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"CASTLES IN THE AIR."

Castles in the air have heretofore been usually considered mere creatures of the brain, with no substantial existence; the Supreme Court of Canada has, however, recently determined that under the Statute of Limitations of Ontario a good legal title by possession may be acquired to a castle in the air. So that we see such structures have ceased to be mere creatures of imagination and become a matter of mundane interest, and actions of ejectment for castles in the air, and for injunctions to restrain interferenee with the possession or enjoyment thereof, may be looked upon as legitimate branches of our legal procedure.

Every man's house, as we all know, is his "castle," a room is also, as we all know, a structure above the ground and is more or less "in the air." If it is in an upper storey of a house it is very much "in the air," and if it happens to be a man's house it is a veritable "castle in the air," and it is to the legal rights respecting such a structure that the Supreme Court of Canada has been applying the resources of its legal lore, and has solemnly determined by a majority of its members that such a structure is not merely "a castle in the air," but is actually "land," to which a possessory title may be acquired under the Real Property Limitations Act. But for this solemn decision, we should have been tempted to think that such a proposition was ridiculous, but courts of law have, by their decisions before now, made the law what the celebrated Mr. Bumble was pleased to term "a ass."*

The case in which this interesting conclusion was reached is *Iredale* v. *Loudon*, 40 S.C.R. 313, on an appeal from the Court of Appeal of Ontario, reported in 15 O.L.R. 286.

*See, for example, the comment of Jessel M.R., in *Couldery* v. *Bartrum*, 45 L.T. 690, on the doctrine of *Cumber* v. *Ware*, 1 Str. 426; and cf. Ont. Jud. Act, s. 58(8).

Before proceeding to discuss the legal aspect of the case we will briefly state the facts.

The plaintiff and defendants were brothers and sisters, and originally owned as tenants in common a parcel of land on which was erected a building. The plaintiff sold his share to the defendants; but after the sale he was allowed to continue in possession of an upper room in the building erected on the land; this room he used as a workshop, for which he at first paid rent, but since 1890 had ceased to do so. The room was reached by a stairway from the street which the defendant was accustomed to lock at nights, and he also kept the door of the upper room locked when not using it. The defendants were in possession of the rest of the building including the part immediately beneath the room occupied by the plaintiff, and they in the exercise of their rights as owners were about to tear down the building, which would have had the effect of demolishing the room occupied by the plaintiff; and the action was therefore commenced to restrain them from so doing, and the case has been well litigated. It was tried before Mabee, J. The plaintiff, besides an injunction, claimed a declaration that he was entitled as owner in fee to the workshop. Mabee, J., granted the injunction, but refused to make any declaration of title. This judgment was reversed by the unanimous judgment of the Court of Appeal (Moss, C.J.O., Osler, Garrow and Maclaren, JJ.A.), whose judgment has now been reversed by a majority of the judges of the Supreme Court (Fitzpatrick, C.J., and Davies and Duff, JJ.) (Maclaren and Idington, JJ., dissenting). Three judges have therefore overruled the decision of six other judges.

The conclusion of the Supreme Court of Canada was, in short, that under the Statute of Limitations by ten years' possession a title may be acquired to a room in a house and also to easements of support and access, notwithstanding that the owner has been all the time in actual occupation of the rest of the building. In other words, if a man takes another into his house and assigns him a bedroom, if he occupies it for ten years without paying rent or giving any written acknowledge-

ment of title, he will have acquired by virtue of the Statute of Limitations a possessory title to his room; such a result will appear to the man in the street an instance of the truth of Mr. Bumble's remark. The "man in the street," we are inclined to think, would not unnaturally suppose that the owner in possession of a house, when he ceased to be willing that another person should continue in his house, would have the right to say to him, "go," and if he did not go, he might send for a policeman and make him go, no matter how long his occupancy might have lasted; and, but for the decision of the Supreme Court of Canada, we should have been inclined to think the man in the street was right.

Mr. Justice Duff, who delivered the judgment in which the Chief Justice concurred, opens his remarks by saying:—

"It is, I think, too late to dispute the proposition that an upper room not resting directly upon the soil, but supported entirely by the surrounding parts of a building might at common law be the subject of a feoffment and livery as a corporeal hereditament, that is to say, *as land*; Co. Litt. 48*b*; Sheppard Touchstone, 202; 1 Preston Estates, 8, 506; *Yorkshire Life* v. *Clayton*, 8 Q.B.D. 421. Subsequently he remarks: "If you have a subject which is land and such a possession of that subject, I think the ground is clear for the operation of the statute."

And the judgment of the majority of the court proceeds on the basis that a room in a house is "land," and therefore within the operation of the Real Property Limitation Act.

In the Court of Appeal two of the learned judges expressed doubt whether the Statute of Limitations had any application. Moss, C.J.O., says: "As to the claim of ownership of the upper flat, it is very doubtful if the statutes are applicable. Very little light is afforded by decisions, but so far as they go they favour the proposition that a grant of an upper room or flat in a building passes no estate or interest in the land. This has been held as respects a lease, although it has also been held that an agreement for such a lease is a contract for an interest in land within the 4th section of the Statute of Frauds. But it

is said that this interest must not be construed as meaning an interest or share in the subjacent soil forming the site of the house or building in which the room or flat is situate. And if that be so the case is not within the definition of land in section 2 (1) of the Real Property Limitations Act." And Garrow, J., remarked: "It is clear that unless the plaintiff is now able to make good his right whatever it is against the lower floor, or soil as well as to the upper floor, his claim must wholly fail, for it would be absurd to hold that he has acquired a title to the upstairs alone, which right the defendants might immediately destroy by pulling down the walls of the lower story. A claim wholly 'in the air' and without reference to the soil or surface could not be made under the statute."

The Supreme Court of Canada has got over this difficulty by declaring that the right of possession of the room draws with it a right of support.

With the greatest respect to the majority of the learned judges of the Supreme Court we venture to doubt whether they have correctly interpreted the passages from Coke and Preston which Mr. Justice Duff referred to as establishing that an upper room is "land."

The passage in Coke Lit. is as follows: "A man may have an inheritance in an upper chamber, though the lower buildings and soil be in another, and seeing it is an inheritance corporeal it shall pass by livery." This, of course, does not say that the chamber is "land," but merely that it is property of such a character as may be the subject of inheritance and may be conveyed by the same method as land.

The passage from Preston is however more explicit on page 8. He says: "Land comprehends all external subjects which are the objects of sensation, and admit of manual occupation *and are in their nature permanent and immoveable*; in short, *are part of the terrestrial globe*. Thus a house, a garden, an orchard, a field, etc., is land. Of an upper chamber a feoffment may be made; of course, it is a corporeal hereditament, in other words, land."

The last sentence taken by itself is certainly an explicit statement that an upper chamber is "land," but ought it not in reason to be read with what has gone before—must we not infer that the real meaning of the author is that the upper chamber by reason of its immoveable connection with the soil over which it rests, has become a part of that land, not that per se, and apart altogether from its connection with the soil, it is land. The learned author certainly never meant to suggest that a chamber suspended from a balloon is "land." Reading the whole passage together, the only reasonable inference appears to be, not that an upper chamber is per se land, but that its connection with the soil makes it in contemplation of law a part of that particular piece of land over which it is erected.

If this be the true meaning of the passages from Preston and Coke it is obvious that the majority of the judges of the Supreme Court have misinterpreted them. For certain purposes no doubt a building in the eye of the law becomes identified with the land on which it rests, so as to become in contemplation of law a part of that land, but the building is not for all that "land"; the "land" on which it rests may belong to one person, and the building to some one else and the owner of the building in that case may not have any interest whatever in the "land." A building may be made of timber and be moveable, whereas it is of the essential character of "land" that it is immoveable. If a building by being placed on land thereby becomes "land," what "land" is it? Is it the piece of land on which it rests? If so is that piece of land transferred to the other side of the street when you remove the building there? We think we have said enough to shew that a building is not "land." Indeed, it is a self-evident proposition. But assuming it is land we ask again what land is it? Is it, as Mr. Justice Duff seems to suggest, a strata superimposed on the natural soil so that each floor and room is to be regarded as a separate and distinct strata of "land," which is not land, as anybody can see, but a species of legal "land" which has no actual existence, except in the brain of lawyers, and in fact mere land "in the air."

