger figures and cashed at the bank. This practice continued for more than a year before it was finally discovered, upon which the plaintiff company sought to hold the bank liable for paying the checks which had been so raised. The bank claimed that since plaintiff corporation had made no complaint of the improper payment of checks on receipt of its monthly statements and cancelled checks, defendant was relieved of liability for checks paid more than a year previous to plaintiff's demand. The trial court took the case away from the jury, first, on the question of fact, whether the alteration was discoverable by reasonable care on the part of the bank; and second, on the question of law, whether plaintiff was not guilty of laches in failing to complain to the bank within 30 days after receipt of cancelled checks in accordance with the rule of the bank. The Court of Appeals, in affirming the trial Court's decision, decided both these questions in favor of the bank.

It is difficult to understand on what ground the trial Court felt bound to take the case from the jury on the question of fact as the evidence set out by the Court was conflicting. On the second point respecting plaintiff's negligence in failing to examine its cancelled checks, the position of the Court of Appeals, in sustaining the trial Court's action, raises an interesting question. The Court said:

"When the plaintiff sent its passbook to defendant to be balanced, it in effect demanded to be informed as to the condition of its account, and, when the balanced passbook and the vouchers were returned, the silence of the plaintiff respecting the returned vouchers and the entries in the passbook amounted to an admission on its part as to their correctness. The rigid responsibility imposed on banks must be maintained. It is equally important, however, that depositors who make negligent examinations of the accounts rendered to them by their banks should themselves sustain the losses which result from their own and not the bank's carelessness, and which would have been prevented if they themselves had exercised reasonable care. The plaintiff seeks in this case to hold the bank responsible for the payment of checks raised by its own employe, who was authorized by it to prepare the checks and to obtain the money on them, and over whose conduct no reasonable supervision was exercised."

There are several decisions to the effect that the depositor is bound personally or by an authorized agent, and with due diligence, to examine the passbook and vouchers, and to report to the bank without unreasonable delay any errors that may be discovered; and if he fails to do so, and the bank is misled to its prejudice, he cannot afterwards dispute the correctness of the balance shewn by the passbook. It is also held that if the duty of examination is delegated by the depositor to the clerk guilty of the forgeries, he does not so discharge his duty to the bank as to relieve himself from loss. *Critten* v. *National Bank*, 171 N.Y. 219, 63 N.E. 969, 57 L.R.A. 529; *Leather Manufacturers Bank* v. *Morgan*, 117 U.S. 96, 6 Sup. Ct. 657; *Meyers* v. *South-western National Bank.*, 193 Pa. 1, 44 Atl. 280, 74 Am. St. Rep. 672; *Morgan* v. *Trust Co.*, 208 N.Y. 218, 101 N.E. 871, L.R.A. 1915 D, 741; *First National Bank* v. *Allen*, 100 Ala. 476, 14 So. Rep. 335, 27 L.R.A. 426, 46 Am. St. Rep. 80.

The Court, however, goes further in its decision and holds that there can be no recovery even upon checks forged prior to the first balancing of the bank book after the forgery. The rule in New York and many States makes a bank liable for forged checks paid before the balancing of the pass book although as to

subsequent forgeries of the same character, they are not liable. The only limitation on this rule is that the bank shall not have lost any opportunity to obtain restitution. *Critton* v. *National Bank*, *supra*.

Our objection to the decision of the Court in the principal case is not to its statement of the law, but because it saw fit to take the case from the jury. The failure of the plaintiff to examine his checks did not, of itself, release the bank from liability for its own negligence. The question in such cases is a question of fact, to-wit, whether plaintiff's failure to examine his checks was a contributing cause of the forgery. Thus in *Leather Manufacturers Bank* v. *Morgan*, *supra*, the Supreme Court of the United States distinctly declared, that "if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account."

In other words, the question is always one for the jury, for the reason that when the plaintiff makes out a *primâ facie* case of forgery (as he did in this case) the burden of proof is on the defendant to establish his defence that plaintiff's negligence in failing to examine his passbook contributed to the forgery. Under such circumstances, there is no conceivable reason why the Court should take the case from the jury and give judgment for defendant as a matter of law. If the burden were on the plaintiff to shew that his negligence did not contribute to the forgery, it is easy to understand that the Court might take the case away from the jury but with the burden resting on the defendant this can hardly be justified. In the case of *Leather Manufacturers Bank* v. *Morgan*, the Supreme Court remarked, that "the question of the depositor's negligence in examining his returned passbook and vouchers was a question for the jury."

Moreover, as we understand the law on such cases the bank must prove not only that the negligence of plaintiff contributed to the forgery but that the forgery itself was of such a character as not to be easily detected. For, if the bank's officers, before paying the altered checks, could, by proper care and skill, have

detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account. *Leather Manufacturers' Bank* v. *Morgan*, 117 U.S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811.

The mistake of the Court in this case is in deciding a question of fact as a question of law. The question whether the forgery was discoverable or not by the exercise of reasonable care and the question of the effect of plaintiff's negligence were questions which must go to the jury after plaintiff has made out a *primâ facie* case by proving that the paper paid by the bank was not its paper and therefore not properly charged to its account.—*Central Law Journal.*

CONTRACTS BY LETTERS.

