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# The Barrister.

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# The Barrister.

VOL. I. TORONTO, MAY, 1895. No. 6.

## *EDITORIAL.*

WE believe it would be a good idea if the profession in each town and city formed themselves into an association, and held monthly meetings, when they could compare notes, and find how many of them were being worked by professional fakirs. There is a class of men who go around giving their business and patronage to various lawyers, and showing each solicitor a great future, wind being their chief commodity—it is remarkable how well they succeed. It is probable that there is no class of men more easily imposed upon than lawyers. One reason why lawyers are so easily imposed upon by these professional fakers is, that when they are let in, they never "tell it to the world," they never let on to each other that they have been working six months for nothing for some miserable dead head. We believe the time has arrived when they should form associations and compare notes, and draw up a black list, as the tailors were forced to do some time ago in Toronto.

*

HE is a poor detective who in these days cannot support the Crown case by a confession of the person accused of a capital crime. In the public mind there is a growing dislike of confessions obtained by police officers, and the value of extra-judicial confessions of guilt will ultimately disappear unless the zeal of the police be better regulated. It jars one's sense of fair play for a woman to be interviewed by detectives hour after hour on her supposed connection with a crime. It was a quibble to say she was not under arrest: the confession which was the net result of this "sweat-box" method was strictly admissable in evidence under the authorities, but none the less failed to impress the jury. Perhaps this was the most wholesome way of checking the practice. The jury has rebuffed the officer, and perhaps, hereafter, his zeal to make out a case will stop short of worrying the suspect. The officer of course is sufficiently instructed to caution the prisoner in the usual terms at the outset of the squeezing process. Surely this illusory caution ought not to weigh against the pressure of a regular cross-examination. We believe with Chief Justice Armour, who said on one occasion:—"I think the practice of cross-examining prisoners reprehensible, and the superiors of the detectives should instruct them not to do so."

If prisoners are to be questioned the task should be entrusted to others than the sleuth whose motive is largely one of personal triumph as a detective.

*

THE Clara Ford trial has once more brought uppermost the question of confessions. It will be well to see where we are at in Ontario on this topic of law. As settled by R. *v.* Day, 20 O. R. 209, the law is that admissions by the prisoner, although obtained by questioning are admissible in evidence against him. The weight of English authorities left no room for doubt. But the Court left it "to the Legislature to determine whether the practice of cross-examining prisoners is legally to obtain hereafter." Chief Justice Armour in the recent trial of R. *v.* Chattelle refused to admit the admissions made by the prisoner on the train after his arrest, though made in answer to questions put by a newspaper reporter.

*

Until the trial of Felton, in 1628, for the murder of the Duke of Buckingham there was occasional use of torture in England to compel statements of accused. The judges to whom the question was referred at that time were unanimously of opinion that "no such punishment as torture by the rack was known or allowed by our law." A perusal of the reports of state trials will satisfy any one that it was not until fully another generation that the common law, *nemo tenetur prodere seipsum*, was fully recognized to mean that all confessions should be strictly voluntary.

The old learning distinguishes such confessions into judicial and extra-judicial. The judicial, or "a willing confession without violence in open court," has always been enough to found sentence upon. The writers have found excellent moral reasons for admitting against the accused evidence of extra-judicial confessions of guilt. As Taylor in his work on evidence puts it: "Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in the law, their value depending on the sound presumption that a rational being will not make admissions prejudicial to his interest and safety unless when urged by the promptings of truth and conscience." For "promptings of truth and conscience" as the basis of the confession we must now substitute "persistence and ingenuity of detectives." For a long time it was thought necessary that the confession ought to be corroborated by other proof of the *corpus delicti*. Much refining has been done on the word "voluntary," the earlier test being, was the person left at full liberty to act and judge for himself. It was as destroying the true voluntariness of the confession that confessions following inducements or threats by police officers were ruled out. Eyre, C. B., once said: "A confession forced from the mind by the flattery of hope or by the torture of fear comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." For a time the judges went to the other extreme of shielding

the accused on very slight pretext from the damaging effect of his admission. We are all agreed that no artificial difficulties or unnecessary restraints should be put upon crown officers in first discovering and afterwards convicting criminals. But we seem to have reached the other limit of the swing of the pendulum with regard to the method of obtaining confessions, and it is time that parliament by enactment should regulate the matter. We might then escape the mass of perjury so apparent in many criminal trials.

*

CHIEF JUSTICE HAGARTY, in *re* Christie and Toronto Junction, 22 A. R, at pp. 26 and 27, states, in a very plain way, some of the evils of the present system of arbitrations. All that is said of arbitration under the Municipal Act may be said *mutatis mutandis* of references. We cannot do better than give some extracts from the judgment of the Chief Justice:

"I must sincerely regret that a claim like this can only be determined by inflicting on one or other of the ligitants an enormous amount of costs, utterly disproportionate to the amount in dispute.

"Such cases as these—and we have seen a good many of them—are the scandal of the present administration of justice, and it is to be hoped that their occurrence may call for some legislative interference.

"Arbitrations are proverbially costly. This course of proceeding will add much to their expensive reputation. Arbitration was introduced into our municipal legislature with a view of providing an easier and cheaper way of arranging disputes, instead of leaving the parties to the costs of a regular law suit.

"Case after case has been before us of late, where it is evident that the costs of the arbitration have been double or treble that of any ordinary suit tried in court. I think I may safely say that this case tried in the ordinary way, with or without a jury, would have been disposed of in one-third of the time, and at a fourth of the cost of this arbitration. It is an evil of great magnitude, impoverishing the ligitants, and reflecting discredit generally on the law."

*

SOME relief is promised to the ligitant by the act of the last session of the legislature (58 Vic., c. 13) if that act comes into force. It is proposed to form a Shorthand Reporters Fund to enable a reduction to be made to ligitants of the expenses of evidence (s. 40, s-s. 1).

Hitherto the out-of-pocket costs for shorthand reporters' copies of evidence have always been a very heavy charge in references. The referee, who is paid *per horam*, allows the widest latitude in evidence. To some extent the system is to be blamed. If the referee is wrong in his ruling as to evidence, the whole matter may be sent back for further hearing. The referee's suggestion, therefore, that the evidence be received subject to objection is usually acquiesced in. For the possibility of his client having again to undergo the phlebotomy of another reference deters the solicitor from pressing for

a definite ruling. The Chief Justice in the case cited from gives an example of the result in practice:—"The claimant calls an engineer who is asked 250 questions. The defendants then call an engineer who is asked 683. The claimant then calls back his witness, the first engineer, who is asked 290 more questions; and so the marvellously prolix examinations continue from day to day."

A judge should, in view of the present practice before referees, hesitate to send the unfortunate litigants to a reference.

*

THE other measure of relief promised by the Act is the new course of appeals from referees. By section 11 the appeal will be direct to a Divisional Court of the High Court. Any further appeal within the province will be governed by the provisions of section 13. The present practice of an appeal from the referee who has heard the evidence, to a single judge who has not had the advantage of hearing the witnesses, seems an unnecessary step in the cause. It is never likely that either party will be satisfied with the opinion of the single judge.

*

A ruling, not unexpected, but of considerable interest to the Bars of two nations, is the refusal of Mr. Justice Street to allow Francis T. Wellman to appear in defence of the Hyams brothers now on trial. The same ruling was previously given by Magistrate Denison, who had evidently no desire to establish a precedent by which his court room might become a caravansary for itinerant attornies from Buffalo or Rochester. The Colonel foresaw that the illustrious Wellman would be followed by practitioners of a meaner sort.

The distinguished reputation of Mr. Wellman was, no doubt, a great temptation to Mr. Justice Street; as it always is a pleasure for a judge, who feels himself strong, to have to receive light from a new forensic star. But his lordship felt that it would be a shock to our established customs in such matters to introduce such a departure into the practice. Mr. Osler backed up his Lordship's reasons with a series of arguments which are less objections from the counsel for the prosecution than a defence of the Law Society's peculiar jurisdiction.

*

THE Law Society is the arbiter of who shall and who shall not practice in the courts of Ontario; and as Mr. Osler points out there is no discrimination against American lawyers. The bar of England and Scotland, not to mention some not insignificant provinces of Canada, is also excluded. We are highly protected against intrusion except from the Portias who may now arise in our midst and confound our gross masculine understandings.

*

WE are glad that this decision was given in a murder trial—glad because we feared that the American form of entertainment was about to be introduced into our criminal assizes. On the other side of the line a trial for murder is a supreme contest of dramatic power. The counsel for the

prosecution bear down on the accused with the fury of a college hustle. Whatever resources of vituperation the prosecution neglects to employ are applied by the defence. The speeches of counsel are swollen with metaphors, they make the blood and dust fly. The prisoner is nobody; he has dissolved into phrases. If he is acquitted his existence is solely the creation of his counsel; if he is condemned he can suffer nothing worse than to have to listen to four mortal hours of American oratory.

In marked contrast to the American style is the tenor of Mr. Osler's opening address. The counsel for the prosecution is not to fulminate but to assist the court and jury in unravelling the intricacies of a difficult case. We trust that when Mr. Wellman goes home he will feel improved by his stay in "Toronto the Good." While disappointed a little in not being permitted to alarm the simple Canadian jurymen with gems of his rhetoric, let us hope that he will be favorably impressed with the moderation and fair play of a Canadian tribunal. Let him not take it ill if we try the Hyams instead of umpiring a contest between raging orators and truculent champions of the law.

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## *COMMISSIONS.*

This title suggests remuneration for something done or to be done; but that is not the manner of commission we speak of. On the contrary we here deal with a contrivance not to do something or to prevent the doing of something—parliamentary commissions. A contrary opinion was formerly held as to the employment of commissions, namely, that they were to do something, but we treat of the modern practice. To speak plainly the commission trick is an imposition no longer upon the credulity of the public but upon its patience. The public sees through the device, is amused but not offended.