With all due respect to those who hold the contrary opinion, we venture to believe that the Real Property Limitations Act is intended to apply to real "land" and not to merely imaginary or theoretical "land." It is quite true that the definition of "land" in that statute is wide enough to include, "unless a contrary intention appears," messuages and all other hereditaments whether corporeal or incorporeal and money to be laid out in the purchase of land (and chattels and other personal property transmissible to heirs), and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, title, and interests, or any of them, are in possession, reversion, remainder or contingency, R.S.O., c. 133, s. 2. A room in a house may, according to the authorities above referred to, be the subject of a corporeal hereditament, and as such within the terms of the statute, but the statute requires in effect an exclusive possession by a squatter before he can acquire a title under its provisions, and the dilemma which Mr. Justice Garrow put, we do not think is at all answered by the Supreme Court. In order to establish his title under the statute the squatter must shew an exclusive and undisputed possession of the land or of the corporeal hereditament he claims, which in the case in hand was not shewn, but merely a possession jointly with the true owner, which would not be sufficient under the statute to oust the latter's title.

Not only have the Supreme Court declared a room to be "land," but this species of "land" being of such an aerial character that it needs support, they have also declared that the possession of a room draws with it a right to have the substructure, to which no title has been acquired, maintained in statu quo, so far as necessary for the support of the room.

Whether the judgment of Mabee, J., was modified in this respect is not very clear. Duff, J., seems to have disagreed with Davies, J., as to the nature of the plaintiff's right to support,

but Duff, J., with whom the Chief Justice concurred says that "the plaintiff is not entitled to prevent the defendants demolishing their part of the building merely because some part to which he has acquired a possessory title would thereby lose the support which it now receives . . . he is, I think, entitled to an order restraining the defendants from interfering with so much of the structure as rests upon that part of the soil itself to which he had acquired a possessory title." This passage is somewhat difficult to understand, because the plaintiff, according to the judgment of the court, had acquired no possessory title to any part of the soil itself, but merely to a room overhanging the soil, and besides the learned judge seems inconsistent with himself as with one breath he declares the plaintiff is not entitled to something which he in the next breath proceeds to give him.

The Statute of Limitations by this method of construction is made to confer on squatters rights which rightful owners could not acquire. Broadly stated the proposition of law laid down by the Supreme Court is this, a squatter by ten years' possession acquires not only a possessory title to the land he occupies, but also as against the true owner all easements necessary for its enjoyment. For instance, if in the present case the owners of the land also owned a vacant lot over which light came to the room in question, according to this case they might be restrained from building on that lot as it would interfere with the enjoyment of the room! Support is an easement just as much as light, and both are equally necessary to the enjoyment of the room—and yet under the statute 20 years would be necessary to give a rightful owner an easement of support from adjacent land, and an easement of light is not now acquirable by any length of enjoyment. We may remark that the land beneath the plaintiff's room was quoad the plaintiff's "land in the air" adjacent land. Why the statute should be construed in this elastic way in favour of squatters is not very apparent, unless it be that they are regarded by the Supreme Court as a meritorious class which deserves to be encouraged by the courts of law.

THE BOARD OF RAILWAY COMMISSIONERS.

The Board of Railway Commissioners for Canada has been increased to six members under the authority of c. 62 of the statutes of 1908. The *Canada Gazette* of September 19th announces that His Excellency, the Governor-General, has been pleased to make the following appointments: James Pitt Mabee, James Mills, M. E. Bernier, D'Arcy Scott, Thomas Greenway and S. J. McLean, to be members of the Board; J. P. Mabee to be Chief Commissioner and D'Arcy Scott to be Assistant Chief Commissioner thereof.

The three first named were already members of the Board, and we need not refer to them further now. The new Assistant Chief Commissioner is a son of the Secretary of State, who has resigned from the Cabinet. Mr. Scott has been, for some years, the Ottawa solicitor of one of the large railway companies, and, during the past two years, has occupied the important position of Mayor of Ottawa. As such he has had to do with questions between the municipality and the railways. He is known to be fair and practical, and, in time, will, no doubt, become a valuable member of the Board. Without, however, in any way reflecting on his capabilities, it might have been desirable that a lawyer of riper years and maturer judgment should have been chosen as Assistant Commissioner. Mr. Scott might very properly and reasonably have served, for a time at least, as an ordinary member of the Commission, rather than, as he usually will be, the acting Chief Justice of one division of this Railway Court, which is now enabled to sit in two divisions simultaneously.

Mr. Greenway has had large experience in public life, but was, undoubtedly, put on the Board to represent the West and its farming interests. If it is necessary that the farmers should be represented, Mr. Greenway will, no doubt, fulfil the expectations of his friends. The appointment of Prof. S. J. McLean will also be acceptable, for though rather a theorist than having had an experimental training, his intimate knowledge of the

working of railroad transportation from an academic point of view will find its usefulness on the Board. As to these qualifications, he has no superior in the Dominion. At the time of his appointment, Mr. McLean was Associate Professor of Political Science in the University of Toronto.

We deem it to be regretted that there are but two lawyers on the Board. It must not be lost sight of that this Board is a court, and an important one. There are not only questions of common sense to be settled, but most important points of law and as to the admission of evidence. Such being the case it does not seem reasonable to throw too much of the work on the one legal member of the Board whose "opinion upon a question of law shall prevail." The work of the Board is much in the limelight, and the wisdom or otherwise of the new appointments will soon be known.

A RURAL CONSTABULARY.

No one conversant with the conditions which prevail in the rural parts of Ontario, as regards the protection of life and property, can fail to realize the necessity for some better system of police than that now existing. It would be more accurate to say the necessity for creating a system were none now exists, for our rural constabulary can no longer be relied upon as in any degree competent for the duty they are called upon to discharge. Speaking of the rural parts of Ontario we include the villages and small towns not large enough to maintain an effective force of their own, and what applies to Ontario will apply more or less to the other Eastern provinces. There was a time in the history of this country when no householder ever thought of locking his doors at night—when tramps were unknown—when theft of any kind was of rare occurrence—and when, though drinking was more common, and more cases of fighting and of assault came before the magistrates, there was not that spirit of rowdyism now so frequently complained of.

This state of things exists no longer. Greater population,

greater wealth, with all the advantages which advancing civilization brings with it, bring also in their train many evils unknown before. We have not many professional tramps, but there are numbers of men traversing the country in all directions, ostensibly looking for work, but often failing to find it, begging their way from one farm house to another, sleeping in barns and hay-lofts, and causing apprehension not altogether groundless. Cases of robbery and of criminal assault have become frequent, while convictions are rare from the fact that there is no one at hand to pursue or detect the criminal. Minor cases of theft for a similar reason are not dealt with, and many offences of various kinds go unpunished.

From this state of things one very serious result follows. There is among the young people a growing disregard for laws which they do not see enforced, and contempt for authority which cannot make itself respected, and of which no symbol appears. Rowdyism, with all its evil effects, becomes rampant even in little country places where such conduct would never be suspected. It is mere hypocrisy to deny this, or to claim for our rural population a degree of virtue which they do not possess, or to charge the evil upon foreign influences which have never been felt. Want of home influence and of religious training are as potent in country districts as in towns and cities to produce their natural results, but to see offences committed and no punishment to follow is a cause of demoralization most powerful in the country.

We are glad to see that this subject has been taken up by the Press, and still more so to know that it is under consideration by the Provincial Government. Admitting the need for the establishment of an effective rural police we have many examples for our guidance. The Irish constabulary, perhaps the finest police force in the world, has too much of a military character to be altogether suited to us, and the same objection may apply, though in a less degree, to our own North-West police, an equally efficient body of men. Then there is the English system of county constabulary, a rural force much such as we require. The difficulty of establishing a county constabulary would not only

be the expense, but the finding of an authority from which the personal and political element could be altogether excluded, for excluded it must be if any good is to be effected.

As most economical, and likely to be most effective, and most free from dangerous influences, a Provincial Board, properly paid and permanently appointed, would be the best. The chief difficulty would be the selection, and that point must be carefully considered. This Board should be free and untrammelled in the work of organization and administration, and, by proceeding carefully and tentatively, guided also by the example of similarly constituted bodies, should be able to establish a provincial police at once creditable and useful, a force which would be a terror to evil doers, and maintain the power and dignity of the law in the remotest corners of the province.

Such a body could also enforce many laws and regulations now very much neglected, such as returns of births and deaths, and statistics of various kinds, sanitary regulations, etc.

As has been suggested the use of the telephone now so generally established throughout the country would render such a force almost ubiquitous, and the escape of criminals almost impossible. It would of course be largely composed of mounted men, and the occasional sight of a uniformed policeman appearing when least expected, and known to be far removed from any local influence, would have a very salutary effect, and be reassuring to timid wayfarers and uneasy householders.

Force has been given to the views above expressed by the recent riots on the trains carrying harvest hands to the North-West, which are a glaring example of the spirit of lawlessness prevailing in some of our country districts.

LAWYERS' FEES.