This subject, to which we recently referred, shews that a conveyancer has few difficulties greater than that of deciding if a correspondence or an apparent offer and acceptance form a complete contract. Solicitors and house or estate agents *primâ facie* have no authority to enter into contracts for sale or purchase on behalf of their clients or principals, but they are sometimes intrusted with this authority, and, though solicitors are naturally more cautious, the agents are naturally pleased to secure a purchaser and forget the dangers of an open contract. If the negotiations are carried on and the offer accepted subject to a contract, the tendency of the Courts nowadays is to construe this as an acceptance conditional on a proper contract being executed. Thus in the case of *Rossdale* v. *Denny* (noted 149 L.T. Jour. 428), where the offer was subject to a formal contract, Mr. Justice Russell held that it was a conditional offer, and pointed out that in a long line of cases an agreement "subject to" a formal or further contract had been held to be conditional. Again, in *Coope* v. *Ridout* (noted *ante*, p. 23) the offer for purchase was subject to title and contract, and matters went so far that a draft contract had been submitted to the vendor, who returned it with a note saying, "I am returning the draft. It seems to be all in order." Mr. Justice Eve held that no enforceable contract had been shewn. On the other hand, the

same judge held in *A. H. Allen and Co. Limited v. Whiteman* (noted *ante*, p. 23) that there was a concluded agreement, where the plaintiffs wrote: "We are prepared to accept your offer of this property agreeing to the price of £450. Kindly forward the contract in due course." In his Lordship's opinion the execution of a further contract was not a condition. Cases are frequently very near the line, but the principle is well laid down by Lord Parker in *Hatzfeldt* v. *Alexander* (105 L.T. Rep. 434; (1912) 1 Ch. 284). It is to the disadvantage of the vendor (as a rule) that an open contract should be deemed to have been concluded. It may be impossible for him to shew a forty years title, and there may be restrictions or easements affecting the property which he cannot remove, or can remove only at great expense. It is well then to recognise that an acceptance "subject to a formal" (or "further") "contract" does not make an enforceable contract. The agents of persons wishing to sell their property should be instructed to accept any offer of which they approve "as the basis of negotiation for but subject to A. and B. being able to agree the terms of an enforceable contract."—*Law Times*.

CONCURRENT USE OF TRADE MARKS;

By Russel S. Smart, B.A., M.E.

(ANNOTATION FROM 51 D.L.R.)

The rights as between two parties who use a trade mark concurrently have never been defined in Canada.

The Supreme Court of the United States in *United Drug Co.* v. *Theodore Rectanus Co.* (1918), 248 U.S. 90 at 97, said: "The asserted doctrine is based upon the fundamental error of supposing that a trade mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy. *Canal Co.* v. *Clark* (1871), 13 Wall. 311, 322, 20 L. Ed. 581; *McLean* v. *Fleming* (1877), 96 U.S. 245, 254, 24 L. Ed. 828. There is no such thing as property in a trade mark except as a right appurtenant to an established business or trade in connection with which the mark is employed. The law of trade marks is but a part of the broader law of unfair competition; the right to a particular mark grows out of its use, not its mere adoption; its function is simply to designate the goods as the product of a particular trader and to protect his goodwill against the sale of another's product as his; and it is not the subject of property except in connection with an existing business. *Hanover Milling Co.* v. *Metcalf* (1916), 240 U.S. 403, 412-414, 36 Sup Ct. 357, 60 L. Ed. 713, 6 T.M. Rep. 149.

The owner of a trade mark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly. See *United States* v. *Bell Telephone Co.* (1896), 167 U.S. 224, 250, 17 Sup. Ct. 209, 42 L. Ed. 144; *Bement* v. *National Harrow Co.* (1901), 186 U.S. 70, 90, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Paper Bag Patent Case* (1908), 210 U.S. 405, 424, 28 Sup. Ct. 748, 52 L. Ed. 1122.

In truth a trade mark confers no monopoly whatever in a proper sense, but is merely . . . a distinguishing mark or symbol—a protection of one's goodwill in trade by placing a distinguishing mark or symbol—a commercial signature—upon the merchandise or the package in which it is sold.

It results that the adoption of a trade mark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade. And the expression, sometimes met with, that a trade mark right is not limited in its enjoyment by territorial bounds, is true only in the sense that wherever the trade goes, attended by the use of the mark, the right of the trader to be protected against the sale by others of their wares in the place of his wares will be sustained.

Property in trade marks and the right to their exclusive use rest upon the laws of the several States, and depend upon them for security and protection; the power of Congress to legislate on the subject being only such as arises from the authority to regulate the commerce with foreign nations and among several States and with the Indian tribes. Trade Mark Cases, 100 U.S. 82, 95, 25 L. Ed. 550. (Points out Act of Congress limited to Interstate Trade.) (*Massachusetts* v. *Louisville T.M.* "Rex," a registered trade mark.)

This was following the earlier cases of *Hanover Milling Co.* v. *Metcalfe* (1916), 240 U.S. 403, 36 Sup. Ct. Rep. 357 at 360, in which their opinion was expressed as follows:

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another. *Canal Co.* v. *Clark*, 13 Wall. 311, 322; *McLean* v. *Fleming*, 96 U.S. 245, 251; *Amoskeag Manufacturing Co.* v. *Trainer* (1879), 101 U.S. 51, 53; *Menendez* v. *Holt* (1888), 128 U.S. 514, 520; *Lawrence M'fg. Co.* v. *Tennessee M'fg. Co.* (1891), 138 U.S. 537, 546, 11 Sup. Ct. Rep. 396.