Notwithstanding, however, the very general knowledge that people have of commissions and their use, it is surprising to find that the text books and dictionaries are still copying the older definitions without regard to the changes in modern usage. Thus the latest edition of Webster defines commission as "a company of persons joined in the performance of some duty or the execution of some trust." It is high time to correct the mischief likely to flow from such an error. We therefore suggest the following definition as embodying some of the essential points of a commission: "A Commission is a company of persons selected to disperse or diffuse the responsibility of a government. Commissions are sometimes divided into dilatory Commissions and quarantine Commissions."

A dilatory Commission is one that postpones indefinitely the necessity for action. A cheap and conspicuous example is the Beer and Skittles (or Temperance) Commission that recently reported at Ottawa. It seems that the net result of this Commission's labor is a difference of opinion as to the use of liquor; a differ-

ence of opinion which was vaguely suspected to have existed before the Commission sat. This Commission cost at least $75,000. To those to whom beer is palatable (and the Commission found there were some) this would mean at current retail rates, 1,200,000 glasses of beer. While to those urban people who prefer water (less a stick) and have to pay water rates, the same sum means, at say 60 cents a thousand gallons, the enormous and refreshing quantity of 2,000,000,000 half pint cups of cold water. These statistics we furnish for the benefit of the estimable gentleman on the Commission who filed that minority report which bristles with alarming calculations.

A quarantine Commission is one through which individuals are required to pass before being presented with a clean bill of health. A case in point is the recent University Commission. For some time students had exhibited vague feelings of unrest, occasioned possibly by continual increases in the fees payable by students and continual decreases in the value received. Whatever the causes, the discontent reached such a pitch that the government had to appoint a quarantine Commission for the relief of some of the professors.

It is not easy to say what evidence should be required in investigating the complaints of inexperienced young men who are not given to docketing and preserving the evidence as it presents itself. Moreover, charges of incompetency in a lecturer are necessarily of a vague character and cannot be reduced to the definiteness of an indictment against a clergyman for heresy. A similar difficulty as to evidence occurs in the case of clubs, where formal evidence is not easily procurable. Some very suitable observations on the evidence to be required in such cases will be found in Guinane v. Sunnyside Boating Co., 21 A. R., 49. We should have thought a university Commission might well adopt some process less severe than the ponderous machinery of a legal tribunal.

However, the Commission went gunning in its own way. The students were forced to reduce to definite charges matters which are not capable of being so reduced. A body of art students might say of a man that he was an incompetent artist but to make specific charges to prove the divine failure to make an artist would lead to absurdities. So with the art of teaching; incompetence in a lecturer is a charge that cannot be made more definite. To exact anything more specific is to push the complainant into a ridiculous position. The Commission did not seem averse to ridiculing the students.

The Commission did not inquire into the defects and needs of the Toronto University; it heard no evidence that could be ruled out, except possibly the evidence of the late Professor Ashley. That gentleman's testimony was not exactly opinion evidence, or hearsay evidence; it was rather opinion evidence founded on hearsay. But we shall not criticize further the methods of a Commission whose labors culminated in giving the College Council a formidable advantage in their important struggle with Mr. Tucker. The Commission has done its work well and given entire satisfaction to those who appointed it.

However we commend to the attention of the Honorable the Minister of Education (who since our amiable suggestion of a Lectureship on Pulls has done us the honor of returning his copy of the BARRISTER) the following considerations: Neither the legal profession, which is

largely recruited from Toronto University, nor the general public, which wants value for its money, is satisfied with the present state of the Provincial University. In the public mind there was before the Commission and after the Commission there still is a suspicion amounting to conviction that the University funds and property have been grossly mismanaged, that the fees of students have been increased to provide billet for useless professors, and that its official appointments have been the work not of an educationist but of a politician. We beg to remind the Minister of Education, whose sudden advancement into the legal profession was not by virtue of a college degree but by an act of the legislature,—we beg to remind him that his Commission is only a temporary relief and that a great many people who have not been over pleased to see the bright and promising students made the sport of legal bullies will not stand by and see the ruin of our national university.

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## *RECENT REPORTED CASES.*

### IN THE COURT OF APPEAL.

In the commissioners for the Queen Victoria, &c. Park v. Colt, 22 A.R., it is laid down that in cases of improvements under mistake of title within, R.S.O. 1887, ch. 100, s. 50, the cost or value of the improvments is not the measure of allowance to be made but the amount by which the value of the land has been enhanced. Per Burton, J. A., in order to succeed in a claim for improvements under the section the claimant must establish three things: (1) That the alleged improvements were lasting improvements. (2) That he made them under the belief that the land was his own. (3) That the value of the land had been enhanced by such improvements. In an action for possession and mesne profits by the true owner, the claimant, under the section, is not to be charged in the account with profits, but only with a fair occupation rent. (cf. Munsie v. Lindsay, 11, O.R. 520.)

*

When discovery of new evidence is a ground for allowing a new trial is discussed, in Trumble v. Horten, 22 A.R., 51. It is a matter of legal discretion, but where in an action of which the subject matter was trifling, the Divisional Court ordered a new trial on affidavits showing merely the discovery of further evidence corroborative of the evidence at the trial the order was set aside. Murray v. Canada Central R. W. Co., 7 A. R., 646, in which the authorities are collected, followed, Maclennan, J. A., cited Scott v. Scott, 9 L. T. N. S, 456; McDermott v. Ireson, 38 U. C. R., 13; Miller v. Confederation Life Insurance Co., 11 O.R., 120, 14 A. R. 218.

*

That a creditor cannot take the benefit of the consideration for a transfer of goods and afterwards attack the transfer as fraudulent is the point decided in Wood *et al* v. Reeson *et al*, 22 A. R. 57. Nor does the assignee for benefit of creditors stand on any better footing than ordinary creditors in this respect. Osler, J. A., referred to his judgment in Beemer v. Oliver, 10 A. R., 662, where the cases are collected. See also Newnham v. Stevenson, 10 C. B., 713, 13 C. B., 302; Croft v. Lumley, 6 H. L. C., 705. The question is not as much one of estoppel as of election. Scarf v. Jardine, 7 App. Cas. at 349; Jones v. Carter, 12 M. & W., 718; Clough v. London and North Western R. W. Co., L. R. 7, Ex. 26.

For some reason or other the judges of the Court of Appeal seem to divide more frequently of late than ever before. In the part of the appeal reports just delivered we note that the court divided in the following cases: In *re* Christie and Toronto Junction, 22 A. R., 21. The Chief Justice and Maclennan, J. A.; hold that in an arbitration under sections 401 and 404 of the Consolidated Municipal Act, a judge to whom an appeal is taken against the award cannot, merely on his own understanding of the evidence and on a view of the premises, increase the award. *Per contra* Burton and Osler, JJ. A., that the judge can deal with the award on the merits (*i.e.*, as he pleases), and can reduce or increase the amount or vary the division as to costs.

*

THE same opposition in the view of the judges on the matters involved is found in Barnes v. The Dominion Grange Mutual Fire Insurance Ass., 22 A. R., 68. An application was made to the Association for insurance for a term of four years and the premium note given. The appellant received an interim receipt which provided that unless the receipt was followed by a policy within fifty days the contract of insurance should wholly cease and determine. The interim receipt also provided that the contract was subject to approval of the directors who could cancel the policy within fifty days by letter. No notice of cancellation was given and no policy was issued. By the Chief Justice, it was a contract of insurance which could be terminated only in accordance with the 19th statutory condition. Per Burton and Osler, JJ. A. It was a mere incomplete provisional contract for four years, and also an actual contract for fifty days, which came to an end by effluxion of time, and the 19th condition did not apply. Per Maclennan, J.A., there was a contract of insurance, the provision for expiry was a variation from the statutory condition which, by reason of not being printed in the required mode, was not binding.

*

The court was again divided against itself in *re* Township of Mersea v. Township of Rochester, 22 A. R., 110, a case of maintenance of drainage works affecting several minor municipalities, but constructed by the county. The Chief Justice and Maclennan, J. A., were of opinion that the drainage referee has jurisdiction to set aside a by-law of a minor municipality charging other minor municipalities with a portion of the expense of repairs. Per Burton and Osler, JJ. A., the drainage referee has no jurisdiction. His jurisdiction depends upon that of the township.

*

BOND v. Toronto Railway Co., 22 A.R., 78, turned upon the meaning of the Workmen's Compensation for Injuries Act, 55 Vic., c. 30, s. 3., held that having car buffers of different heights so that in coupling the buffers overlap and afford no protection to the person effecting the coupling is a "defect in the arrangement of the plant," entitling the servant to claim for injuries received in coupling. The Railway Company has taken a further appeal to the Supreme Court of Canada.

*

WHAT is a water course is considered in Arthur v. Grand Trunk Ry. Co., 22 A. R., 89, and determined that if water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel, and is of sufficient volume to be serviceable to the persons through, or by, whose lands it flows, it is a watercourse, and for its diversion an action will lie (Beer v. Stroud, 19 O. R. 10, considered) when a railway company diverts the watercourse without filing a plan, the right of the land owner is not limited to an arbitration, but he may bring an action for damages. In the absence of an undertaking by the company to restore the watercourse the land owner is entitled to have the damage assessed as for a permanent injury. The cases are collected in the argument and judgment.

*

THAT facts intended to be relied on in mitigation of damages in a libel action must be set out in the statement of defence is the decision in Beaton v. The Intelligencer Printing and Publishing Co., 22 A. R., 97. Unless so set out such facts cannot be set out in evidence.

It is pointed out that Con. Rule 399 is inconsistent with Con. Rule 563 and governs. The defendant may plead in mitigation of damages that the article complained of was published in good faith in the usual course of business.