We are glad to see this subject taken up in a very sensible way in perhaps the best of our Canadian newspapers. It is not much use for a legal journal to explain matters of this kind, as such explanations do not reach those who need enlightenment, but comments which appear, for example, in such a widely cir-

culated newspaper as the *Montreal Star* are educational in the right direction. We reproduce part of the article. Its perusal by the learned divine, whose utterance was the text for it, will explain to him several things, which, if he had known, he probably would not have made the foolish observations he did (see ante, p. 563). The remarks which we quote in reference to litigants not knowing what amount of expense they are incurring are a forcible argument for what we hold to be advisable, namely: a lump sum for litigation; or, what is otherwise known as a block system of charges. This would seem to be the most practicable solution of the difficulty. The learned preacher is reported to have said—inter alia:—

"The question of exorbitant legal fees and astonishing medical charges is one that has puzzled many a good man. Yet what is there to do about it? We do not blame a farmer for getting all he can for his wheat, or a merchant for charging specially high prices for some rare article which he happens to possess. So if a lawyer can get these staggering prices for his services why should he fail to reach out his hand? The world is pretty generally run on that principle. We will usually find, if we will enquire, that these large fees are paid either by very wealthy corporations or individuals who have interests of immense value at stake. They can afford to pay the fee to reduce any risk they may run of losing the case. The only way to prevent this would be to prevent the occurrence of such cases. It is hardly fair to ask the lawyers to work for low fees when they can get high ones. The legal fee which stirs a sense of injustice is that which surprises the man asked to pay it. Where a big corporation employs a lawyer with the expectation of paying a large fee, and pays it, it is hard to see on what grounds any one can base a complaint. But when the simple citizen goes to law, or is dragged into law, and employs a lawyer expecting to pay a moderate fee, but is confronted with a staggering bill which altogether exceeds his anticipations, then sympathy is aroused. There ought to be some means by which a prospective litigant could find out in advance about what his plunge into litigation is likely to cost

him. We could not expect the lawyers to foresee all the smaller charges and come down to a few odd dollars in their estimates; but they ought to be able and willing to give rough estimates which would generally stand. One trouble is that many a man goes to law without counting the cost, just as he summons a physician and does not ask what he is going to be charged until the bill comes in. In the latter case especially, there is a delicacy about such a course. We trust to the honour of our physicians touching their financial dealings just as we do in their treatment of the sick. But there is no particular reason why we should be so squeamish in mentioning money to a lawyer. And a little plain talking before a case began might obviate a good deal of grumbling and perhaps litigation afterward. It might even obviate the case itself."

The learning on the subject of covenants running with land is not free from difficulty, and a lawyer need not be ashamed to take time to consider, when asked to advise thereon. Not so abstruse, however, was it in the opinion of a government agent seeking signatures to a document granting to a certain public utility in the Province of Ontario a right of way or easement of some sort. A farmer who was approached by the agent (a rag and bottle man, by the way, and who therefore knew a thing or two) was a little suspicious that in this public utility might lurk danger to his property and perhaps to life and limb, and so he said he would not sign unless full protection were secured to him and his against all accidents. The agent was equal to the occasion, for he held up the document and triumphantly called the farmer's attention to the concluding proviso, which, he said, was inserted for that very purpose. This safeguard reads as follows: "The burden and benefit of this agreement is intended, as far as may be, to run with the said lands." This, of course, was conclusive and the farmer signed.

TELEPHONIC COMMUNICATIONS AS EVIDENCE.

As science and civilization advances the law attempts to follow, if not as promptly as it would, at least not a great way off. The case of *Knickerbocker Ice Co.* v. *Gardiner Dairy Co.*, 69 Atl. Rep. 405, discusses the admissibility and effect of telephonic communications as evidence.

In that case the evidence of Mr. Wilbourn, superintendent of the Gardiner Company, in reference to a telephone conversation with the Knickerbocker Company, was admitted, subject to exception. He called up the company and inquired who was there, and the party at the phone said the Knickerbocker Ice Company. He did not recognize the voice of the person talking. The man at the phone stated the price of the ice, said they had plenty of it, and would let the plaintiff have it provided it gave them all its trade. The plaintiff got five or six loads that day (June 29th), and all the orders were by telephone. He had his talks with the same person, and in each case he got all the ice he ordered. One of defendant's exceptions was to the refusal to strike out that evidence.

The trial court admitted the evidence and the appellate court after reviewing the authorities upheld the action of the trial court, saying: "As it is a character of evidence that might be used improperly, courts should be careful in the application of the rule. "The authorities amply sustain the decision in this case. In *Murphy* v. *Jack*, 142 N.Y. 215, 36 N.E. Rep. 882, 40 Am. St. Rep. 590, which was an application to vacate an attachment which had been issued on an affidavit made on information over the telephone, the court said: 'There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff and recognized his voice, or if it had appeared, in some satisfactory way, that he knew it was the plaintiff who was speaking with him.' In *Wolfe* v. *Mo. Pac. R. Co.*, 97 Mo. 473, 11 S.W. Rep. 49, 3 L.R.A. 539, 10 Am. St. Rep. 331, it was held that a conversation by telephone be-

tween a witness and another person in the private office of a party is not inadmissible because the witness does not identify the voice of the other person as that of the party or his clerk. Barclay, J., said: 'When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business therein carried on.' See also, *Mo. Pac. Ry. Co.* v. *Heidenheimer*, 82 Tex. 201, 17 S.W. Rep. 608, 27 Am. St. Rep. 861; *Gen. Hospital Soc.* v. *N. H. Rendering Co.*, 79 Conn. 581, 65 Atl. Rep. 1065; *Kan. City Star Co.* v. *Standard Warehouse Co.*, 123 Mo. App. 13, 99 S.W. Rep. 765; *Godair* v. *Ham. Nat. Bank*, 225 Ill. 572, 80 N.E. Rep. 407, 116 Am. St. Rep. 172; Jones on Ev., s. 210; Wigmore on Ev. s. 2155. The latter says: 'No one has ever contended that, if the person first calling up is the very one to be identified, his mere purporting to be A. is sufficient, any more than the mere purporting signature of A. to a letter would be sufficient. Ante, s. 2148. The only case practically presented therefore is that of B.'s calling up A. and being answered by a person purporting to be A. There is much to be said for the circumstantial trustworthiness of mercantile custom (ante, s. 95) by which, in average experience, the numbers in the telephone directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs, and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury, just as testimony based on prices current is received. Ante, s. 719. This view has received some judicial support.' The author then goes on to consider the case where the antiphonal speaker does not purport to be a particular person, but merely some member of the office staff authorized to make a contract or an admission, and added: 'On the principle above suggested (though not with the same force)

mercantile experience may well suffice, by which customarily the person who is in fact summoned to the telephone and proceeds to conduct the negotiation is prima facie a person authorized to do so, precisely as a person receiving money at the cashier's desk is presumably authorized to do so. Upon this point there is little judicial inclination to take the liberal view.' ''—*Central Law Journal.*

The International Law Association, which last year met in this country, held its session on September 22nd and the days following, at Budapest, Hungary, on the invitation of the Budapest Bar Association, the Association of Hungarian Jurists, and the Budapest Lawyers' Club. The programme includes the following subjects, on which papers have been promised: International Arbitration; Double Taxation; Unification of the Law of Bills of Exchange; Cases of International Private Law in Egyptian Mixed Tribunals; Jurisdiction in Divorce; International Regulation of Road Traffic; Enforcement of Arbitral Decrees and Judgments Abroad; Authentication of Foreign Law in Court Proceedings; Comparison of English and Continental Procedure; The Conditions of Service and Legal Position of Seamen; International Aspects of Workmen's Compensation; Extradition Treaties; The Sale of Goods in its International Bearings; Territorial Waters.

REVIEW OF CURRENT ENGLISH CASES.

WILL—CONSTRUCTION—CONTINGENT—REMAINDER OR EXECUTORY DEVISE.

White v. *Summers* (1908) 2 Ch. 256 shews that the question whether a devise is to be construed as contingent remainder or as an executory devise is one of strict law and is unaffected by the intention of the testator, unless his words can be construed as making alternative gifts, one as a contingent remainder and the other by way of executory devise. In this case in 1847, the testator devised real estate to one Bowen for life and after his death to his sons successively in tail male, in default of such issue to the eldest or other son of Jas. Summers, who should first attain or have attained 21, successively in tail male, and in default of such issue to Frances, the daughter of Jas. Summers for life and on her death to her sons successively in tail male. Bowen died in 1859, and at that date no son of Jas. Summers had attained 21. Jas. Summers, however, entered into possession as guardian of his infant son, who entered into possession on his attaining 21, and who was, on his death in 1879, succeeded by his son who was in possession at the commencement of the action. Frances Summers lived until March 1, 1906, and on her death her son brought the present action claiming the estate, on the ground that the gift to Jas. Summers' son was a gift in contingent remainder, and he, not having attained 21 in the lifetime of Bowen, the remainder never took effect. Parker, J., held that this contention was valid and gave judgment for the plaintiff.

TRADE MARK—INVENTED WORD.