This essential element is the same in trade mark cases as in cases of unfair competition unaccompanied with trade mark infringement. In fact, the common law of trade marks is but a part of the broader law of unfair competition. *Elgin Watch Co.* v. *Illinois Watch Case Co.* (1901), 179 U.S. 665, 674; *G. & C. Merriam Co.* v. *Saalfield*, 198 Fed. Rep. 369, 372; *Cohen* v. *Nagle* (1906), 190 Mass. 4, 8, 15, 2 L.R.A. (N.S.) 964; *S. A. & E. Ann. Cas.* 553, 555 558" (Reprd. p. 415), and cases to the effect that the exclusive right to the use of a trade mark is founded on priority of appropriation, 36 Sup. Ct. Rep., at 361. "But these expressions are to be understood in their application to the facts of the cases decided. In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question. But where two parties independently are employing the same mark upon goods of the same class, but in separate markets

wholly remote the one from the other, the question of prior appropriation is legally insignificant; unless at least it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

The following earlier decisions in the United States shew the development of the law:

Infringement—Right to injunction—Use of mark in different localities.

(U.S. Circuit Court, N.Y.). Complainant and its predecessors in Baltimore, and defendant and its predecessors in New York City, each for more than 30 years produced and sold a rye whiskey under the name of "Baltimore Club." Complainant's business was chiefly local and did not extend to New York City until shortly before the commencement of this suit, when it placed its goods in the market there. Defendant's business was larger, and whatever reputation or value attached to the name in New York was due to its efforts and its goods. *Held*, that complainant, even if conceded priority of use in the limited area of its business, had no standing to enjoin defendant's use in New York since that would be to further the deception of the public there, which it is the primary object of equity in such cases to prevent. (See Trade Marks and Trade Names, Cent. Dig. §93; Dec. Dig. §84, 88.) *Thomas G. Carroll & Son Co.* v. *McIlvaine & Baldwin Inc.* (1909), 171 Fed. 125.

Use of mark in territory where plaintiff's goods unknown—Not restrained.

(U.S. Circuit Court of Appeals, 7th Cir.) Complainant, an Ohio Milling company, since 1872 has used the name "Tea Rose" as a common-law trade mark for one of its brands of flour, but has never sold such brand in the territory southeast of the Ohio river comprising the States of Georgia, Florida, Alabama, and Mississippi, although it has recently made some effort to establish a trade there in other brands Defendant, without knowledge of its prior use by complainant, since 1893 has used the name "Tea Rose" for one of its own brands of flour in which it has built up an extensive trade in the States named, where the name has come to mean defendants' flour and no other kind. *Held*, that complainant was not entitled to an injunction to restrain defend nt from using the name in such territory. *Hanover Star Milling Co.* v. *Allen & Wheeler Co.* (1913), 208 Fed. 513.

First to adopt enjoined from unfair competition in territory—First occupied by one last to adopt.

(U.S. Supreme Ct., 1916.) Where it appeared that the plaintiff had through a long period of years established a valuable trade in the Southeastern States, particularly Alabama, in connection with the use of an alleged trade mark "Tea Rose," so that its mill in Illinois became known as the "Tea Rose Mill," and the defendant, though also a user of the mark "Tea Rose" for a considerable period, had but recently invaded the territory in question and by unfair means had attempted to cut into the trade of the plaintiff by selling flour under this mark in Alabama. *Held*, that the plaintiff is entitled to an injunction against defendant irrespective of its claim to affirmative trade mark rights in that territory and notwithstanding the

fact that The Allen & Wheeler Company, not involved in the suit, had used the same mark prior to either plaintiff or defendant in other territory, *Hanover Star Milling Co.* v. *Metcalfe*, 240 U.S. 403, 36 Sup. Ct. 357.

The same question has also arisen in England in the case of *Edge & Sons Ltd.* v. *Gallon & Sons* (1899), 16 R.P.C. 509; (1900), 17 R.P.C. 557. The facts in this case were as follows (17 R.P.C.): "In 1888 E. commenced to call his blue "Dolly," and it was ordered, invoiced and advertised thereafter as "Dolly." In 1894 a company was formed which took over the business of E. In 1898 the company commenced an action against G. & Son for supplying blue not being the plaintiffs' to persons ordering "Dolly Blue." The blue so supplied was blue manufactured by R. and bore R's trade mark, which consisted of a washing tub called in some parts a "Dolly" tub and in other parts a "Peggy" tub with a handle of a dolly or peggy stick projecting from it. R. had used this trade mark since 1871, and registered it under the Trade Marks Act in 1876. It was admitted that R's blue was called "Oval Blue" and was invoiced as "Oval"; but the defendants' case was that retail customers often asked for it as "Dolly Blue," both before 1888 and since, and that there had, in fact, been a concurrent use of the word "Dolly" to describe E's blue and R's blue. *Held*, at the trial, that the plaintiffs were entitled to an injunction. The defendants appealed to the Court of Appeal, who held that concurrent user of the term "Dolly" to denote Ripley's blue as well as the plaintiffs' was proved, and the judgment of the Judge at the trial was wrong. The appeal was allowed with costs above and below, and the plaintiffs' costs of the trial, which had been paid by the defendants, were ordered to be repaid to them, but without interest. The plaintiffs then appealed to the House of Lords. *Held*, by the House of Lords, that the concurrent user was proved, and the judgments of the Court of Appeal were right.

Under the Canadian Trade Mark and Design Act, R.S.C. 1906, ch. 71, sec. 11, the applicant is required to be entitled to the exclusive use of the trade mark.

In *Partlo* v. *Todd* (1888), 17 Can. S.C.R. 196, Ritchie, C.J., said at 199: "And this sec. 8, which is relied on as giving an absolute exclusive use, must be read in connection with the other provisions of the statute and it is quite clear that this exclusive use is only to attach when there is a legal registration."