•

THE jurisdiction of the County Court in cases of guaranty of payment of the price of goods was considered in Thomson v, Eede, 22 A. R., 105, and held that as there is no ascertainment of the amount as between the vendor and the guarantor, as ascertainment of the amount between the vendor and debtor is not binding upon the guarantor, the County Court has no jurisdiction to entertain an action for more than $200. Where an action was for two unliquidated claims each within, but together beyond the jurisdiction of the County Court, the plaintiff was allowed, after judgment, to amend by abandoning one of them. Ostrom v. Benjamin (No. 2), 31 A. R., 467; Vogt v. Boyle, 8 P. R., 249; McLaughlin v. Schaefer, 13 A. R., 253.

•

THE city of Toronto escaped in the Court of Appeal liability for the overflow of a sewer, the result of an extraordinary rainfall. In Garfield v. The City of Toronto, 22 A. R., 128, it was laid down that if a sewer, built and maintained by a municipal corporation, is free from structural defects and is of sufficient capacity to answer all ordinary needs, the corporation is not liable for damages caused, as a result of an extraordinary rainfall, by water breaking into the cellar of a person compelled by by-law to use the sewer for drainage purposes. An extraordinary rain fall is within the definition of an act of God within the technical meaning of that term, though it is not of unprecedented severity, if there is nothing in previous experience to point to a probability of recurrence. On "act of God" see Nichols v. Marshland, L. R. 2, Ex. D. 6; Nugent v. Smith, L. R., I. C., P. D., 423; Nitro-Phosphate &c. Co. v. London and St. Katharine Docks Co., 9 Ch. D., 503; Dixon v. Metropolitan Board of Works, 7 Q. B. D., 418.

•

AN action had been brought against a partnership in the firm name as maker, and against an individual as endorser, of a promissory note. The action was dismissed as against the endorser on the ground that he had endorsed at the request of the holders for their accommodation. Judgment was given against the partnership. It was now sought, in an action upon the judgment against the same endorser, to prove him to be a partner and therefore bound by the judgment against the firm. The Court of Appeal in Ray v. Isbister, 22 A. R., 12, held the dismissal of the action to be an answer to the action on the judgment. Clark v. Cullen, 9 Q. B. D., 355 referred to.

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## *EXCHANGE EXCERPTS.*

IT is to be feared that in the matter of practical reform for the law and the lawyers, things are almost past praying for. One recalls that interesting occasion when the walrus and the carpenter were walking hand in hand:

> They wept like anything to see
> Such quantities of sand:
> "If this were only cleared away,"
> They said, "it *would* be grand."

So, too, with the law and the lawyers. There are such quantities of sand!

> "If seven maids with seven mops
> Swept it for half a year,
> Do you suppose," the walrus said,
> "That they could get it clear?"
> "I doubt it," said the carpenter,
> And shed a bitter tear.

I also doubt whether mops will make any impression on our sand system. What is this English Judicature but a rusty, musty, creaking, leaking, tinkered old machine, which has had its day and turned out of the mill an infinity of evil? It is great and glorious, in a way, to trace

our courts back to the Curia Regis of Henry II., but we do not live in Henry the Second's reign, and require methods quite different in the 59th of Victoria. The French revolutionists swept away a system almost as ancient in favor of one based solely on reason and convenience. The French law courts date only from the legislation of the Constituent Assembly in 1791. And until some scarcely less drastic remedy is found for the English system, it will remain an appalling and ever-swelling agglomeration of things old and new—a huge clumsy hulk thickly encrusted with the barnacles of precedent.—*The Brief.*

*

To come into the closest possible relations with the active business, as well as the social and governmental, life of the people is the prerogative of the Bar. That it is doing this in these days, as it has never adequately done before, is one of its chiefest glories. But in doing this it has allowed itself to lose, in large measure, the lofty independence, the genuine learning, the fine sense of professional dignity and honor, which for nearly a century in this country lifted and maintained our jurisprudence above the steadily rising level of the people. The profession of law need never have forfeited the high estate which it attained by the possession and exercise of the qualities enumerated; but it cannot be denied that for the past thirty years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking.—*The West Virginia Bar.*

*

THE Chicago judge who has recently decided that a pickpocket is not punishable for being caught with his hand in another man's pocket because there was nothing in the pocket to steal was remarkably considerate after all. He might have ordered the man whose pockets made all the trouble under arrest for false pretenses.—*Lockport* (N.Y.) *Sun.*

*

DETENTION OF WITNESS.—Although a person may, upon proper showing, be held in custody as a witness, such detention will not be permitted merely upon *ex parte* affidavits.

Persons detained as witnesses are held "upon civil process," under How. Ann. St. § 8941, provided that persons held on civil process shall not be confined in a room with those arrested on a criminal charge. In *re* Lewelling (Mich.) 62 N.W. Rept. 554.

*

THE loss of a hand within the meaning of an accident policy is held, in the Wisconsin case of Lord v. American Mutual Accident Association, 16 L. R. A. 741, to be a question for the jury, where three fingers were torn off and the hand otherwise mutilated.

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## *LO! THE POOR LAWYER.*

At Halifax, that quaint old city,
There dwelt a lawyer whose renown
For crafty, subtile, fox-like cunning
Spread far beyond his native town.

Like lawyers everywhere, he oft
Found clients who were far more free
To enter into suit of law
Than pay their lawyer's well-earned fee.

An Indian, of the Miami,
For service rendered long ago,
Indebted was to him, and seemed
Contented well to leave it so.

The lawyer waited long: at last
His patience bore no longer strain,
With process, judgment, execution,
He threatened, nor was it in vain.

"Poor Lo" got scared and paid the money,
But lingered after he had paid;
"Why do you wait?" the lawyer asked,
"Me want receipt," the Indian said.

"Receipt!" the limb of law rejoined,
"What know you how these things are done?
Tell me the use of a receipt
And I'll be pleased to give you one."

The red man stood a moment, then,
With merry twinkle in his eye,
He said, "S'pose now me sick, me die,
Me go to Heben by an' by;

"The 'Postle Peter come an' ask,
'Ol' Simon, what you want?' me say,
'Want to get in,' an' den he ask,
'You pay dat bill to Lawyer J.?'

"What den me do? Hab no receipt,
Me must go out to find you. Well—
Me fool hab been—to find you den
Me must go hunt all over h——."

J. A. DREISS, in *The Bohemian.*

## *THE RIGHT TO SHOOT A BURGLAR.*

BURGLARY is the breaking and entering a dwelling house of another in the night with intent to commit a felony. Burglary is a felony, and the burglar is a felon.

When is a person justified in shooting a burglar?

All civilized communities recognize the right of man to protect his person or property from injury. This right is known as "the right of private or self-defence." It is a natural right, founded not in the law of society, but in the law which governs the universe, the law of nature. Of this right of self-defense, Justice Nicholas, of Kentucky, says: "The right of punishing crimes and the infraction of individual rights may well be presumed to be surrendered by every man to the whole community when he enters into civil society. The well-being of society requires it. Not so, however, as to the right of self-defence. Its possession and exercise are still necessary to individual security, and not incompatible with the public good. It is true, society may curtail this right, and, no doubt, does restrain its exercise in many particulars. But it is emphatically a right brought by the individual with him into society, and not derived from it. He, consequently, retains the plenary right so far as it has not been restrained by the laws of society. The extent of the right of self-defense is necessarily undefined by the law of nature. Its only limit is necessity."

East, in his Pleas of the Crown, lays down the principle in these words: "A man may repel force by force in defense of his person, habitation, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he killed him in so doing, it is called justifiable self-defense."

The above principle is recognized as law in this country.

The right to take life in defense of property, as well as of person and habitation, is a natural right; but the law limits its exercise to the prevention of forcible and atrocious crimes, of which burglary is one.

"At the present day, however, the doctrine intimated by Lord Coke, that a felon may be killed in attempting to commit a felony, without *any inevitable cause*, does not exist."

The same law of necessity applies to killing in defense against felonious attempts against property, as in other cases of private defense; and a killing in such cases must be shown to have been necessary to prevent the threatened felony.

The same rule applies to the killing of a burglar, who is, as we have stated, a felon.

On this question of killing a burglar, Mr. Wharton says: "There can be no question that a person who, according to his lights, *bona fide* believes that a burglar is breaking into his house, can take the life of such burglar, if this be apparently the only way of preventing the offence; and the *bona fide* belief is a defense, if not negligently adopted, even though an innocent person be killed."

We agree with Mr. Wharton, that actual and positive danger is not indispensible to justify killing a person for a burglar. Where a dwelling house is broken into, or there is evidence sufficient to induce in a person a reasonable and well-grounded belief that there is a burglar in the house, he is justified in using whatever weapons or means of defense he may have, whether the danger was real or only apparent. It would be monstrous to expect a person in such cases to be entirely cool, or in all cases to have great courage or large intellect; while he can know nothing whatever concerning the designs of the apparent burglar any more than can be inferred from appearance.

"It is the duty of every one who sees a felony attempted by violence to prevent it, if possible; and in the performance of this duty, which is an active one, there is a legal right to use all necessary means to make the resistance."

A person, however, cannot lawfully kill the felon if he can prevent the consummation of the felonious intent by other means, as by arresting or disabling him.

In conclusion, to justify a person in shooting a burglar:

First, it must be necessary; or, in other words, the only way of preventing the consummation of the felonious intent.

Second, to shoot without first inquiring his purpose, "there must be circumstances calculated to arouse the fear of a reasonable man, or indicating a danger so urgent or pressing as to excuse the instantaneous use of a deadly weapon."—Frank B. Livingstone, in *Harvard Law Review.*

## *CROSS-EXAMINATION.*

The young lawyer who reads what Mr. Greenleaf says about the value of cross-examination in eliciting the truth and confounding the false witness, braces himself for the contest and plunges with vigor into the cross-examination. He makes the witness retrace all the ground which he has gone over, so as to catch him in slight variations. He thrusts at him unimportant papers and asks him to explain trifling inconsistencies. He tries the witness' temper and tries his own, gets both the witness and himself into a perspiration, and finishes his storm of chops and tomato sauce with the consciousness, if he be a pretty shrewd fellow, that he has made the witness' story more emphatic, emphasized the point in it which hurt most, and altogether done his side of the case about as much damage as if he had himself introduced two or three additional adverse witnesses.