In *Phillippart* v. *Whiteley* (1908) 2 Ch. 274, Parker, J., held that the word "Diabolo" as applied to a top spun by means of two sticks and a cord, is not an invented word, but a mere variant from the Italian word Diavolo, meaning the devil, and is therefore not registrable as a trade mark.

ADMINISTRATION—REAL ASSETS—DEVISE IN TRUST—ALIENATION BY DEVISEE—PURCHASER FOR VALUE WITHOUT NOTICE FROM DEVISEE—BONA FIDE ALIENATION—PRIORITY OVER CREDITOR OF TESTATOR—DEBTS RECOVERY ACT, 1830 (11 GEO. IV. & 1 W. IV. c. 47) ss. 6. 8 (2 EDW. VII. c. 1, s. 4, ONT.)

In re Atkinson, Proctor v. *Atkinson* (1908) 2 Ch. 307. Under the English Debts Recovery Act, 1830 (11 Geo. IV. & 1 W. IV. c. 47) a somewhat similar provision is to be found as that in (2 Edw. VII. c. 1. s. 4) which, while making lands devised assets in the hands of a devisee for payment of the devisors' debts, nevertheless protects bona fide purchasers from the devisee without notice of the debts. In this case the Court of Appeal (Cozens-Hardy, M.R., and Buckley and Kennedy, L.JJ.), decide, overruling Joyce, J., that the protection of the statutes extends to equitable as well as legal estates.

ADMINISTRATION—REAL ESTATE—SUCCESSION DUTY—EQUITABLE CHARGE—EXONERATION—LOCKE KING'S ACT, 1854 (17-18 VICT. c. 113), AND 1877 (40-41 VICT. c. 34)—(R.S.O. c. 128, s. 37).

In re Bowerman, Porter v. *Bowerman* (1908) 2 Ch. 340. In this case a person entitled to real estate died intestate in 1904, his estate being subject to succession duty, which by statute is made a charge on the land. The land descended to one Bowerman who also died intestate in 1907 without having paid the duty, his heir at law claimed to have the estate exonerated from payment of the duty by the personal estate, but Joyce, J., held that Locke King's Act applied (see R.S.O. c. 128, s. 37) and that the heir took cum onere.

MARRIAGE—DIVORCE—FOREIGN JURISDICTION — PUTATIVE MARRIAGE—LEGITIMACY OF ISSUE OF INVALID MARRIAGE—LAW OF SCOTLAND—IGNORANCE OF FACT—ERROR IN LAW.

In re Stirling, Stirling v. *Stirling* (1908) 1 Ch. 344 is an illustration of the difficulties people are apt to get into when they embark on divorce proceedings. The facts of the case were that Mr. and Mrs. Smith were married in Canada in 1883. Mr. Smith was Scotch, but he appears to have acquired a Canadian domicil. Mrs. Smith committed adultery with one Stirling and in 1895 left Smith and went to live with Stirling. Mr. Smith left Canada for the purpose

of getting a divorce in North Dakota and he took up his residence in that State for ninety days, and at the end of that time presented a petition for divorce alleging as the grounds that Mrs. Smith in her husband's absence had associated and become intimate with Stirling so as to cause gossip, that she thought more of Stirling than the plaintiff, that she was now travelling with Stirling in California, and that she neglected her husband and children. Mrs. Smith on the same day appeared by attorney and consented to an immediate hearing and made no objection. The pretended divorce was therefore granted on the same day and twelve days afterwards the formal judgment was drawn up and entered. Eight months afterwards Mrs. Smith went through the form of marriage with Stirling who had since died leaving as issue of the marriage one child the defendant who as heir at law in tail of his father claimed to be entitled to a certain trust fund in England. The plaintiff was the person next entitled, and contended that the defendant was illegitimate. This depended on the validity of the North Dakota divorce. But the defendant contended that even if it were invalid, yet under Scotch law where there has been a bona fide belief on the part of the parents that they were lawfully married, the issue is legitimate even though the marriage be in fact invalid. Eady, J., held, indeed it was not contested by counsel, that the Dakota divorce was invalid in Scotland and Canada, first for want of jurisdiction on the part of the foreign court, the plaintiff not having been truly domiciled within its jurisdiction; and also as having been granted on grounds not recognized by the law of either Scotland or Canada, and without deciding whether the doctrine of putative marriage was part of the law of Scotland, he held that if it were, it is confined to cases where the spouses have bona fide made a mistake of fact, and here he found the mistake, if any, was a mistake of law, viz., that the Dakota divorce would be valid in Scotland.

WILL—CHARGE OF DEBTS AND LEGACIES—BENEFICIAL DEVISE TO EXECUTOR—IMPLIED POWER TO SELL OR MORTGAGE—MORTGAGE BY DEVISE TO RAISE LEGACIES—LIABILITY OF MORTGAGEE TO SEE TO APPLICATION OF MONEY.

In re Henson, Chester v. *Henson* (1908) 2 Ch. 356. In this case a testator by will dated in 1879, charged his real estate with payment of debts and legacies and subject to such charge devised the land beneficially to one of his executors. The devisee

executed several mortgages the proceeds of some of which he applied in payment of legacies, but the moneys raised on one of the mortgages were not so applied, and a contest arose whether the legatee or the mortgagee was entitled to priority. Eady, J., held in favour of the mortgagee, on the ground that the devisee had an implied power under the will to sell or mortgage for the payment of debts and legacies, and that the charge being of both debts and legacies, the mortgagee was not bound to see to the application of the mortgage money, and he also held that it is not necessary for the protection of the mortgagee that the executor devisee should expressly purport to execute the mortgage in his capacity of executor.

WILL—DIRECTION TO PAY "DEBTS"—COLONIAL SUCCESSION DUTY—"DEEMED TO BE A DEBT."

In re Brewster, Butler v. *Southam* (1908) 2 Ch. 365. In this case, a testatrix domiciled in England made an English will appointing English executors and trustees and colonial executors and trustees. She directed the colonial trustees to sell land in Melbourne and remit the proceeds to the English trustees to be held on certain specific trusts. She devised the residue of her real and personal estate to her English trustees upon trust to sell, and thereout inter alia pay her "debts," and to stand possessed of residue on certain trusts. The land in Melbourne was subject to succession duty which by the colonial statute was to be "deemed to be a debt of the testatrix," and the question Eady, J., was called on to decide was whether this duty was payable as a "debt" out of the residuary estate, and he held that it was not, and fell properly on the Melbourne property in respect of which it was payable.

COMMISSION—PAYABLE "AS LONG AS WE DO BUSINESS"—DEATH OF CONTRACTEE—CONTINUATION OF BUSINESS.

In *Wilson* v. *Harper* (1908) 2 Ch. 370, one Joseph Wrae, a commercial traveller, made an agreement with the defendants whereby it was agreed that in consideration of Wrae introducing to the defendants, customers, the defendants were to allow Wrae 5 per cent. on all accounts he introduced, so long as the defendants did business with them. Wrae had died and the plaintiffs were his personal representatives, and claimed to recover the above commission on accounts of customers introduced

by Wrae, and who continued, after his death, to be customers of the defendants. The defendants contended that the death of Wrae had put an end to the contract, but Neville, J., held that by the terms of the agreement, the commission was payable as long as the defendants continued to do business with customers introduced by Wrae, and that, therefore, it continued to be payable, even after his death. Judgment was therefore given in favour of the plaintiffs.

VENDOR AND PURCHASER—RESTRICTIVE COVENANTS—RIGHTS OF PURCHASERS INTER SE—UNEXECUTED ENGROSSMENT—RELEASE BY ACCEPTING LESS ONEROUS RESTRICTIONS—INJUNCTION.

Elliston v. *Reacher* (1908) 2 Ch. 374. This was an action for an injunction to restrain a breach of a restrictive covenant not to erect a hotel on defendants' land. The plaintiffs were one Elliston, the owner of lot 27, and other parties, who were owners of lots 30 and 31. The plaintiffs' lands had originally formed part of the same estate, and the owners had laid it out as a building estate, and the several lots had been sold subject to the covenants contained in an "indenture" dated January 16, 1861. At the trial an engrossment of an unexecuted deed of that date was produced, which, the judge found as a fact, was the document referred to as an "indenture," and which contained restrictive covenants inter alia against building a hotel. The defendants' land had been conveyed by the common owner subject to the same covenants, but while the predecessors of title of the plaintiffs, who owned lots 30 and 31 owned those lots they joined in a conveyance to the defendants of their lot, and this conveyance was not made subject to the restrictive covenants now sought to be enforced. This objection did not apply, however, to Elliston. Parker, J., who tried the action, held that the defendant, having purchased with notice of the restrictive covenants to which the estate was subject, was bound thereby as against Elliston, but the other plaintiffs had lost their right to enforce them by reason of their predecessors in title having conveyed to the defendant subject only to covenants of a less onerous character. He, therefore, granted an injunction in favour of Elliston, but dismissed the action as far as the other plaintiffs were concerned.