"It is not the registration that makes the party proprietor of a trade mark; he must be proprietor before he can register," at p. 200. "I think the term 'proprietor of a trade mark' means a person who has appropriated and acquired a right to the exclusive use of the mark," at p. 201 . . . (See *McAndrew* v. *Bassett* (1864), 4 DeG. J. & S. 380 at 384.)

In the same case in the Appeal Court (1887), 14 A.R. (Ont.) 444 at 451, Hagarty, C.J.O., said: "I think the object of the Act was not to create new rights but to facilitate the vindication of existing rights . . . (cites early statutes). All this legislation is based upon the further protection of existing rights. Next year 24 Vict., ch. 21, was passed, for the first time establishing a register. It declares it expedient to make provision for the better ascertaining and determining the right of manufacturers and others to enjoy the exclusive use of trade marks claimed by them."

A distinction must be drawn between a trade mark which is a mark on goods and a trade name used on a hotel, store or establishment. A trade mark as such must be applied to a vendible article. (*McAndrew* v. *Bassett* (1864), 4 DeG.J. & S. 380.)

The distinction between trade marks and trade names is pointed out by Sebastian, 5th ed., p. 17, as follows:

"In imitations of trade names, again, used as such and not as trade marks on goods, there is a difference from trade mark cases proper: there is a false representation, but it is a representation, not that certain goods are certain other goods, but that a certain establishment is a certain other establishment, the object being that the one establishment should obtain custom intended for the other. Such cases are not cases of trade mark, not being concerned with marks placed on vendible articles in the market (*McAndrew* v. *Bassett*, 4 De G.J. & S. 380) but still the Court has to proceed on much the same lines.

All such cases, whether of trade mark or trade name or other unfair use of another's reputation, are concerned with an injurious attack upon the goodwill of a rival business; customers are diverted from one trader to another, and orders intended for one find their way to another. *Trade marks are really a branch of the goodwill of the business with which they are connected, representing it in the market, while the trade name over the shop represents it to the passer-by.* It is by the devolution of the goodwill that that of the trade marks is regulated; (822 of the Trade Marks Act, 1905; Rules 76-81 of the Trade Marks Rules, 1906; see also 70 of the Patents Act, 1883; and 82 of the Trade Marks Act, 1875); they are in fact included in, and valued as part of, the goodwill (*Hall* v. *Barrows* (1863), 4 De G.J. & S. 150); severed from it they cannot exist. (*Thorneloe* v. *Hill*, [1894] 1 Ch. 569.)

This distinction has been adopted very widely in the United States as the following case will show:

TRADE MARK GENERAL—TRADE NAME LOCAL.

(N.Y. Supreme Court.) A trade mark designates an article of commerce and is affixed thereto. It is thus general or universal accompanying the article, while the trade name applies to a business and is as a rule local. A trade mark can be infringed anywhere but not so with a trade name, the owner of which has an exclusive right thereto in his locality only. *Ball* v. *Broadway Bazaar* (1907), 106 N.Y. Supp. 249; 121 App. Div. 546.

THEORY OF PROTECTION OF TRADE NAMES.

Trade names are protected on the theory that, while the primary and common user of a word or phrase may not be exclusively appropriated, there being a secondary meaning or construction which will belong to the person who has developed it. *Sartor* v. *Schaden* (1904), 125 Iowa 696; 101 N.W. 511.

TRADE NAME IS LOCAL—SAME NAME MAY BE USED IN DIFFERENT LOCALITIES.

(Iowa, 1904.) A trade mark covers the limits of the jurisdiction granting the same and is protected therein, a trade name is of necessity local, and is based on usage in a particular locality in which the user thereof is doing business; and as one person may own a trade mark in one country or jurisdiction and another own it in another, so one person may have a property

right in a trade name in one locality and another person have a property right in the same word in another locality. *Sartor* v. *Schaden*, 125 Iowa 696; 101 N.W. 511.

BUSINESS SIGN NOT A TRADE MARK.

(Missouri App., 1911.) A business sign does not constitute a trade mark. *Covert et al.* v. *Bernat* (1911), 138 S.W. Repts. 103.

TRADE MARK, TRADE NAME—DISTINCTION BETWEEN.

(Sup. Ct. Kans., 1914). A" trade mark" relates chiefly to the thing sold, while a "trade name" involves also the individuality of the maker both for protection in trade and to avoid confusion in business. *Harryman* v. *Harryman* (1914), 144 Pac. 262.

The use of the name of a corporation as a trade mark was dealt with in the *Boston Rubber Shoe Co.* v. *Boston Rubber Co.*, of Montreal (1902), 32 Can. S.C.R. 315.

The plaintiff incorporated in Massachusetts in 1852; registered the trade mark in 1897. The defendant in 1890 sold rubber boots and shoes with the mark of "The Boston Rubber Co., of Montreal, Ltd.," and pleaded that the mark was in effect a corporate name and the use of it was not fraudulent. The trial by Audette held that the defendants were free to use their corporate name in the absence of fraud. The judgment was reversed by the Supreme Court which held that the word "Boston" had become an invented or fancied name. Sir Louis Davies said, at page 327:

"It seems to me, with great respect, very difficult on the evidence in this case to find that fraud and bad faith were absent; . . . The object . . . may not have been to deceive purchasers . . . but that such would have been the result, I entertain no reasonable doubt. If so, it would bring the case directly within the rule laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* (1865), 11 E L. Cas. 523 at 538."