The old practitioner, who has been there before, asks the witness a few unimportant questions, confining himself as nearly as he decently can to drawing out the witness' opinion on the weather and state of the crops, and finishes with the pleasing thought that he has disappointed his adversary, who expected the cross-examination of that witness to bring out a number of matters about which the witness could not be asked in chief.

Cross-examination is a great thing, and, if employed in the proper place and with the proper witness, is productive of excellent results. The fundamental and most important canon, however, in the science of cross-examination is: Do not cross-examine the wrong witness.—*West Virginia Bar.*

## *HUMORS OF THE LAW.*

In the good old days in Washington, a lawyer who was discussing a motion before his Honor, Judge Green, involving the question whether certain alleged facts amounted to fraud, in support of his contention read copious extracts from Browne on Frauds. In doing so, he constantly called the author's name Brown-e. This grated on the learned and critical ear of Judge Greene, who at last interrupted the counsel with the question, "Why do you pronounce that name Brown-e?" "It is spelled," answered our friend with charming gravity, "B-r-o-w-n-e; if that is not Brown-e I would like to know what it does spell!" "I spell my name," says the Judge, "G-r-e-e-n-e! you would not call me Green-e, would you?" "That depends," replied our friend, "on how your Honor decides this motion." The judge waived the contempt and joined in a general laugh.—*Central Law Journal.*

*

Whenever a lawyer undertakes to circumvent the law in the interest of a client, he becomes *particeps criminis* with the person whom he shields from the law. —*American Lawyer.*

*

Lawyer (in a whisper).—Here comes the jury. Ten to one they will acquit you.

Client (after listening to the verdict). —It seems to be twelve to none they don't.

*

The following is vouched for as an actual fact. A lecturer on Criminal Law at one of our law schools, in tracing the history of Criminal Law, quoted: Whosoever sheddeth man's blood, by man shall his blood be shed." Genesis ix. 6.

Not long afterwards a member of the class was hunting the library diligently for a copy of "Genesis Reports." It is unnecessary to add that he was unable to find the citation under that title.

*

ONE of the learned justices of the Maine Supreme Court, than whom no man better knows how to appreciate a really amusing thing, was holding court at Ellsworth, and, according to honored custom, called in a local clergyman to open the session with a supplication to heaven. This worthy gentleman came, and after a chat with the justice proceeded to address the giver of all good and perfect things thus: "Almighty God! we beseech Thee to bestow upon the presiding justice the wisdom which he so greatly needs!" The learned recipient of the blessing never heard the rest of that remarkable prayer, which, in truth, was cut short by disorder in the court, strongly resembling half-smothered laughter from the direction of the clerk's desk. It is said that the same judge once opened court after prayer which began this way: "Oh, Lord, we pray Thee to overrule the decisions of the court to thine own honor and glory."

*

AUSTRALIAN JUSTICE.—The stories of early Australian judges are numerous and incredible. The following incident, which is vouched for as a fact, is of a judge who had a very lofty idea of his own legal capacity, and was, at the same time, anxious to sustain the dignity of his court. A "shooting case" came before him. There was no direct evidence as to the perpetrator of the murder, but the individual arrested was well known, and indeed confessed the deed.

When brought into court the judge cautioned the prisoner that he must remember his rights as a free citizen, and that above all things he must not interrupt the proceedings of the court. After this friendly warning the judge proceeded to state that he, the prisoner, was accused of having, on such a date, shot the deceased.

Upon this the prisoner broke in, "Well, and so I did."

The judge was annoyed at the interruption.

"Hold your tongue, sir," he exclaimed. "Haven't I told you not to commit yourself nor interrupt me? I shall commit you for contempt of court if you do so again!" he added sternly.

He then repeated the accusation upon which the prisoner broke in.

"I have told ye afore that I killed —"

The judge's indignation was intense at this second interruption and he demanded, "Mr. Sheriff, what is your evidence?"

"I have nothing but circumstantial evidence, your honor, and the prisoner's own confession."

"Then," said the judge, "I discharge the prisoner on this accusation, but commit him for contempt of court."—*The Guide.*

*

EDWARD EVERETT and Judge Story once met at dinner. In his post-prandial speech the judge said that "Fame rises where Everett goes," to which Mr. Everett replied: "However high my fame may rise, I am sure I will never get above one Story."—*The West Virginia Bar.*

*

A WITNESS who had given his evidence in such a way as satisfied everybody in court that he was committing perjury, being cautioned by the judge, said at last:

"My lord, you may believe me or not, but I have not stated a word that is false, for I have been wedded to truth from my infancy."

"Yes, sir," said Sir William Maule, "but the question is how long you have been a widower."—*Pittsburg Legal Journal.*

*

DANIEL C. POMEROY, once a prominent New York criminal lawyer, in his early life was a stage driver on the old Butterfield line, and gleaned his legal education largely upon the box seat of his coach, or while change of horses was being made at the stations. He was associated with others in defence of one, Mrs. McCarthy, on her trial at Utica for the murder of a man named Hall, of Ogdensburg, who was killed by a bullet from her revolver, which was aimed at another man. Judge

Doolittle presided at the trial, and seemed to believe in the prisoner's guilt. The judge was bitter, and so was Pomeroy. The latter made an objection and insisted upon it rather strenuously. "Mr. Pomeroy," said the judge, "I am not a horse, and can't be driven." "Well, your Honor, I learned in my early experience to drive mules, and I will try to keep up my former good reputation." —*Chicago Law Journal.*

*

A CERTAIN justice of the peace having arrived, previous to a trial, at a conclusion upon a question of law highly satisfactory to himself, refused to entertain any argument by the opposing counsel. "If your Honor pleases," the counsel replied, "I should like to cite a few authorities upon the point." Here he was sharply interrupted by the justice, who stated: "The Court knows the law, and is thoroughly advised in the premises, and has given its opinion, and that settles it," "It was not," continued the counsel, "with an idea of convincing your Honor that you are wrong, but I should like to show you what a fool Blackstone was."—*Ibid.*

A WELL known judge, when a Q. C., being unable to support his argument in a certain case by any legal precedent, invented one on the spot. His opponent was equal to the occasion and invented another, which put the Q. C. wholly in the wrong.

"Where's your authority for that?" inquired the Q. C. "It's in no law book with which I'm acquainted."

"You'll find it," said the other promptly, "on the same page of the book you have just quoted."—*Ibid.*

*

A BLACKSMITH of a village in Spain murdered a man, and was condemned to be hanged. The chief peasants of the place joined together and begged the Alcade that the blacksmith might not suffer, because he was necessary to the place, which could not do without a blacksmith to shoe horses, mend wheels and such offices. But the Alcade said, "How then can I carry out the law?" A laborer answered, "Sir, there are two lawyers in the village, and for so small a place one is enough! you may hang the other."—*Ibid.*

## *NOTES OF ENGLISH CASES.*

Is a libel published by a head constable in pursuance of an order made by magistrate published on a privileged occasion or not?

Andrews *v.* Nott Bower (L. T. 588). The Watch Committee for a certain town directed their head constable to keep a book, with remarks therein, as to the different licensed houses. The book was printed and supplied to the magistrates, and thirty-seven copies were sold to persons having business at the licensing sessions. One column in the book was headed "Superintendent's Remarks." In this column, opposite the entry of the licensed house of which one of the plaintiffs was licensee, the defendant inserted these words: "The licensee of this house has been served by the police with notice of objections to the renewal of her license on the undermentioned grounds, viz., (1) that you permit improper conduct to take place between your bar-maids and men upon your licensed premises." On this evidence, Mr. Justice Lawrence directed that the plaintiff could not recover, for the occasion was privileged. The Court of Appeal (Esher, M. R., Lopes and Rigby, L. JJ.) held that the ruling of Lawrence, J., was right, and that the occasion was privileged.

*

If a libel is published on a privileged occasion, is it actionable under any circumstances?

Nevill *v.* Fine Art and General Insurance Co., Limited (T. 332). The Court of Appeal (Esher, M.R., Lopes and Rigby, L.JJ.) held that it was actionable on proof of actual malice. The more important and interesting question as to a corporation being capable of publishing a libel maliciously was not discussed, as its decision was not necessary for the case.

*

Does the law imply a covenant or agreement for quiet enjoyment on the part of the landlord in a case where there is no express covenant, and the word "demise" is not used?

Baynes & Co. *v.* Lloyd and others S. J. 415). Yes, said Lord Russell, L. C. J., such a covenant or agreement is annexed to the relation of landlord and tenant, and this whether the relationship is created by instrument under seal or not under seal; but, said the learned judge, the liability on the implied covenant or agreement only lasts as long as the landlord's interest in the premises remains, and if the tenant would have a remedy for disturbance after that interest has ceased, he should take care to obtain an express covenant for quiet enjoyment.

*

Can the Court rectify a voluntary settlement?

Bonhote *v.* Henderson (W. N. 64). Yes, said Kekewich, J.; but it will hesitate to do so at the instance of the settlor merely on his own evidence, such as written instructions, even though the rectification sought would bring the settlement more into harmony with recognised precedents, and with what the settlor might reasonably have intended at the time.

*

Must the address of the grantor, on a bill of sale, be the place where he resides! Dolcini *v.* Dolcini, T. 344.

No, said the Divisional Court, upholding the bill of sale in question, where the address given was that of the grantor's club, and not of his residence or place of business. Said Cave, J., in delivering judgment:—"Counsel had failed to show that there was any provision making bills of sales void in a case such as this. The only necessity was that the bill should be in the form given in the schedule to the Act. Now the schedule did provide that the name and address of the witness must appear."

*

What is the measure of damages for breach of a contract to publish an advertisement?