NEGLIGENCE—NEGLIGENT MODE OF CONDUCTING BUSINESS—DANGEROUS PRACTICE—EVIDENCE—SINGLE ACT OR OMISSION—EVIDENCE OF SIMILAR ACTS OR OMISSIONS—INFECTING CUSTOMER WITH BARBER'S ITCH.

Hales v. *Kerr* (1908) 2 K.B. 601 was an action brought by a customer of the defendant, a barber, for infecting him with barber's itch. The plaintiff gave evidence shewing that he had been a customer of the defendant who, while shaving him, had cut him slightly with a razor and then rubbed the cut with a towel and applied a powder puff; that very soon afterwards the cut became inflamed and barber's itch developed. The plaintiff negatived being at any other barber's, and also gave evidence to shew that two other persons who were customers of the defendant had been similarly affected after being shaved at his shop. The evidence of these two witnesses was objected to by defendant, but admitted as bearing on the allegation that the defendant was guilty of negligence in not keeping his razors and other appliances clean. Judgment was given in the County Court for the plaintiff, which was affirmed by the Divisional Court (Channell and Sutton, JJ.). The appeal was on the ground of the admissibility of the evidence objected to, but the Divisional Court held that for the purpose of supporting an allegation as to the defendant's mode of carrying on his business, the evidence had been properly admitted.

SHIP—BILL OF LADING—CONDITION LIMITING LIABILITY—LOSS DUE TO NEGLIGENCE.

Baxter's Leather Co. v. *Royal Mail SS. Co.* (1908) 2 K.B. 626, it may perhaps be remembered, was an action brought on a bill of lading which limited the liability of the shipowners for loss of goods of any description "beyond the amount of £2 per cubic foot for any one package," unless shipped under a special declaration of value and extra freight paid. Goods which had been shipped without any declaration of value and without payment of any extra freight were lost through the shipowners' negligence, Bingham, J. (1908) 1 K.B. 796 (noted ante, p. 349), held the defendants were not liable for the goods lost, beyond the specified amount, notwithstanding the loss arose through their negligence, and his decision has been now affirmed by the Court of Appeal (Barnes, P.P.D., and Farwell and Kennedy, L.JJ.).

CRIMINAL LAW—EVIDENCE OF ACCOMPLICE—ABSENCE OF CORROBORATION—OMISSION OF JUDGE TO CAUTION JURY.

In *King* v. *Tait* (1908) 2 K.B. 680, the new Court of Criminal Appeal (Lord Alverstone, C.J., and Ridley and Darling, JJ.), quashed the conviction because the judge at the trial had omitted to caution the jury that they should not convict on the uncorroborated evidence of an accomplice.

SHIP—CHARTER PARTY—EXCEPTIONS — CONSTRUCTION—"EJUSDEM GENERIS."

In *Larsen* v. *Sylvester* (1908) A.C. 295, the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne, Hereford, Robertson and Collins) have held, affirming the judgments of the courts below, that in the construction of the charter party in question in this action, the "ejusdem generis" rule of construction was not properly applicable. The charter party excepted both parties from all liability arising from "frosts, strikes . . . and any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo." Delay was caused by the block of other ships at the loading port, and their Lordships held this was within the exception. They, however, expressly guard themselves against being understood as in anyway impeaching the correctness of the "ejusdem generis" rule of construction.

HIGHWAY — MINE UNDER HIGHWAY — SUBSIDENCE OF HIGHWAY CAUSED BY MINE OWNER—REPAIR OF HIGHWAY—MEASURE OF DAMAGES.

Lodge Holes Colliery v. *Wednesbury* (1908) A.C. 323 is the case known in the courts below as *Wednesbury* v. *The Lodge Holes Colliery* (1907) 1 K.B. 78 (noted ante, vol. 43, p. 162). The action was by a municipal body against mine owners for having caused a subsidence in a highway vested in the plaintiffs. The plaintiffs, in repairing the road, had restored it to its former level. The defendants contended that the repairs were excessive, and that they were merely liable for what it would have cost to make the road reasonably commodious for the public. The Court of Appeal overruling Jelf, J., held, that the defendants were liable for the full amount of damages claimed, but the House of Lords (Lord Loreburn, L.C., and Lords Macnaghten and Atkinson) consider that Jelf, J., was right, and

have restored his judgment, holding that the plaintiffs could only recover what it would have cost to restore the road so as to make it equally commodious as it was before the subsidence, and that this might have been done without restoring the road to its original level.

JUSTICES—QUARTER SESSIONS—JURISDICTION OF HIGH COURT—STATED CASE—DECISION OF JUSTICES FINAL.

In *Kydd* v. *Watch Committee of Liverpool* (1908) A.C. 327 the House of Lords have overruled the decision of the Court of Appeal (1907) 2 K.B. 591 (noted ante, vol. 43, p. 698). By a statute it was provided that in certain cases the party aggrieved might appeal from the decision of the Police Board to the Court of Quarter Sessions, whose decision should be final. The Court of Appeal overruling a Divisional Court held, that where a Court of Quarter Sessions gave its decision in the form of a stated case, the High Court had jurisdiction to entertain the case, but their Lordships held that this view was erroneous, notwithstanding they had themselves entertained jurisdiction in a similar case where, however, the objection had not been raised.

INSURANCE—WARRANTY OF FREEDOM FROM CAPTURE—CAPTURE OF SHIP—CONDEMNATION—TITLE OF CAPTORS.

In *Andersen* v. *Martin* (1908) A.C. 334 the House of Lords have affirmed the decision of the Court of Appeal (1907) 2 K.B. 248 (noted ante, vol. 43, p. 620). The action was on a policy of marine insurance which excepted the insurers from liability in case of loss by capture. The vessel was captured by a belligerent, but before condemnation it became a total wreck, but the vessel was subsequently condemned as a prize by a prize court. The court below held that the title of the captors related back to the date of capture, and the plaintiff could not recover for the loss by subsequent wreck, and their Lordships agree with that conclusion.

TRUST—GIFT OF INCOME ACCORDING TO TRUSTEES' DISCRETION—ASSIGNEE OF LEGATEE.

Train v. *Clapperton* (1908) A.C. 342 was an appeal from the Scotch Court of Session. A testator had bequeathed a fund of £5,000 to trustees upon trust to pay to his brother during his lifetime "either the whole or only a portion of the annual

revenue thereof, and that subject to such conditions and restrictions, all as my trustees in their sole and absolute discretion think fit." The trustees had become involved in litigation as to the testator's estate, and during five years, had only paid the brother £24 5s. The brother assigned his interest to the plaintiff who claimed to be paid the whole of the income of the £5,000, but the House of Lords agreed with the court below, that the plaintiff had no higher rights than his assignor, and that he had no right to the total income, its disposal being left to the absolute discretion of the trustees.

NEGLIGENCE—RAILWAY COMPANY—FAILURE TO CLOSE DOOR OF CARRIAGE.

Toal v. *North British Ry.* (1908) A.C. 352 was an action to recover damages against a railway company for alleged negligence. The plaintiff was standing on the railway platform, where he had alighted from a train, and had been struck and injured by the door of one of the compartments of a car which had been left open, when the train again started. The defendant set up that the plaintiff was injured through his own negligence in not leaving the platform immediately after he alighted, and the Scotch Court of Session thought this contention well founded and refused the plaintiff a jury trial, but the House of Lords (Lord Loreburn, L.C., and Lords Halsbury, Ashbourne, Robertson and Collins) considered that the leaving the door open was some evidence of negligence on the part of the defendants which the plaintiff was entitled to have submitted to a jury.

INNKEEPER—LIMITATION OF LIABILITY—GOODS DEPOSITED WITH INNKEEPER "EXPRESSLY FOR SAFE KEEPING"—EVIDENCE—INNKEEPERS' LIABILITY ACT, 1863 (26-27 VICT. C. 41) S. 1—(R.S.O. C. 187, S. 3).

Whitehouse v. *Pickett* (1908) A.C. 357. This was an action against an innkeeper to recover damages for loss of goods placed in his keeping by the plaintiffs' traveller, a guest. The plaintiffs' traveller carried with him a bag of samples worth £1,800, which, on arrival at defendant's inn, he handed to the "boots" who took it without anything being said to the defendant's office and placed it in the same place it had been placed on previous occasions. Later in the day the traveller asked for the

bag and it was found to have been stolen. At the trial, judgment went for the plaintiff, but on appeal the Court of Session held, that as there was no proof of any deposit expressly for safe keeping, the Innkeepers' Liability Act, 1863 (26-27 Vict. c. 41) s. 1 (R.S.O. c. 187, s. 3) applied, and the innkeeper's liability was limited to the amount therein mentioned, to which the judgment was reduced, and with this conclusion the House of Lords (Lord Loreburn, L.C., and Lords Ashbourne and Robertson) agreed, but Lord Collins dissented. The majority being of opinion that in order to constitute an express deposit under the statute, it must be proved that something was said or done by the depositor to apprize the innkeeper of the fact that the deposit was being made with him for safe custody.