And at page 333, "Nor am I able to see how he can, by obtaining for himself and his associates letters corporate under the statute, do under cover of the corporate name what he otherwise would be prevented from doing. The defendant company has the right to use its corporate name for all lawful and legitimate purposes. It has not the right to use it, however, by stamping it upon goods it has manufactured and offered for sale, if by so doing it causes the purchasing public to believe that the goods are those of the plaintiff company." Restrained use of words "Boston" or "Bostons" in connection with rubber boots and shoes by stamping circular advertising without clearly distinguishing from the shoes of the plaintiffs.

REVIEW OF CURRENT ENGLISH CASES.

(Registered in accordance with the Copyright Act.)

REVENUE—SALE OF INVENTION—PAYMENT OF LUMP SUM AND PERCENTAGE ON SALES—"ROYALTIES"—INCOME—CAPITAL —INCOME TAX.

Jones v. *Commissioners of Inland Revenue* (1920) 1 K.B. 711. The question at issue in his case was whether or not royalties payable as part of the consideration for the sale of an invention were to be deemed capital or income for the purposes of taxation. Rowlatt, J., decided that, being payments of an uncertain amount, they were to be regarded as income and not as capital and he rejected the argument that they were in effect instalments of purchase money.

CARRIAGE—LICENCE—TRICYCLE WITH MOTOR WHEEL ATTACHED —CARRIAGE WITH FOUR WHEELS PROPELLED BY MECHANICAL POWER.

Hollands v. *Williamson* (1920) 1 K.B. 716. By statute a duty of excise is payable for every carriage as therein defined,—and the Act defined "carriage" as meaning and including "any carriage (except a hackney carriage) . . . drawn or propelled upon a road . . . by steam or electricity or any other mechanical power. "The defendant owned and used a tricycle to which he attached a fourth wheel propelled by a petrol combustion engine of one horse power. He could and did propel the tricycle by hand, or by means of the fourth wheel or both means combined. On a case stated by justices, a Divisional Court (Lord Reading, C.J., and Sankey and Avory, JJ.) held that the vehicle was a carriage within the meaning of the Act and subject to duty.

FORCIBLE ENTRY—ASSAULT—TRESPASS—RIGHT OF DEFENDANT TO ENTER—CIVIL REMEDY—5 RIC. II. STAT. 1, C. 7.

Hemmings v. *Stoke Pogis Golf Club* (1920) 1 K.B. 720. In this case the male plaintiff was formerly the defendants' servant, and lived in a house on their premises for the proper performance of his duties, and the female plaintiff was his wife and lived with him. In May, 1918, the male plaintiff left the defendants' service but refused to give up the dwelling-house, thereupon the defendants caused him and his wife to be forcibly ejected, using no unnecessary violence, the female plaintiff being carried out in a chair from

which she declined to move, and the plaintiff's furniture was likewise removed. The plaintiffs claimed that this was a forcible entry in violation of the statute 5 Ric. II, St. 1, c. 7, and claimed damages; they did not claim any right or title to possession of the house. In these circumstances Peterson, J., held that the plaintiffs were entitled to damages, but on appeal to the Court of Appeal (Bankes, Scrutton, and Duke, L.JJ.) his decision was reversed, on the ground that the defendants' right of entry was a defence to civil proceedings for the acts complained of, the Court overruling *Newton* v. *Harland*, 1840, 1Sc.N.R. 474; *Beddall* v. *Maitland* (1880), 17 Ch.D. 174; and *Edwick* v. *Hawkes* (1881), 18 Ch.D. 190, so far as it followed the previous cases.

BRITISH COLUMBIA—LEGISLATIVE POWERS OF PROVINCE—WORKMEN'S COMPENSATION ACT (6 GEO. 5, c. 77, B.C.)—SHIP SEAMEN—RESIDENCE WITHIN PROVINCE—ACCIDENT OUTSIDE PROVINCE—B.N.A. ACT, s. 92 (13).

Workmen's Compensation Board v. *Can. Pac. Ry.* (1920) A.C. 184. This was an appeal from the Court of Appeal of British Columbia holding that the Provincial Workmen's Compensation Act (6 Geo. 5, c. 77) insofar as it purported to entitle seamen meeting with accidents outside the limits of the Province to compensation under the Act, was *ultra vires* of the Provincial Legislature. The Act in question is administered by a Board and the fund out of which the compensation is payable is levied by assessment on the employers of workmen who are under the Act entitled to compensation. The Canadian Pacific Ry. Co., the plaintiffs in the action, were owners of a steamship and on board of this steamer were a number of seamen resident in the Province; and the vessel was lost with all hands outside the limits of the Province. The action was brought by the Railway Company to restrain the Board from paying any compensation under the Act to the dependants of the seamen who had been thus lost, on the ground that the Act so far as it authorized compensation to be paid in respect of accidents happening out of the jurisdiction was *ultra vires*, as being an interference with the right to immunity from liability which the plaintiffs were entitled to outside the Province, and as also being an interference with the Imperial Merchant Shipping Act, 1894, s. 503; and the Canada Shipping Act (R.S.C. c. 113), s. 215. The Court of Appeal gave effect to these contentions, but the Judicial Committee of the Privy Council (Lord Birkenhead, L.C., and Lords Haldane, Buckmaster and Parmoor, and Duff, J.) overruled them, holding

that the legislation might be maintained under the Province's power to impose taxation for provincial purposes—and to legislate in regard to the rights of residents and was not an interference with the Shipping Acts above referred to, though it might necessitate an election by the workmen between the provisions of the several Acts.