Marcus *v.* Meyers and Davis (T. 327). Mr. Justice Kennedy held that the true

measure of damages was not the cost of the advertisement, but loss of business caused thereby, and the evidence in this case went to show that in the opinion of the jury he had suffered damage to the extent of £60, for which amount his lordship gave judgment.

*

If a servant travels by train with personal luggage which is the property of the master, and the luggage is lost, can the master sue, he having taken the tickets?

Meux *v.* Great Eastern Railway Co. (T. 315). Mr. Justice Matthew, without calling on defendant's counsel, held that there was no privity of contract between the master and the company, and that the master could not therefore sue for loss or injury to the luggage.

Is a servant at liberty to copy customers' names from his master's business books with a view to using them after he has quitted service for the purpose of soliciting custom in a rival business started by him?

Robb *v.* Green (L. T. 559). No, said Hawkins, J., since by doing so he is guilty of a breach of his contract of service, there being an implied obligation on a servant that he will perform his duty honestly and faithfully, and that he will not abuse his confidence on matters appertaining to his service, and that he will, by all reasonable means in his power, protect his master's interest in respect of matters confided to him in the course of his service.

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## *NOTES OF RECENT CASES IN THE ONTARIO REPORTS.*

### QUEEN'S BENCH DIVISION.

In Nelligan *v.* Nelligan, 26 O. R. 8, the husband, the defendant, had been insane at intervals for years, and during such periods of insanity, had been confined in the asylum. He declined to live with his wife, being afraid that he might again be confined in the asylum. In an action for alimony, held that the wife was entitled, for the husband was living separate from her without any sufficient cause, and under such circumstances as would, under the law of England as it stood on 10th June, 1887, have entitled her to a decree for restitution of conjugal rights. The only bar under Sec. 29 of R. S. O. ch. 44, to an action for alimony against a husband, who is living separately from his wife, is cruelty or adultery on the part of the applicant.

*

Section 154 of the Division Courts Act provides that "Either party may require a jury in tort or replevin, where the sum or the value of the goods sought to be recovered exceeds $20, and in all other cases where the amount sought to be recovered exceeds $30." An insurance company endorsed its summons to recover back from the insured the sum of $30 loss under an insurance effected by him, payment of which is alleged to have been procured by his false and fraudulent representations. The judge struck out the plaintiff's jury notice, on the ground that this was not an action of tort, and the amount must therefore exceed $30. Held (*Re* London Mutual Fire Insurance Co. *v.* McFarlane, 26 O. R. 14) that the cause of action was one arising *ex delicto*, and therefore one of tort, and the judge in chambers was right in prohibiting the County judge from trying the suit as amended.

*

Haist *v.* Grand Trunk Ry. Co., 26 O. R. 19, was an action for damages for negligence, whereby the plaintiff was injured in alighting from a train. The defendants denied negligence, and pleaded contributory negligence, also pleaded a payment of $10.00 to the plaintiff before action, and a receipt in writing signed by him in the following terms, "In lieu of all claims I might have against said company on account of an injury received . . . by reason of my stepping off a train . . . such act being of my own account, and not in consequence of any negligence or

otherwise on behalf of such railway company or any of its employees." Held that the receipt could not support a plea of accord and satisfaction, nor of release, nor did it operate by way of estoppel. Johnson *v.* G. T. R. Co., 25 O. R. 64; 21 A. R. 408, distinguished. The plaintiff replied to the plea of the defendants that if he had signed the receipt, he was induced to do it by fraud or undue influence. Held that the issue raised by the document was not a distinct issue, but rather a matter of evidence upon the issues of negligence and contributory negligence. and should have been submitted to the jury and not separately tried by the judge.

*

In Cullerton *v.* Miller, 26 O. R. 36, the defendant was the owner of certain water lots upon a lake front, subject to the usual reservations in favor of the Crown of free passage over all navigable waters thereon. The defendant refused to allow the plaintiffs to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice, unless the plaintiff paid him toll. This the plaintiff refused to do. Held, by Rose J., that the water over the defendant's lot was a highway, and the plaintiff had the right, without payment, to cross the lot whether the water was fluid or frozen, and the plaintiff was entitled to a declaration of right. Goodderham *v.* City of Toronto, 21 O. R., 120; 19 A. R., 64, and City of Toronto *v.* Lorsch, 24 O. R., 239, followed. Upon the question of damages for the interruption, held the defendant was liable for such reasonable damage as flowed directly from the wrong done by this refusal; but, as he had acted without malice and under a *bona fide* mistake as to his rights, and as the plaintiff might have paid the toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice.

*

The Divisional Court granted prohibition (reversing the decision of Boyd, C., 25 O. R., 253) in *re* Clark *et al v.* Barber, 26 O. R., 47. The balance of purchase money under an agreement for sale of land was payable by instalments, with interest, half yearly. At the time when these instalments of principal were overdue, and interest amounting to $70, and three years' taxes also were overdue, an action was brought for the arrears of interest and two years' taxes, amounting in all to $95.30. As the plaintiffs could have recovered all the purchase money and interest due when the action was begun under one count in a Superior Court, this was a dividing of the cause of action within sec. 77 of the Division Courts Act, R. S. O., 1887, c. 51. *Re* Gordon *v.* O'Brien, 11 P.R., 287, approved. Public School Trustees *v.* Township of Nottawasaga, 15 A. R., 319, distinguished.

*

The town of Berlin owned a park in which there was a building originally used for concerts and then as a dressing room, refreshment booth or shelter. A society obtained the exclusive use of the park from the town for a holiday to hold games therein, and charged an admission fee. The plaintiff attended the celebration and with others took shelter in the building during a shower. While sitting in the building a board from the ceiling fell upon the plaintiff and injured her. She sought damages from the town in the action Schmidt *v.* Town of Berlin, 26 O.R., 54. Held that a municipal corporation, owner of a public park and building therein, is not liable to a mere licensee for personal injuries sustained owing to want of repair of the building, at all events when knowledge of the want of repair is not shown. Cases cited: Municipality of Picton *v.* Geldert (1893) A. C. 24; Steele *v.* City of Boston, 128 Mass., 583; Moore *v.* City of Toronto, reported in note to this case.

*

Hollender *v.* Ffoulkes, 26 O. R., 61, was an action on a foreign judgment. The defendants pleaded that the order for such judgment was obtained upon a false affidavit, and that the plaintiffs obtained the judgment by fraudulently concealing from the court the true nature of the transactions between them and the defendant. This was held a good defence. Abouloff *v.* Oppenheimer, 10 Q. B. D. 295, and Vadala *v.* Lawes, 25 Q. B. D. 310, followed in preference to the deci-

sion of the Court of Appeal for Ontario in Woodruff *v.* McLennan, 14 A. R., 242, in accordance with the expression of the Judicial Committee in Trumble *v.* Hill, 5 App. Cas., 342, that a colonial court should follow the decision of the Court of Appeal in England. To the plea in defence the plaintiff, after rule 1222 came into force, replied that the defendant was precluded by law from raising any question as to the validity of the foreign judgment, which might have been raised by way of appeal in the foreign process. Held this replication was equivalent to a demurrer under the former practice, and was an admission of the truth of the facts stated in the defence. To such replication Rule 403 had no application.

*

An insurance was effected upon the life of a person for the benefit of her father, brothers and sisters. Held in Dolen *el al v.* Metropolitan Life Insurance Co., 26 O. R., 67, that the beneficial interest in the policy, as soon as it was issued vested in the named beneficiaries, and the contract of the insurers being to pay them the moneys payable under the policy, the insured could not, by any act of hers, deprive them of the interest so vested in them, or the right to call upon the insurers for payment. An assignment made by the assured and her father to a stranger to secure a debt had no effect upon such interest or right of the beneficiaries, except that of the father; and the assignee became the mortgagee of such interest of the father. The recovery of a judgment by the assignee against the father for the amount of the debt did not prejudicially affect the security.

*

Where a bond of suretyship was conditioned for the delivery up by the principal on demand of all moneys received and not paid out by him, it is a condition precedent to the liability of the sureties that a personal demand of payment should be made on the principal. So in Port Elgin Public School Board *v.* Eby, 26 O. R., 73, it was held that where the principal died before any demand of payment was made on him, a demand upon his personal representatives was insufficient to charge the sureties. See Provisional Corporation of Bruce *v.* Cromar, 22 U. C. R., 321; Simpson *v.* Routh, 2 B. and C., 682.

*

By his will the testator devised to his son the use of and during his lifetime certain land, but if he died without issue then it was to be equally divided between two named grandsons; and by a subsequent clause, on the death of testator's widow, he directed that the said land and all other property not bequeathed by his will, should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him. Held by MacMahon, J., in Martin *v.* Chandlar, 26 O. R., 81, that under R. S. O., ch. 109, s, 32, the failure of issue referred to was a failure during the son's lifetime or at his death, and not an indefinite failure, and that by virtue of the subsequent clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the land fell in and formed part of the residue. *Re* Bird and Barnard's U. Contract, 59 L. T. N. S., 166, and Stobbart *v.* Guardhouse, 7 O. R., 239, distinguished.

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## *IN THE CHANCERY DIVISION.*

In Oliver *v.* Lockie, 26 O. R., 28, sec. 35 of R. S. O., 1887, ch. 111, was considered. The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, erected by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of dominant tenement; and the fact that the burthen has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement. Ennor *v.* Barwell, 2 Giff., 410, distinguished. Cases cited: Wood *v.* Waud, 3 Exch., 788; Greatrex *v.* Hayward, 8 Exch., 391; Arkwright *v.* Gell, 5 M. & W., 203; Gaved *v.* Martyn, 19 C. B. N. S., 732; Beeston *v.* Weate,

5 E. & B., 986; Mason *v.* The Shrewsbury, etc., R. W. Co., L. R. 6 Q. B., 528; Sampson *v.* Hoddinot, 1 C. B. N. S., 611.