ADMINISTRATION BOND—DURATION OF SURETIES' LIABILITY—COMPLETION OF ADMINISTRATION—LOSS OCCASIONED BY BENEFICIARIES RIGHTFULLY IN POSSESSION.

Blake v. *Bayne* (1908) A.C. 371 was an appeal from the High Court of Australia. The action was brought against the sureties named in a bond given for the due administration of a deceased intestate's estate. The appeal turned principally on the evidence, and the Judicial Committee of the Privy Council (Lord Loreburn, L.C., and Lords Macnaghten, Atkinson and Collins, and Sir A. Wilson) differed from the Court below as to its effect, and came to the conclusion that there had been no misconduct by the administratrix, and no loss of assets in the course of administration, that a deed of indemnity executed by the plaintiffs, and on which the defendants relied, had been executed with full knowledge of the facts, and was binding on the plaintiffs, and an effectual discharge of the alleged liability of the defendants, and, thirdly, that after the payment of the testator's debts, the plaintiffs and the administratrix, as next of kin of the deceased, were entitled to the residue in undivided shares, and so held and enjoyed it, and that the loss of the estate had taken place while it was rightfully in their possession, and, therefore, although the administratrix continued to act as the manager of the estate with the concurrence of the plaintiffs, yet the losses which had thereby resulted could not be attributed to her in her character of administratrix. The judgment of the Court below was, therefore, reversed.

REPORTS AND NOTES OF CASES.

Province of Ontario.

HIGH COURT OF JUSTICE.

Teetzel, J.] [July 10.

FRASER *v.* PERE MARQUETTE R.W. Co.

Crops—Destruction by fire—Railway Act, s. 298—Liability of railway company—Marsh hay baled and piled at siding.

This was an action for damages for the destruction of hay which was baled and piled at the railway siding awaiting shipment. The plaintiff owned a quantity of marsh lands, from which he annually cut grass commonly called marsh hay. It is also called sea grass, and, besides being used for fodder, it is used for the manufacture of mattresses. A large quantity of it had been cut and baled and at time of destruction was piled by siding used by defendant in connection with the Wallaceburg Sugar Refinery, awaiting shipment.

Two questions arise for determination: (1) Is the material covered by the word "crops" in s. 298 of the Railway Act of Canada? (2) If it was a crop while in the field, would it lose that character when baled and delivered for shipment?

TEETZEL, J.:—"In the Standard dictionary the word crop is defined as 'plants or grains collectively that are cultivated for consumption; also the soil product of a particular kind, place or season; anything gathered and stored at a proper time and for future use.' The grass in question is perennial and besides the work of cutting and gathering, the only work bestowed upon the ground consists in burning off, every spring, the old growth of the former grass. If the material had been destroyed in the field whether before or after it had been cut it would be well within the above definition of the word crop. Mr. Stone, solicitor for the defendants, presented a very ingenious argument, that, conceding the above to be the correct view, when the material was removed from the farm and piled along defendants' tracks for shipment, it lost the character of 'crop' within the contemplation of s. 298, and became merchandise.

"I am unable to adopt this argument. The Legislature has not

made provision in respect of crops in any particular place or while on a farm only, but in respect of 'crops' generally, no matter where situate."

A. B. Carscallen, for plaintiff. *F. Stone*, for defendants.

Teetzel, J.] [July 23.

EBY, BLAIN CO. *v.* MONTREAL PACKING CO.

Chose in action—Assignment of book debts to creditor—Notice not given to debtors—Cheque in payment of book debts received by debtor as agent of assignee—Transfer of cheque to another creditor—Property in cheques.

The Eby, Blain Company obtained from the plaintiff Atkinson an assignment of present and future book accounts as security for past indebtedness and for further advances. No notice of this assignment was given to the parties owing the book accounts. Atkinson was permitted to collect the accounts and to use the proceeds in paying general expenses and liabilities up to about July 26, 1907, when this privilege was withdrawn and he was constituted agent for the Eby, Blain Co. to make collections solely for their benefit. The defendants were also creditors of Atkinson and on the 29th of August they were notified of the assignment to the Eby, Blain Co. On September 27th an agent of the defendants called at Atkinson's store and prevailed upon the bookkeeper to deliver to him on account of defendants' claim $107.61 in cash and cheques of persons owing book accounts amounting to $633.01.

Held, that under the circumstances of this case the absence of such notice did not affect the plaintiff's rights. As between Atkinson and the Eby, Blain Co., the former by the assignment divested himself of all property in the book accounts and after his appointment as agent to collect and transmit the proceeds, any other disposition of them would have been wrongful. When the cheques were delivered to the defendants they had actual notice of the assignment of the accounts represented by the cheques, and the fact that, as between the Eby, Blain Co. and the debtors the former could not have maintained in their own name an action by reason of notice of the assignment having been given under s. 58, s.-s. 5, of the Judicature Act cannot be taken advantage of by the defendants after the debtors have paid the accounts to the assignees' agent. Without the notice the

plaintiffs were equitable owners of the book accounts, and, after payment to their agent, their title was complete as against the debtors who paid Atkinson and the defendants who had notice of the equitable interest.

As to the $107.61, cash, there was no evidence at the trial to shew how much, if any part, represented collection on book accounts and this part of the claim was not allowed.

R. McKay, for plaintiffs. *Ludwig*, for defendants.

Anglin, J.] [Sept. 10.

IN RE BY-LAW NO. 204 OF THE TOWN OF GALT.

SCOTT *v.* PATTERSON.

Hydro-Electric Commission Act—Contract—Illegality—Not in accordance with by-law authorising it—Refusal of mayor to sign—Rights and liabilities of mayor as to.

The plaintiff, a ratepayer of the Town of Galt, applied on behalf of himself and all other ratepayers of that town, for an order in the nature of a mandamus commanding Thomas Patterson, as mayor of the town, to sign a contract between the Hydro-Electric Power Commission of Ontario and the town, for the transmission of electrical power to the town under a by-law passed Jan. 7, 1907, and approved by the ratepayers. The mayor objected to sign the contract on the ground that the contract did not conform in its terms to the provisions of the said by-law.

The Hydro-Electric Power Commission of Ontario was constituted by 6 Edw. VII. c. 15. Sec. 7 of that Act provides that the council of the municipal corporation may submit to the electors a by-law authorising it to enter into a contract for the supply of power, and in case such by-law receives the assent of the majority of the electors the contract may be entered into by the Commission and the municipal corporation.

Semble, although the statute does not in terms forbid municipal corporations to enter into contracts with the Hydro-Electric Power Commission for the supply of energy without first obtaining the approval of the electors such a prohibition is a necessary implication of the statute.

The by-law in question was for the supply of power at from $17.37 to $22 per horse power per annum ready for distribution

by the municipality. The proposed contract did not conform to the by-law in that it purported to bind the municipality to pay a fixed price for energy at Niagara and a proportionate share of the cost of transmission and other charges which were not determined.

Held, 1. That such contract would be illegal and a breach of faith with the electorate and contrary to the requirements of 6 Edw. VII. c. 15, and 7 Edw. VII. c. 10.

2. This being so the mayor was justified in refusing to sign the contract.

3. The mayor would have no right to refuse to sign because in his judgment the terms of the contract were not in the best interest of the municipality, nor upon any ground of policy, but where the legislature has empowered the municipality to enter into such contract only with the approval of the majority of the electors and this approval has not been obtained, he cannot be compelled to sign a contract which would commit the municipality to a liability which the legislature has not empowered him to make and which could only be entered into in violation of the conditions prescribed by the statute.

4. Whilst s. 333 of the Municipal Act directs that every by-law shall be signed by the head of the corporation and whilst this section has been held to be imperative and to impose upon the mayor a ministerial statutory duty enforceable by summary order of mandamus (see *Kennedy* v. *Boles,* 6 O.W.R. 837) he cannot be compelled to sign a contract where the refusal is based upon the ground that the by-law is beyond the jurisdiction of the council and that it purports to authorize and require the making of an invalid and illegal contract. The court will not assist in the doing of that which is unauthorized and illegal and which involves an act of bad faith. (See *State ex rel. Nicholson* v. *Mayor of Newark,* 35 N.J.L. 396.) The mayor is not a mere automaton, bound to place his signature to any document no matter how vicious or illegal, because he has been directed to do so by the council.