BRITISH COLUMBIA—VENDOR AND PURCHASER—REGISTRATION OF TITLES—INDEFEASIBLE TITLE—OBJECTION TO OWNERS' TITLE—R.S.B.C. (1911) c. 127, s. 22.

Creelman v. *Hudson Bay Insurance Co.* (1920) A.C. 194. This also was an appeal from the Court of Appeal of British Columbia and should be read in conjunction with the *Esquimalt* case, *supra*. In this case the plaintiffs the Hudson Bay Insurance Co. claimed to recover the purchase money due under a contract for the sale of certain lands to the defendants. The plaintiffs were incorporated under a Dominion statute and were registered as the owners of an indefeasible title to the land, but the defendants set up that the land was not needed for the purposes of the plaintiffs' business and that they had not under their statutory powers any right to hold land for any other purpose. The Judge who tried the action upheld the objection, but his decision was unanimously reversed by the Court of Appeal, and the Judicial Committee of the Privy Council (Lords Buckmaster, Parmoor and Wrenbury) have affirmed the decision. In their opinion the certificate of title under the Land Registry Act is a certificate which while it remains unaltered or unchallenged upon the register is one which every purchaser is bound to accept and to enable such a question to be raised as that in this case would be to defeat the very purpose of the Act.

ONTARIO — MUNICIPAL CORPORATION — EXECUTED CONTRACT —ABSENCE OF BY-LAW—MUNICIPAL ACT (R.S.O. (1914) c. 192), s. 249.

Mackay v. *Toronto* (1920) A.C. 208. This was an appeal from the Supreme Court of Ontario, 43 O.L.R. 17. The action was brought against the City of Toronto to recover on an executed contract, for work and labour done in the following circumstances: The Mayor of the city instructed the plaintiffs to prepare a report as to the commercial and financial aspect of a contemplated purchase of the street railway undertaking. The plaintiffs, employment was not authorized by by-law, but they proceeded as instructed, and prepared an interim report, which was subse-

quently printed by order of the City Council. The action was dismissed by Middleton, J., and his judgment was affirmed by the Appellate Division, and the Judicial Committee (Lords Haldane, Buckmaster, and Dunedin and Duff,) have affirmed the Appellate Division. Their Lordships being of the opinion that even if the employment of the plaintiffs was *intra vires* of the corporation the contract in question was of such a nature that it could not be validly made except by by-law; and their Lordships remark that it is far from clear that the contract could be regarded as fully executed.

BRITISH COLUMBIA—REGISTRATION OF TITLES—INDEFEASIBLE FEE—REFUSAL TO REGISTER—LIS PENDENS—PENDING ACTION GOING TO THE ROOT OF THE TITLE.

Esquimalt and Nanaimo Ry. v. *Granby Con. Mining & S. Co.* (1920) A.C. 172. This was a proceeding under the British Columbia Registration of Titles Act. The Granby Con. Mining and Smelting Co. applied to the Registrar of the Land Titles Act claiming to be registered as entitled to an indefeasible fein the landse in question. They claimed to have acquired title under a grant from the Crown. The Esquimalt and Nanaimo Ry. claimed that this grant was invalid and claimed to be the owners under a prior grant from the Crown, and had commenced an action for that purpose and registered a *lis pendens*. The Registrar in these circumstances refused to register the applicants, they thereupon petitioned the Court to order the Registrar to register their title and the Railway Co. also applied to the Court by motion to inhibit any dealing with the land. Macdonald, J., before whom the petition and motion were heard, dismissed the petition, but the Court of Appeal reversed his decision and ordered the Registrar-General to register the mining company's title: and the Railway Company thereupon appealed to H.M. in Council. The Judicial Committee of the Privy Council (Lords Haldane, Buckmaster and Atkinson and Duff, J.) held that as the objection of the Railway Company went to the very root of the mining company's title and if it was established the mining company would have no title at all, the Registrar was right in refusing to register the company as entitled to an indefeasible fee and the judgement of the Court of Appeal was therefore reversed.

LAWYERS LYRICS.

HAIL BRITANNIA.

July 1, 1920.

Germans, engrossed with schemes for gain,
And, drinking deep from pleasure's bowl,
Had well-nigh lost all thought of pain,
And had forgot they had a soul;
Of false philosophy the prey,
They thought but of the present day.

Riches and power and lordly sway
Were their sole objects of desire,
And to obtain their selfish way
They needs must set the world afire.
Self (ruled), supreme, and with mail'd fist,
They hoped to do what e'er they'd list.

Souls that are dead to higher things
Are wont to grovel on the earth,
While those who soar on seraphs' wings
Are fill'd with joy and heavenly mirth,
From weed-chok'd soil no beauteous flowers arise,
Nor in unholy deeds seek we for virtue's prize.

Their plighted word, to them was thing of naught;
No obstacle it proved to any deed
Which to attain the end they sought
Appeared a method to succeed;
But Honour, Truth, and Justice stand
Despite the blows of hostile hand.

When Truth and Justice were assailed
Great Britain rose in awful might,
And all her children quickly hailed
To aid, and by her side to fight.
The call was heard and straight obeyed;
She met her foes all undismayed.

By numbers great beyond belief,
Equipped with all the skill of art,
They thought the world to bring to grief;
Such is the wisdom of the mart;
On Britain's arms they looked with scorn,
Thus Pride before a fall is often born.