*

In the Scottish American Investment Co. *v.* Sexton, 260 O.R., 77, Ferguson, J. held that a hot air furnace fixed to the floor by screws and placed in a dwelling house, during its construction, by a mortgagor, in pursuance of the agreement for the loan on the property, cannot be removed by him during the currency of the mortgage. The mortgagee is entitled to an order restraining its removal, and if so removed, no title to it passes as against the mortgagee, even to an innocent purchaser, the mortgagee is entitled to an order for its replacement.

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The testator by her will gave the residue of her will in trust for a certain class of the poor of the county, "who must have been *bona fide* residents of the county before they became destitute or needy." A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only. Held by Meredith, C. J., in Steele *v.* Grover that in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein. See Corporation of Over Darwen *v.* Justices of Lancashire, 15 Q. B. D., 20.

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Meredith, C. J., followed Pringle *v.* Corporation of Napanee, 43 U.C.R., 285, in Kinsey *v.* Kinsey, 26 O. R., 99, that the bequest of the residue of the testator's estate to the executors to invest the same and apply the annual interest therefrom for the promotion of free thought and free speech in the Province of Ontario was void as opposed to Christianity.

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In *re* Colquhoun, 26 O. R., 104, held by Meredith, C. J., that on the death of a person, intestate, leaving no issue, the children of a predeceased brother or sister are not entitled under section 6 of the Devolution of Estates Act, R. S. O., Ch. 108, to share in competition with a surviving father, mother, brother or sister of the intestate.

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A mandamus was refused by Boyd, C., in *re* Ottawa Municipal Election, 26 O. R., 106, to compel a county judge to proceed with a recount, when the ballot papers cast at an election were not sealed up as provided by sec. 155 of 55 Vic., c. 42. (O.)

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The capacity of an Indian to make a will was considered by Rose, J., in Johnson *v.* Jones, 26 O.R., 109. Held that an Indian male or female may make a will and dispose of real or personal property subject to the provisions of the Indian Act, R. S. C., c. 43, or other estate. *Qu.* Whether questions as to the distribution of the property of a deceased Indian are under section 20 of the Indian Act, R. S. C., c. 43, for the decision of Superintendent-General and not for the decision of the court?

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The decision in *re* Grant, 26 O.R., 120, is no longer law. By section 12 of the Act relating to Insurance Law, passed at the late session of the legislature, it is declared that the insured has power by will to declare trusts of life insurance policies or to reapportion the insurance monies within the scope of the Act to secure to wives and children the benefit of life insurance, R. S. O., c. 136, as amended by 51 Vic. c. 22.

## *The Liability of a Subscriber in a Company formed under the Joint Stock Companies Act, R. S. O. Chap. 157, upon unpaid Subscriptions and some means by which it can be avoided.*

BY A. C. MACDONELL, D.C.L.

In order to make a person liable for shares the stock must be alloted to him either by the letters patent or charter itself, in which case no further act of the company is necessary or he may become liable therefor by allotment and notice thereof by the directors and in any event there is no liability to pay until a call has been made and notice thereof given to the shareholder.

It frequently happens that shareholders seek to avoid liability upon the ground that stock has been either illegally or irregularly allotted or called. Where a person is named in a charter as one of the corporators of the company, if the amount of his holding is not specified he will be treated as a shareholder in respect of one share at least, but if he is stated to be the holder of stock to a certain amount or number of shares, this is conclusive upon him and no further act of the directors is necessary in alloting the stock or giving notice thereof. Such a person is not in the position of a person having a mere incohate right to receive shares but is an actual member and shareholder in the company by virtue of the charter in respect of the holding recognized by that instrument—Sec. 42 of the Act, *in re* Haggert Bros. Mnfg. Co., 19 A.R. 582—hence in such a case as this the shareholder seldom attempts to evade liability and it is therefore chiefly in respect of stock alloted by the directors that litigation occurs.

Our Act contains no definition of the term "subscriber" but for the purposes of the Act a subscriber has been aptly defined to be "a person who has put down his name to a contract by which he binds himself to contribute to the extent of the number of shares for which he puts down his name." The liability of such a subscriber is generally tested in any one of the following proceedings:

(1) An action by the company against the subscriber for calls.

(2) An action by the subscriber against the company to cancel his allotment.

(3) An action by a corporate creditor against a subscriber.

(4) In a winding up proceeding under the "Winding Up Act."

In all of these cases the important question for determination is, is the alleged subscriber a shareholder or member of the company.

Sec. 2, s.-s. 6 of the Company's Act R.S.O. Chap. 157, enacts that the word "shareholder," shall mean every subscriber to or holder of stock in the company, and shall extend to and include the personal representatives of the shareholder, and subsec. 3 of sec. 14 of the "Winding Up Act," R.S.O., chap. 183, shortly stated, defines a "member" as a shareholder who has transferred his shares under circumstances which do not by law free him from liability in respect thereof.

The first avenue of escape which suggests itself to the member's solicitor is naturally, is his client legally a member of the company, and have all things necessary been done, and have all times necessary elapsed, to fix him with liability, and first has the stock been legally alloted.

### ALLOTMENT AND NOTICE.

The Statute has been interpreted as contemplating two modes of acquiring stock, one by subscription and the other by allotment, and where a party signs the stock subscription book of the company, the contract is in terms an unqualified taking of the shares and no further formal allotment is necessary—*re* the Queen City Refining Company, 10 O.R., 264—this case has, however, been explained by the Court of Appeal—*In re* The London

Speaker Printing Company, 16 A.R., 508 and limited to cases in which the subscription to the company's stock book takes place after the incorporation of the company. Until the issue of the letters patent there is no company in existence, and the only shareholders at the date of the charter are those who are named therein and to whom stock is thereby alloted, and there is no contractural liability cast upon a person who, prior to the issue of the letters patent has signed an agreement to subscribe for shares in a prospective company unless he is one of the corporators mentioned in the charter when issued, and such a person may subsequently refuse to subscribe or apply for or accept shares, as there can be no privity of contract between such a person and the company which was not in existence when he became a subscriber. Such a person is under no common law liability not even if his name is entered in the books of the company as a shareholder and notice of meetings and demands of payment of calls be sent to him.

There must be a binding contract to take the shares between the company and the person who is unwilling to admit his liability, there must be two persons to such a contract, as to any other, and even if the contract had been made with a person professing to be a trustee for the proposed company the case would be no better as such a trustee could not act for a principal who has no existence, nor does the statute make such a person liable and it therefore appears that unless stock is allotted by the charter of incorporation itself or signed for in the company's stock book, after incorporation, the application for shares must be accepted by the company and the stock alloted in the terms of the application in order to constitute a binding agreement and the acceptance must be by persons who are legally qualified to bind the company, and all proceedings of the directors regarding the allotment must be regular as regards quorum, qualification and summoning the directors, but the allotee may be estopped by his own acts from taking advantage of the irregularity and an irregular allotment may be ratified at any time before the allotee repudiates the shares on the ground of the invalidity of the allotment.

Unless dispensed with by the applicant, notice of acceptance is essential to a binding contract to become a member of the company. Under all ordinary circumstances a notice of allotment within a reasonable time after the allotment of shares is necessary to the allotee or his agent where the alleged shareholder has only applied for shares by subscription, and this even although the shares may have been actually alloted by the directors—Nasmith v. Manning, s.c. 417. It is not necessary, however, to prove express formal notice, it is sufficient to show that the allotee in fact knew of it.

PAYMENT FOR SHARES.

Shares are generally paid for in cash and where this is done trouble seldom occurs, but stock is now frequently paid for by transfer of property and such payment is perfectly legal, and a man may therefore properly accept stock as paid up and not be liable thereon in consideration of a transfer of property, but he must not be a promoter or director or other person standing in a fiduciary relation to the company at the time he acquires the property, nor can such a person secretly sell his own property to the company for shares and conceal from them facts which might influence them, if known. If a man standing in the position of trustee towards the company acquires property under such circumstances as would enable the company to say to him "the property you have applied in payment for your shares was not yours but ours," then he can be made liable to pay for his stock in cash at the instance of a creditor, but the purchaser who buys in his own name and expends his own money and means in acquiring property must be clearly shown to have acted in a fiduciary relationship towards the company before he can be held to have lost the right to deal with the property as his own—*re* Hess Mnfg. Co., 21 A.R., 66.

TRANSFER OF SHARES.

Under the English Companies' Act the shares whether paid up or not can be

transferred without restriction. If therefore the articles of the association do not impose any particular restrictions upon a transfer that, for instance, it must be subject to approval by the board or otherwise, it may be lawful for a shareholder to transfer his shares out and out to anybody even to a pauper, for the mere purpose of escaping liability, but the transfer must not be colorable or fraudulent, it must be bona fide and absolute and not in trust, but great difficulty is sometimes found in pronouncing whether a transaction of this kind is or is not bona fide and as a consequence there will be found reported cases which are somewhat contradictory. Under the Ontario Joint Stock Companies Act every transfer of shares while calls remain unpaid is wholly without effect. Sec. 48 states that no share shall be transferred until all previous calls thereon have been fully paid in and Sec. 61 states that every shareholder until the whole of his stock has been paid up shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon, etc., etc.

It is exceedingly difficult for a member to whom stock has once been alloted to avoid liability to corporate creditors; true he can transfer it but such transfer must be to a bona fide purchaser who intends to pay and has the ability to pay for it, and it is the right and duty of the directors to see that no such transfer is made for the purpose of evading liability and if the directors are misled the transfer can be set aside and in no case is it complete till entered in the company's books and to be of *any* effect the *transfer must* be complete before winding up proceedings are taken.