5. The illegality in the contract has not been overcome by 8 Edw. VII. c. 22, which purports to authorize councils to enter into certain contracts with the Hydro-Electric Power Commission in a certain form. Sec. 4 of that Act which declares a certain form to be a sufficient compliance with the Act and to make valid any such contracts as therein referred to involves the proposition that the legislature has indirectly dispensed with the

consent required from the ratepayers, but if the legislature intended to permit the municipality to enter into such contracts without the consent of the electorate, such intention would have to be expressly and clearly stated, and not left to implication. (See *Municipality of Brock* v. *Toronto and Nipissing Ry. Co.*, 17 Grant 433.)

6. That the price of the energy to be supplied is a most material term of the contract and not a matter of form such as referred to in the expression "form of contract" used in s. 4 of the Act.

7. The contention that although the court should be of the opinion that the contract differed materially from the terms approved of by the electorate, the mayor would nevertheless be required to execute it even though proceedings were afterwards taken to declare the contract invalid cannot be entertained. This would be objectionable on the ground of circuity of action; it would moreover be an abuse of the discretion of the court to order a mandamus to sign a contract which would work a gross breach of faith with the electorate, and contravenes the statute. (See *Rex* v. *Askew*, 4 Burr. 2189.)

DuVernet, K.C., for the motion. The Mayor of Galt in person.

Cartwright, Master.] SMITH *v.* CITY OF LONDON. [Sept. 15.

Pleading—Embarrassment—Striking out paragraphs in statement of claim—Parties.

This was a motion to strike out certain paragraphs in the statement of claim in an action which charged misrepresentations on the part of Hon. Adam Beck, as chairman of the Hydro-Electric Power Commission of Ontario, and those acting under him whereby the council of the city was misled on material points, which representations led to the execution of a contract between the Commission and the corporation of the City of London for the supply of electric energy. The plaintiff's action was to have this contract declared invalid and to restrain of council from delivering the contract to the Commission or taking any step to carry it into operation. The Hydro-Electric Power Commission of Ontario was not a party defendant.

CARTWRIGHT, MASTER.—"The motion was supported on two grounds:—Firstly, it was said that charges of misrepresentation are made against the chairman of the Commission and those acting under his authority whereby the council was misled on a material point. It was argued that this was improper because the Commission is not a party to the action. Secondly, it was said that the statement of claim attacks the validity of the By-law No. 2920 although it is therein set out that it has been validated by the legislature. It was said in answer that the paragraphs which are complained of are mainly historical (as in *Morley* v. *Canada Woollen Mills* (1903) 2 O.W.R. 457-478) and that the relief sought is asked on two grounds: 1st, that the contract is not such as the by-law authorizes; and 2nd, that the council were induced to enter into it through the advocacy and erroneous statements of the agent of the Commission, and it was confidently submitted that the statement of claim contains nothing that is not revelant to these grounds of attack.

The statement of claim is a good deal longer than usual, but is not necessarily objectionable on that account. On the contrary, it gives a full and clear statement of the facts out of which the action proceeded; and of those other facts on which the plaintiff relies to prove his case. It is quite clear that pleadings are not to be reformed in Chambers unless hopelessly bad (and perhaps not always then). As was said by Bowen, L.J., in *Knowles* v. *Roberts*, 38 Ch. Div., at p. 270: "The court is not to dictate to parties how they should frame their case" though they "must not offend against the rules of pleadings."

After consideration of the statement of claim it does not appear to me to be open to attack. The validity of the by-law is not in any way attacked. This could scarcely be seriously attempted when the fact of its having been validated is fully set out in paragraph two. Nor is it any objection that the Commissioners or their agents are stated to have misled the council as set out in paragraph nineteen. These are statements, in conformity with the rules of some of the material facts on which the plaintiff will rely and on proof of which he hopes to succeed. The fact that the Commission is not a party is no objection as no relief is asked against that body or any one connected with it.

The motion will be dismissed with costs to plaintiff in the cause.

DuVernet, K.C., for the motion. *Middleton*, K.C., and *J. M. McEvoy*, for plaintiff.

Held, by MEREDITH, C.J.C.P., on appeal from the Master in Chambers, that paragraph 14 should be struck out as being irrelevant and therefore embarrassing.

Semble, that the plaintiff could take nothing by his suit under the charges of misrepresentation if the Hydro-Electric Commission was not made a party defendant.

Lefroy, for defendants (appellants). *McEvoy*, for plaintiff.

MASTER'S OFFICE—COUNTY OF CARLETON.

WEBSTER *v.* JURY COPPER MINES.

Company—Employment of agent—Sale of shares—Action for wages—Absence of by-law or resolution of directors—Parol agreement with directors—Sale of shares without prospectus.

Held, that a contract is binding on a company although not under seal and without by-law or resolution of the directors, nor is a meeting of the directors material provided the necessary number concur in making the contract.

[OTTAWA, August 18.—W. L. Scott.

This was an action referred by consent to W. L. Scott, Esq., Local Master at Ottawa, for trial under s. 27 of Arbitration Act.

The defendants were an incorporated mining company, and in May, 1907, the plaintiff, who resided at Ottawa, went, by defendants' request, to Sault St. Marie, with a view to his employment as agent for the sale of the company's stock in Ottawa and elsewhere. After interviews with the president and secretary he attended a meeting of the directors where the matter was further discussed. It was finally arranged that the plaintiff should be employed for two months, at least, at $100 per month and his expenses paid, and in addition he was to receive 10% commission on all stock sold. No formal resolution was passed. The parol agreement, however, was made on the part of the company by the president and secretary and at least three other directors, and a fourth director, though not present at the meeting, was a party to the agreement and consented to the arrangement. It appears from the evidence that these six formed the entire directorate. The sum of $100 was paid to the plaintiff on account of expenses. He returned to Ottawa and endeavoured to sell the stock. Later on he assisted the company in preparing

a prospectus. Subsequently the company endeavoured to sell the mine or a controlling interest in it, by selling stock of the shareholders en bloc. The plaintiff at one time succeeded in negotiating a sale of 51% of the stock, but the directors did not consider the price large enough and refused to ratify the sale, and afterwards brought purchasers to inspect the mine. This was in November. During all this period the plaintiff was devoting his time and energies to these efforts to sell the stock in one way or the other. He was in constant communication with the officers of the company. He, however, did not succeed in actually disposing of a single share.

J. J. O'Meara, for plaintiff. *A. C. Boyce*, K.C., for defendants.

THE MASTER:—The first question is, was there ever a valid contract binding on the company? I think there was. It seems quite clear from the authorities that no by-law or seal was necessary. The Companies Act, R.S.O. 1897, c. 191, s. 47, provides that the directors may make by-laws for the appointment of "officers, agents, and servants," but it follows from *Bernadin* v. *Municipality of North Dufferin*, 19 S.C.R. 581, that "may" is permissive only, and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. This conclusion also follows from *Gold Leaf Mining Co.* v. *Clark*, 6 O.W.R. 1035. The by-law that was there held to be a condition precedent was a by-law for the issue of stock at less than par, and that has no application here. That a formal resolution was unnecessary is less clear. By s. 46 of the Companies Act, "the directors of the company shall have full power in all things to administer the affairs of the company; and may make or cause to be made for the company any description of contract which the company may by law enter into." A president has unusually wide powers, but these must be conferred by by-law, and no by-law is proved here. Moreover, it was not with the president alone, but with the directors present at the meeting, including the president, that the bargain was made. It was argued on the authority of *D'Arcy* v. *Tamar Kit Hill and Callington R.W. Co.*, L.R. 2 Ex. 158, that directors exercising their powers must act together and as a board; and the only way a board can speak is by formal resolution; but see the later case of *In re Bonelli's Telegraph Co., Collie's claim*, L.R. 12 Eq. 246, a case very like the present. In that case, by the articles of incorporation of

the company it was provided that three directors should form a quorum; and that the directors should have power at their discretion to sell the company's business; and also at their discretion to appoint agents; any such agents to be remunerated at the discretion of the directors. The directors, without any resolution, or in fact any meeting at which all were present, entered into an agreement with Collie to pay him a commission on any sale effected for more than a specified amount. This was signed by two directors in London, was then mailed to Manchester, where it was signed by two others, and was finally handed to Collie. On the sale's going through, Collie was held entitled to recover the commission from the official liquidators of the company. The case of *D'Arcy* v. *Tamar Kit Hill and Callington R.W. Co.* was referred to and distinguished. Sir James Bacon, V.-C., who rendered the decision, says (p. 258): "Then it is said that the formal authority to enter into the agreement was wanting, for that the article providing that the acts of directors shall be binding means that they shall act in their combined wisdom. . . . I quite agree that the 'combined wisdom' is required in this sense that they must all be of one mind, but I do not know that it is necessary that they shall all meet in one place. . . . If you are satisfied that the persons whose concurrence is necessary to give validity to the act did so concur, with full knowledge of all that they were doing, in my opinion the terms of the law are fully satisfied, and it is not necessary that whatever is done by directors should be done under some roof, in some place where they are all three assembled." A fortiori then, where, as in the present case, directors meet formally and unanimously agree to hire the plaintiff on certain specified terms, and the plaintiff goes on and does his part, the company cannot afterwards escape liability on the ground that no formal resolution was entered in the minutes. In *Hamilton and Port Dover R.W. Co.* v. *Gore Bank*, 20 Gr. 190, where an informal agreement was sought to be enforced, much importance was attached to the question of whether or not the directors in fact knew of the terms of the agreement which certain of their number had purported to authorize. No such question can arise here, for the agreement was, as I have said, not only known to but authorized by all of the directors.