The army, they declared "contemptible,"
They soon did come with grief to know
Was in all knightly power invincible,
Though, like the ocean, it might ebb and flow:
For, like the ocean, with resistless force
It ever onward rolled without remorse.

Before the advancing tide should all destroy,
The beaten foe does to the victors yield, and seek for peace;
The hoped-for victory he will ne'er enjoy.
The sheep he hoped to shear retain their fleece,
Thus doth ambitious greed lead men astray
And none can pity them in their dismay.

O, blessed mother, Freedom-loving Isle,
Long may ye rule in love and on thy children smile!
Long may their hearts in union beat with thine!
Long may thy glories on them reflected shine!
Thou art the Pride and Glory of the Earth,
All praise to Heaven be, who gave thee birt!

—G. S. H.

NOTES OF UNITED STATES DECISIONS.

HIGHWAYS—LOAD WHICH FRIGHTENS HORSE—NEGLIGENCE.

Operating upon the highway a motor car loaded in such manner that a horse drawing a buggy on the highway becomes frightened at it is not actionable negligence.

Pease v. *Cochran*, 173 N. W. 158, annotated in 5 A.L.R. 936.

HUSBAND AND WIFE—POWER TO DEFEAT ANTENUPTIAL AGREEMENT.

A man who has entered into an antenuptial agreement with a woman who becomes his wife, to give her by will a proportional part of his estate, cannot make gifts either absolutely, conditionally, indirectly, or otherwise for the main purpose of defeating his agreement and preventing it from operating for the benefit of the wife.

Eaton v. *Eaton*, 233 Mass. 351, 124 N. E. 37, annotated in 5 A.L.R. 1426.

INSURANCE—DEATH IN COMMON DISASTER—RIGHT TO PROCEEDS OF POLICY.

Where insured and beneficiary, under a policy providing that if the beneficiary shall die first, the interest of the beneficiary shall

vest in the insured, perish in a common disaster, without evidence as to which died first, the proceeds of the policy go to the representatives of the beneficiary, on the theory that he did not die in the lifetime of the insured.

Watkins v. *Home Life & Accident Ins. Co.*, 208 S. W. 587 5 A.L.R. 791.

MINES—RIGHT TO PUMP OIL.

An owner of land under which there is fugitive mineral oil is not entitled to complain that his neighbour uses a pump in a well located on the neighbour's property, although the effect is to drain oil from beneath that of the property owner.

Higgins Oil & Fuel Co. v. *Guaranty Oil Co.*, 145 La.—, 82, So. 206.

[Cases on the respective rights of adjoining landowners as to pumping oil are gathered in the note accompanying this decision in 5 A.L.R. 411.]

MORTGAGE—BY CORPORATION TO DIRECTOR—VALIDITY.

A mortgage by a corporation to secure a director for money lent to pay pressing debts, and enable it to extricate itself from immediate embarrassment, is valid and enforceable.

Re Lake Chelan Land Co., 257 Fed. 497, annotated in 5 A.L.R. 557.

NEGLIGENCE—IMPUTING.

Where one undertakes to rescue another from danger, the antecedent negligence of the person rescued is held not imputable to the person effecting the rescue.

Bond v. *Baltimore & O. R. Co.*, 82 W. Va. 557, 96 S. E. 932, annotated in 5 A.L.R. 201.

NEGLIGENCE—UNSAFE PREMISES—FALL—RES IPSA LOQUITUR.

A mere fall of a person on the premises of another, without any evidence to shew how the fall was occasioned, raises no presumption of negligence on the part of the owner; and the doctrine of *res ipsa loquitur*, which is only applicable when the thing shewn speaks of the negligence of the defendant, not merely of the happening of the accident, does not apply.

Garland v. *Furst Store*, 107 Atl. 38. [See 5 A.L.R. 275, for note on the applicability of the doctrine of *res ipsa loquitur* to the fall of a person.]

PAYMENT — CHECK — FAILURE TO PRESENT — GARNISHMENT — EFFECT.

Failure of a creditor to present a check tendered in payment of the debt without any agreement that it shall be accepted as payment, whether good or bad, for ten days on account of illness, does not satisfy the indebtedness if, when the check is presented for payment, the maker's account has been garnished by another creditor.

Wileman v. *King*, 82 So. 265, 5 A.L.R. 584.

SCHOOL—DEED TO DISTRICT—EFFECT OF WORDS "FOR SCHOOL PURPOSES ONLY."

The insertion in a deed of a parcel of land to a school district upon which to erect a school house of the words "for school purposes only" does not restrict the title of the district or prevent its leasing the property for the production of oil and gas.

Phillips Gas & Oil Co. v. *Lingenfelter*, 262 Pa. 500, 105 Atl. 888, to which is appended in 5 A.L.R. 1495 a note on the effect on oil and gas or other mineral rights in land, of the language in a conveyance specifying the purpose for which the property is to be used.

STATUTE—CONSTRUCTION—MEANINGLESS REFERENCE.

A section of a statute attempting to refer to and adopt relevant sections of other statutes, but which by mistake refers to irrelevant sections, which makes the reference meaningless, may be read without such reference.

McLendon v. *Columbia*, 101 S. C. 48, 85 S. E. 234, which is annotated in 5 A.L.R. 990, on the effect of a mistake in reference in a statute to another statute, constitution, public document, record, or the like.

TENDER—SUFFICIENCY—KNOWLEDGE OF CREDITOR.