### CANCELLATION OF ALLOTMENT.

If the stock has been improperly alloted to him, or if there has been fraud or deceit on the company's part in procuring his application for stock or membership in the company his proper course would seem to be a common law action of deceit against the company to cancel the stock but such an action requires the clearest kind of proof to support it—Beatty v. Nealon, 12 A.R., 50 and 13 S. C. 1. And where a shareholder has bona fide claims against the company either by reason of fraud or misrepresentation or any other cause which would enable the Court to decree such relief, the company has the power to compromise such claims and to relieve the shareholder of his shares—Livingstone *v.* Temperance Colonization Co., 17 A.R., 379—but the directors cannot cancel stock merely to avoid liability thereon for non-payment of stock or otherwise. A corporation has as incidental to its existence the same power of compromising claims made against it as an individual has, but there must be a bona fide dispute, there must be nothing that would amount to fictitious litigation for the purpose of enabling the shareholder to free himself, and where the law is clear upon a point no settlement or compromise proceeding upon the ground of doubt as to the law can be maintained as such would be merely a colorable agreement—Healey, on joint stock companies, p. 113.

"*Cancelled*" is an improper term to use with reference to surrendered or forfeited shares. Surrender or forfeiture does not tend to diminution of the capital, all that can be intended by the use of these latter terms is that the shares could be re-alloted to some one else.

There may be retirement from member ship in a company on the ground of misrepresentation or otherwise where a shareholder would be in a position to proceed against the company to have his name removed from the list of shareholders; this can be accomplished if there has been any fraud or misrepresentation or designed concealment on the part of the company or its agents by which the member was induced to undertake the liability; frequently such an action or defence as the case may be is based upon a prospectus containing material misrepresentations or concealment of facts; such a contract or subscription for stock, however, is voidable only and is valid until rescinded and the remedy may be barred by laches or acquiescence on the part of the member and there can be no rescisson of the agreement after a winding up has commenced either voluntary or at the instance of a creditor.

STOCK SUBSCRIBED SUBJECT TO A CONDITION.

A member may also repudiate his liability upon the ground that the stock was subscribed for subject to a condition or conditions precedent which have been neither performed or waived and in such a case the allotment is bad, such, for instance, as where the applicant made his acceptance of shares conditional upon his appointment of manager, or that he should have the carrying out of certain contracts, or in certain cases, that his shares should be paid for out of commissions, similarly, if the conditions be such as the company cannot legally accept, the contract is void for want of mutuality, and unless the applicant has done something to preclude himself from repudiating his shares he will not be liable—Healey, p. 71.

The non-performance of a condition subsequent does not put the member in so favorable a position but in some cases and while the company is a going concern the shareholder may have an equity to call upon the company to perform the condition subsequent which he has imposed or to rescind the agreement, such equity will be lost, if not enforced before the commencement of winding up proceedings.

SURRENDER.

There is no inherent power in directors to accept a surrender of shares and unless the charter gives the power it cannot be exercised; where the power exists and is exercised in perfect faith and for the best interests of the company the member is relieved from all further liability. The surrender must be bona fide and not for the purpose of enabling the shareholder to escape liability, such a proceeding cannot be impugned on the ground that it would diminish the capital of the company, for such shares can be re-issued by the company, but in the absence of authority in the Act or charter issued thereunder a holder of unpaid shares cannot be relieved from liability by surrender and there being no power given to companies under the Joint Stock Companies' Act to enable shareholders to surrender their stock, it is submitted that no surrende. can be made, at least until all calls have been made and paid.

FORFEITURE.

The forfeiture of shares is distinctly recognized by the Ontario Joint Stock Companies' Act and there can be no question as to the power of a company in a proper case to forfeit shares, but the power to forfeit must be strictly adhered to by a duly qualified board of directors and must be exercised with bona fides and a careful observance of all prescribed conditions.

It is a power which can be exercised when the circumstances of the stockholder may make such exercise expedient for the interests of the company, its very nature shows that it is not a power to be exercised for the interest of a shareholder, it cannot therefore be made a collusive means of relieving a shareholder from his responsibility, and it being only optional with the directors, a shareholder cannot abstain from paying his calls and then rest in the belief that his shares will be forfeited and himself discharged. As forfeiture destroys the connection between the shareholder and the company no person can be made a contributory in respect of calls owing on his shares forfeited because the claim of the company is deemed to be satisfied by forfeiture and the latter if good and valid will be a sufficient defence to an action for the calls– Healey, p. 118. The use of a double remedy by both action and forfeiture can always be restrained so that it shall not be used for obtaining a double remedy.

MANAGEMENT.

No shareholder can, however, escape liability or repudiate his stock by reason of irregularities or alleged mismanagement on the part of the directors.

Collusive and fictitious actions are frequently brought by the company against the shareholder or by the shareholder against the company, for the purpose of setting aside alloted stock or paying up calls or otherwise evading the shareholder's liability. Such actions are generally very ingenious and frequently successful. If a shareholder has paid to one creditor he cannot be compelled to pay to another; and relying upon this, shareholders frequently procure friendly credi-

tors to bring actions against them, in such an action judgment is recovered, speedily if necessary, and duly satisfied, at least to all appearances, and the shareholder is thereafter not in arrear, and cannot be made a contributor, or otherwise made liable to creditors. The courts, however, do their utmost to protect corporate creditors, all unpaid subscriptions being treated as a trust fund for the benefit of creditors and all transactions by which a company attempts to release a shareholder from his obligation to pay the full par value of his stock will be closely scrutinized if brought before the Courts.

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## *COLONIAL JUDGES ON THE PRIVY COUNCIL.*

THE legal programme of the government is more interesting than their political one. Not to mention the highly contentious Land Transfer Bill, the Perjury Bill and the Evidence in Criminal Cases Bill are measures to whose general scope it is not possible to object. And now, in addition to these, we have the promise of the introduction into the Upper House in a short time of a bill to enable colonial judges to sit in the Privy Council. There cannot be two opinions as to the commanding dignity with which the Judicial Committee of the Privy Council discharges its functions. The profound respect with which its decisions are received in the distant colonies and dependencies of the empire, for which it is the Supreme Court of Appeal, is in itself conclusive evidence of this fact. But the admission of representative colonial lawyers to a share in its deliberations is, from every point of view, desirable. It will raise the high standard of legal ability already existing in the colonies to still higher elevations. Moreover, it will materially strengthen the Judicial Committee itself. No educated layman with an intelligent knowledge of the history and growth of the principal British colonies needs to be told how rapid and far-reaching have been the developments of colonial, commercial and legal life in comparatively recent years. It is obvious that a tribunal in which lawyers, who have been born and bred in the midst of these developments and who are practically acquainted with their character, find a place must be better fitted for the determination of the intricate problems to to which they give rise than one which contains no such element. But the principle is already *ex concessis*, since the Privy Council has for many years, under the authority of the legislature, enjoyed the assistance of Indian judges, whose services have admittedly been of the utmost value in the decision of Indian appeals. Several observations will probably occur to anyone who reflects on the matter in its broad aspects. In the first place, it would seem to be desirable that the contemplated legislation should be sufficiently general in its terms to permit of the representation in the Privy Council of colonies which may not yet be, but may hereafter become, important enough to merit the privilege, without the necessity for a fresh recourse to parliament. Again, it would almost seem, from the language used by Lord Herschell in announcing his intention to introduce the bill, that only colonial judges should be eligible for promotion to the Judicial Committee. The policy of such a restriction—if it is really intended—is not apparent.—*Law Journal*, England.

## *HYPNOTISM IN CRIMINAL DEFENCE.*

It is curious to observe how hypnotism is being used of late as a criminal defence. Murderers used to set up insanity and irresistible impulse as an excuse for their crimes, and the sentimental public promptly took pity on them and treated them as heroes and martyrs. Today hynotism is the fashionable defense.

The west has been especially prolific in cases of hypnotism in the criminal courts and several self-confessed criminals have succeeded in convincing a jury of twelve men that the crime was committed while under the power of another's will. The thief or murderer or rapist comes into court and says, yes, he did this thing, but he couldn't help it. He wasn't a free moral agent. An unseen power compelled him to do the act. The old-fashioned public would have been content to call this power the devil, but the end-of-the-century public needs a more elaborate nomenclature; the criminal lawyer can't plead hypnotism as a defense, but as a species, or under the guise, of insanity he uses it for all it is worth; the European authorities are drawn upon to prove that the criminal at bar could not have formed the criminal intent necessary to make him amenable to our laws and if, as in some cases, the jury are the judges both of the law and the facts, the prisoner generally goes free. The theory is, that given the power to hypnotize and you can make your hypnotic victim do anything you wish, says the *Philadelphia Times*. You suggest the crime and he does the rest. This is called "hypnotic suggestion." The hypnotizer suggests for instance to his subject that a certain person has seduced his wife, and says, "here is a pistol; when awake you will kill him and avenge the honor of your family." When he awakes he does it, and believes that the dead man had actually been guilty. Such cases are well sustained in the laboratory experiments of the professors; but they do not figure in the criminal courts.

Hypnotic suggestion has been used in the last few years quite frequently as an explanation of juvenile crime. Young criminals, it was found, always travelled with those old in crime, in whose power they seemed to be entirely. In the experience of the Elmira reformatory, it has been found that most of the young law-breakers cannot be regarded as free moral agents; a crime is suggested to them by an older head, and their youthful will is so overwhelmed that they do whatever they are told to do. If any one will study the youthful law breakers that come before our criminal courts every day, he will be struck with the entire absence of conscience as to the import of their offenses. It is not stoicism, nor is it ignorance, and it is not surprising that the hypnotists should attempt to explain it.