It is next contended that no stock could legally be sold without the publication of a prospectus, and that, none having been published, the plaintiff, who was employed to sell stock,

cannot recover. I can see nothing in this contention. Under 6 Edw. VII. c. 27, s. 2, s.-s. 3, sales of stock are voidable at the option of the purchaser when no prospectus has been shewn him; but that is a matter for a purchaser to raise. I know of no principle on which the defendants can set up their failure to issue a prospectus in answer to the present claim. It was the duty of the defendants, not of the plaintiff, to issue the prospectus, and it is not even pretended that the absence of one stood in the way of any sale of stock.

The plaintiff is entitled to judgment for the amount claimed for salary.

Province of Nova Scotia.

SUPREME COURT.

Drysdale, J.] IN RE G. T. W. MILLER. [August 12.

Administration—Power of sale—Trustee Act.

M. by his will appointed his daughter A. sole executrix and trustee with full power as such to sell any portion of his estate for the purpose among other things of obtaining and setting apart a principal fund and applying a sufficient income therefrom to the support and maintenance of an invalid son. After the death of A., her son, the respondent G., undertook without being duly authorized thereto to carry out the trusts under the will of M. One of the beneficiaries under the will of M. commenced proceedings under the Trustee Act praying for administration of the estate of M., for the appointment of a new trustee in the place of A., and for an accounting by G.

Held, 1. That the prayer of the petition must be granted.

2. That the power of sale contained in the will under the trust for the son remained in the executor and that resort must be had to the executor to sell any land required to carry out the trust.

3. That the trust in favour of the son attached to the office of trustee and the power to sell and to carry on the trust was in one and the same person.

4. That the respondent G. could not have his costs of opposing the motion paid out of the estate.

R. E. Harris, K.C., for the petitioner. *W. B. A. Ritchie*, K.C., for respondent.

Province of Manitoba.

COURT OF APPEAL.

Full Court.] ADAMS *v.* MONTGOMERY. [July 15.

County Courts Act, R.S.M. 1902, *c.* 38, *ss.* 60(*d*), 61—*Jurisdiction of County Court—Injunction—Garnishment—Fraudulent conveyance.*

The plaintiff, having entered suit in the County Court against the defendant for the amount of a promissory note, sought to attach certain money owing or accruing due from the garnishee to the defendant's wife on the sale of a parcel of land by her to the garnishee, alleging that this land was held by the wife as trustee for the debtor, and obtained from the County Court judge the common order garnishing moneys due to the primary debtor and also an order prohibiting the garnishee from paying over any money to the defendant's wife until it should be determined whether the money was an asset of the debtor or not.

Subsequently, judgment having been recovered by the plaintiff for the debt, he obtained an order for the trial of an issue to determine such question.

Held, that the County Court had no jurisdiction to make the order staying payment to the wife and that the order for the trial of the issue fell with it and that both orders should be set aside with costs.

Donohoe v. *Hull*, 24 S.C.R. 683, followed.

Monkman, for plaintiff. *Coyne*, for Mrs. Montgomery.

KING'S BENCH.

Macdonald, J.] HALSTED *v.* HIRSCHMANN. [July 15.

Promissory note—Garnishment.

The garnishees borrowed $500 from the defendant and gave him an instrument in the following form. "Winnipeg, June 20th, 1907. Received from P. Hirschmann the sum of five hundred dollars advance to be repaid at expiration of 9 months.

W. & M." The defendant indorsed and transferred the instrument to one Hugo Hirschmann on March 16th, 1908, for value received.

Held, that this instrument was a negotiable promissory note and the money payable under it was not attachable by garnishment proceedings during its currency.

A. B. Hudson, for plaintiff. *Burbidge*, for defendant.

Mathers, J.] MONROE *v.* HEUBACH. [July 17.

Contract—Agreement for sale of land—Stipulation for formal contract—Waiver—Interest.

Action to recover payment of one instalment of purchas money under an agreement of sale of land in the form of a written option signed by the plantiffs and accepted in writing by the defendant. The option contained all necessary terms of the proposed purchase including a provision that, should the defendant sell any portion of the lands, the plaintiff would execute a transfer or conveyance of the lands sold provided that the amounts had been agreed upon between the plaintiffs and the defendant and, in the event of their being unable to agree, then provided the selling price was at a fair valuation to be determined by the named arbitrators. It contained also a clause providing that upon the exercise of the said option a formal agreement of sale should be entered into between the parties containing such terms and conditions as are suitable and usually contained in the form of agreement of sale in common use by the firm of Tupper, Phippen & Co. The letter of acceptance also contained the defendant's statement; "I shall be pleased to have you arrange for the preparation of the formal agreement of sale." No formal agreement was ever prepared or executed, but the defendant, before the due date of the instalment sued for, entered into an agreemen for the sale of a considerable portion of the property and applied for and obtained a conveyance of such portion from the plaintiffs upon payment of an amount agreed upon between the parties.

Held, 1. There was a complete contract between the parties enforceable by the plaintiffs notwithstanding the absence of the more formal agreement contemplated. The principles laid

down by Lord Westbury in *Chinnock* v. *Marchioness of Ely*, 4 DeG. J. & S. 638, adopted.

2. If it had been otherwise, the defendant had waived his right to have a formal agreement executed by making the sale referred to.

3. The defendant, having exercised rights of possession of the property by making such sale and not having set apart the money for the instalment by depositing it in a bank or other proper place of deposit in a separate account, was liable to pay interest on the amount from the due date although there was some delay on the plaintiffs' part in making title: *Stevenson* v. *Davies*, 23 S.C.R., at p. 631.

A. B. Hudson and *A. V. Hudson*, for plaintiffs. *Galt*, for defendant.

Province of British Columbia.

SUPREME COURT.

Full Court.] IN RE NARAIN SINGH. [July 29.

Costs—Against the Crown—Whether they can be awarded.

The court will, and when occasion requires, should give costs either for or against the Crown. *Reg.* v. *Little* (1898) 6 B.C. 321 followed.

A. D. Taylor, K.C., for the Crown. *Brydone-Jack*, contra.

Hunter, C.J.] REX *v.* SHEEHAN. [Sept. 1.

Criminal law—Vagrancy—Means of support—Gambling—Evidence—Code s. 207 (*a*).

Accused, when arrested, had on his person $27.20. Evidence was given that he lived by "following the race track," and that his general associates were gamblers and other criminal classes.

Held, that, although he might be convicted under s.-s. (*l*) of s. 238 of the Code, yet he could not, on the evidence, be convicted

of being a loose, idle, disorderly person with no visible means of support; and that evidence that the money found on his person was obtained by gambling was immaterial.

Lowe (Moresby & O'Reilly), for the accused. *Helmcken*, K.C., for the Crown and the magistrate.

Hunter, C.J.] REX *v.* REGAN. [Sept. 14.

Criminal law—Certiorari—Idle and disorderly person—Necessity for person charged to properly account for herself—Police officer—Disclosure of his authority to accused person.

A police detective, in plain clothes, questioned accused as to what she was doing in a certain house. He did not inform her that he was an officer.

Held, that the officer should have first disclosed his authority, and then expressly asked the accused to give an account of herself.

Lowe (Moresby & O'Reilly), for the accused. *Morphy,* for the Crown.

Flotsam and Jetsam.

HIS EYE ON THE CLOCK.—A fourteen year old boy recently testifying in a New York city court was quite positive as to the time a certain accident occurred. The opposing counsel, to test his ability in such matters, asked him to estimate a period of three minutes. When the boy finally said the time was up, he was found right to the second. The lawyer hastily excused him, but afterwards discovered that, all the time, the boy had been looking at the court-room clock directly over the lawyer's head.

HAD FORGOTTEN ABOUT HER.—A San Francisco man, testifying in Washington not long since in a land case, was asked if he knew a woman named Pearl E. R——. For a minute or two he seemed to be struggling to remember. Finally his face lighted up, and he said: "Why, yes, I remember it now. She was my wife once. We were divorced eight years ago."

"Have you," asked a judge of a prisoner just convicted, "anything to offer to the court before sentence is passed?" "No, your honor," remarked the prisoner regretfully, "my lawyer took the last cent."