Where the amount due is within the exclusive knowledge of the creditor, and the creditor on demand neglects or refuses to indicate the correct amount that is due, the debtor may tender so much as he thinks is justly due, and if less than the true amount, the tender will nevertheless be good.

Kraus v. *Potts*, 53 Okla. 379, 156 Pac. 1162, 5 A.L.R. 1213.

THREAT—ACTIONABILITY.

To render actionable a threat causing fear, it must be of such a nature and made under such circumstances as to affect the mind of a person of ordinary reason and firmness so as to influence his conduct, or it must appear that the person against whom it was made was peculiarly susceptible to fear, and that the person making the threat knew and took advantage of the fact that he could not stand as much as an ordinary person.

Brooker v. *Silverthorne*, 99 S. E. 350.

Flotsam and Jetsam.

A will was recently filed for probate in the County of Simcoe. One of the provisions is so quaint and unusual that we record it. It reads as follows:

"I also give to my said brother all of my office furniture and appliances including my iron safe, typewriter, cabinets, stamp, and other appliances and law books. I also give him all boats or canoes, and all scrap books and all manuscript or printed speeches, addresses and compositions of a literary nature on condition that he shall on each twenty-fourth day of May at noon in each and every year stand out on the front platform or walk of his place of residence and shout out loud the words 'Hurrah for Laurier and Reciprocity' unless he shall be incapacitated therefor by ill-health or feebleness, notice thereof to be posted the day previous in the Post Office where he lives."

We understand that the death of the brother before the will came into force mercifully relieved him from the strange obligation.

CHANGE OF NAME.

At common law a man could change his name at will, and in but few American States has any statutory restriction been imposed on the right. A writer in the *Canada Law Journal* (January, 1920), writing from a Province wherein the common law obtains, makes a forcible argument for restriction. He fails, however, to distinguish clearly between two entirely distinct things, the taking of one or more assumed names as an aid to the concealment of identity and a permanent change of name by a person maintaining a fixed residence. The former is, as he says, the common

practice of criminals, and is habitually resorted to by the promoters of sporadic business ventures which are criminal or on the verge of criminality. This practice is of course wholly vicious, is adopted in aid of an illegal enterprise and is frequently an important element in its success. But it is not altogether clear how it can be prevented. Change of name without prescribed formalities may be made a criminal offense, but nine times out of ten the project in aid of which the change is made is itself criminal, and the adding of one more penalty will avail nothing; certainly it will not deter the burglar or "con man" with a long record of felonies behind him from taking a new alias at the scene of each new crime. Nothing short of the establishment of a complete system of personal identification records and passports such as obtains in some parts of Europe would check this class of name changing. While such a system might be in many ways advantageous, as for example in putting some check on the criminal tramp, nothing is more certain than that it cannot be adopted or enforced at the present time.—*Law Notes.*

In the report of a case in the official reports of a certain Province of the Dominion appears a judgment, dated February 24th, 1919, which begins as follows: "The accused, in the month of June last, was found guilty by the jury of having committed a robbery at the — Branch of the Royal Bank, together with one L—, being armed with an offensive weapon, *the late Chief Justice presiding.*" This being evidently an official robbery, having the sanction of the Court, presumably no punishment was inflicted; but have our Judges time to preside at such functions?

The above reminds us of a saying of a brilliant and witty Chief Justice of Ontario of long ago. He had a strong aversion to Courts of Equity, contrasting them unfavourably with those of the common law. There was in those days much unnecessary circumlocution and red tape, for example, in obtaining an order to get money out of the Court of Chancery. A robbery had recently been committed by one of the officials of the Court at Osgoode Hall, who decamped with a large sum of Court money. "Ah" said the Chief Justice, "Mr. R. (the absconder) has introduced a new practice in his Court which is eminently simple, and really the only possible way of obtaining justice in that Court."

Gypsy Smith, the evangelist, said on his recent voyage from Liverpool: "There are some men who can make a success even of failure. Thus there was a certain peer once who rose to make his maiden speech—a speech granting to all accused persons the right of counsel—and when he put his hand in his pocket for his notes they weren't there. The peer gulped. He looked about him wildly. Gulped again. Then he said: 'If I, my lords, who now rise only to give my opinion on this bill—if I am so confounded that I am unable to express what I had in mind, what must be the condition of that man who, without any assistance, has got to plead for his life?' Then the peer sat down to the cheers of a converted chamber, and his bill passed almost unanimously." —*Argonaut.*

Gov. Morrow recently told some interesting stories of the mountaineers in his State:

"I suppose you demand a feud story. Of course, there are no longer feuds in Kentucky and that feud thing was pretty much overdone by romancing beyond the borders of Kentucky. However, here is a feud story. I cannot vouch for it as I can the others, but this is it:

"'Lige Parsons dropped into the court house one day and went to see his friend, the Probate Judge.

" 'Howdy, Lige.'

" 'Howdy, Judge.'

" 'What's doing down Possum Trot, Lige?'

" 'Nuthin' worth dividin' Judge, nuthin' wuth dividin.'

"There was no conversation for a few minutes, when Lige began:

" 'Tother evening, I was a-settin' a-reading of my Bible, Judge, when shootin' began. One of the gals said 'twuz the Persons boys down by the fence.

" 'Now, Judge, I didn't mind them Persons boys shootin', but I thought they might kill a calf critter or two or maybe hit the ol' woman, so I picked up my rifle and drapped a few shots down thar by the fence and went back a-reading' of my Bible.

" 'Next mornin', Judge, I went down by the fence, an' they was all gone, 'cept four' "—*Post-Dispatch.*