Hypnotism, or the influence of "collective suggestion," as it is called, has been used to exonerate persons guilty of assisting to lynch their fellow man. A mob becomes hypnotized by an idea. They hear cries of "hang him," "kill him," and the like, and losing their will power they rush upon their victim. Considerable literature is springing up to explain our lynchings in this way, and in

several cases where the courts have had self-confessed lynchers before them they have refused to convict on the ground that the accused were without their senses and practically in a state of hypnosis, so that no real criminal intent could be formed. It is a "collective suggestion," that hypnotizes and leads them to do acts which they would not do were they possessed of their normal will. It is claimed that this same theory of hypnotic suggestion explains the fact that murders and suicides always go in series. Some time ago, for instance, New York had an epidemic of poison murders; recently she had an epidemic of suicides. Some years ago a woman in Jersey City threw vitriol into the face of her betrayer. She was described in the newspapers; her charms dwelt upon; her letters and her photographs published; immediately there was an epidemic of vitriol throwing. Such people are seldom convicted; the old medical experts excused them on the ground of temporary or emotional insanity; the new schools would probably not hesitate to follow in the footsteps of the European experts and claim exoneration on some theory of hypnotic influence.

When a shocking case of suicide has been reported in all its ghastly details, it is by no means surprising that an exceptionally impressionable mind should be seized and held by the idea of suicide, until all control and will power is gone and the act is committed. "If you ever must cut your throat," jokingly said the professor in one of our colleges to his student, "don't bungle like this poor fellow," and he pointed to a cadaver, that had been brought in with his head hacked off. The professor, with great earnestness, demonstrated how a small nick in the carcoid artery would do the work quickly and artistically. The next morning the student was found with his neck cut in the most approved fashion. This is an authentic case and there was some controversy among lawyers at the time as to whether the professor was not guilty of manslaughter.

Hypnotists claim that many crimes can be explained on the theory of criminal auto-suggestion, as they call it. Crimes in which a suggestion or passion or idea so takes hold of a man that he loses all moral consciousness until the criminal act is accomplished, after which he is himself again and recognizes what he has done. This is the old notion of emotional insanity in a new dress. It takes away the cold-bloodedness of murder, while it leaves all the premeditation and forethought. In the Hayward-Blixt murder of Miss Ging it is maintained that Hayward became possessed of the murderous idea, until he lost moral consciousness, and because of his own concentration of purpose he was able to hypnotise poor Blixt. Such theories, it will be seen at once, are so much of the air, airy, that they lend themselves very happily to the speculative and over-sentimental, for whom it is an easy matter to jump at the conclusion that such crimes are those of irresponsible agents.

It is contended that many of the curious bunco and false pretense schemes are successful because of the hypnotic power of the criminal. It is certain that confidence men are always men of strong faces, with eyes that are never forgotten. They charm their victim something like the cobra charms birds. They always have in their power weaker men whom they use as tools.

There are very few lawyers in this country who have paid any attention to hypnotism from a law point of view. The

case of De Jong, a few years ago in Holland, first brought the matter prominently to their attention. De Jong was suspected of having murdered a number of women, and the Dutch judicial authorities proposed to hypnotise him in order to extract from him a confession or a clue to the murder. Such a use of hypnotism led to a great outcry in England and caused no little stir among lawyers here, although it was claimed at the time that a prominent detective agency had repeatedly applied the same methods.

Several civil cases growing out of hypnotic operations have come to our courts—one for alleged alienation of a wife's affections by means of hypnotic influence, and a number by parties hypnotized against their will. If any crimes are really committed by persons thus under the influence of others, our system of criminal punishment for such, is, of course, accordingly unjust to all. But the facts doubtless are, as Dr. Charcot has claimed, that no cases of crime committed under direct hypnotic influence can be found outside of the books and laboratories. A criminal would not be likely to commit a crime by means of an irresponsible agent, who might and probably would lead him into pitfalls. There is doubtless something in indirect suggestion. If one man gazes at a church steeple the crowd will follow suit. If your companion yawn you will. So likewise one crime suggests another. But that fact cannot be expected to have much value as a defense for crime. If it had, every criminal in the country would go free.—*Chicago Law Journal.*

## *HON. JOHN HAWKINS HAGARTY, CHIEF JUSTICE OF ONTARIO.*

BY RICHARD ARMSTRONG.

In 1834, when Muddy York became no more and the goodly city of Toronto took its place, a young Irishman just in his eighteenth year, a type of his country in wit and geniality of nature and brilliancy of attainments, made the new born city his home. Much does Toronto owe to the sons of the Emerald Isle, and kindly does she appreciate them, but possibly there is no one who so rapidly ingratiated himself as the brilliant son of Matthew Hagarty, examiner of his Majesty's Court of Prerogative for Ireland. When John Hawkins Hagarty, a tall slim lad, entered upon the study of law in 1835 there were many, even physicians, who were ready to assert that he would never live to much maturer years and even refused to pass him for insurance, and it would seem that these expectations stood in some chance of verification, for we find during Michaelmas term, 5 Victoria, on an application made by Mr. Hagarty to be sworn in as an attorney that one year of his apprenticeship was spent out of the country, for owing to the despairing state of his health, he had returned to Dublin, the city of his birth, to rest and recuperate. Having been sworn in he immediately commenced the practice of his profession. He was engaged in a great variety of cases, where he might be said to have achieved almost immediate success.

In Trinity term, 7 Victoria, he held briefs in the following cases: Larned v. McRoe, a maritime case involving a large amount; City Bank v. Lee, *re* Malcolm Gillespie an alleged bankrupt, and Cullen v. Price, and was opposed by Harrison, Blake, Baldwin and Cameron as counsel in these various cases.

When we glance over the records and see a man but in his second year at the bar, in such cases, and opposed by the leading counsel of the day, we can but wonder when we remember the lean stripling, a youth in appearance, not half way on his second score. What merit had this man to so readily outstrip his fellows? Rather say what had he not. With judgment quick, keen and penetrating, as his sinewy nervous frame would indicate, with brilliancy and solidity of intellect attained by few, we have a mental equipment that stood him in good stead in his busy and progressive life for a man even of the exceptional ability and the high principles of the now Chief Justice, had to keep his armour bright, for from the time he was called to the bar until he honored the silk, in 1850, he took his place and won his way to fame with Blake, Baldwin, Cameron, Draper, Eccles, Read and Sullivan for competitors. But we should, indeed, be amiss if we did not give full credit to those other forces which made him irresistible before a jury and powerful before the

bench, this was the endowment of his nationality, his native Irish wit with his keen appreciation and sympathy with erring human nature. Writing at this distance of time from his active work at the bar many reminiscences and clever sayings are necessarily lost, but we can be excused for quoting the following, showing, as it does, that after all the most powerful appeal is to the ridiculous:

In Kerby v. Finkle, an action for libel, tried at Woodstock, Mr. Hagarty and Mr. Duggan were the opposing counsel. In addressing the jury Mr. Duggan had occasion to say that the defendant's case was so weak that they found it necessary to send to Toronto and get the very flower of the profession to try and pull them through. When Mr. Hagarty came to address the jury he at once disowned all the compliments paid him by the opposing counsel in his address, and then extending his hands just over the head of Mr. Duggan, who had very red hair with a bald centre, and who was sitting near him and in front of the jury, smiling as if warming his hands, said: "I protest, gentlemen of the jury, against the remarks of my learned friend, I do not claim to be the flower of the profession, but I do say that beneath my outspread hand there sits the sun-flower of the profession." This sally convulsed the judge, jury and all in the court room. This is but one of the hundreds of bon mots which placed Mr. Hagarty in the front rank as the wittiest counsel of his day.

The question naturally arises, how came it that a man of such exceptional attainments, so clever of speech, so bright and genial by nature, did not take a more active part in the politics of the day? Here we find that the Chief Justice was as weak as other men, for in 1847 he ran and was elected to a seat in the City Council, but unfortunately in the same batch was one Baird a master of vituperation and abuse, the scheme was then, as it has occasionally appeared since, to keep good men out of the council and give the ring a chance. In pursuance of this Baird and some others made uncalled for and purely abusive attacks on Mr. Hagarty in the Council. Mr. Hagarty's decision seems to have been to decline re-election, and we can readily appreciate how cruelly hurt was the proud spirit of this high principled man to feel that this was the return for his desire to place his talents at the service of the city.

It has often been regretted that the Chief Justice should have gone on the bench rather than into more active life, but when we feel the comparison that must have forced itself upon him, the public life as he had seen it and the public life of which he had possibly formed for himself in his boyish dreams, whether at the school of his revered preceptor, Mr. Huddard, or in the heyday of his youth at Trinity College, Dublin, in a land where politics are the breath of life, in a land where the youth draw their inspirations from the Burks, Grattans and O'Connels, when we say, he drew this comparison we do not wonder that he should have sacrificed the rights of citizenship for "the

marble tomb of dignity." We have seen him as a lawyer, man of business and politician, but it is by other and stronger ties that he has endeared himself to a large circle of friends, not alone by his scholarship, nor his literary ability, for as a lover of literature he has long been known, but rather in the essence of all these. His was that warm spirited and generous heart in which poesy loves to dwell, and if those who think of the Chief Justice only on the bench, but remember that he sprang from a race bubbling over with humor and poesy, a race, who as lovers, soldiers and patriots, have never been excelled, they will easily understand, as a clever and brilliant compatriot, Nicholas Flood Davin, has said that "a good poet was sacrificed to the lawyer and the judge."

When we think of the present Napoleonic revival it is passing strange that when all the poets of France sought to express in fitting terms their feeling over the burial of Napoleon in Paris, the grandest ode should have come from a colony so long lost to her, that it should have been penned not by a Frenchman nor by a warrior but by a Canadian lawyer. Mr. Hagarty published in *The Maple Leaf* in 1840, among other poems, "The Sea, The Sea," "Ten Thousand," and his ode on "The Funeral of Napoleon I," which we quote:

### THE FUNERAL OF NAPOLEON I.

*(14th December, 1840.)*

Cold and brilliant streams the sunlight on
the wintry banks of Seine,
Glorious the imperial city rears her pride
of tower and fane—
Solemnly with deep voice pealeth, Notre
Dame, thine ancient chime,
Minute guns the death-bell answer in the
same deep measured time.

On the unwonted stillness gather sounds
of an advancing host,
As the rising tempest chafeth on St.
Helen's far-off coast;
Nearer rolls a mighty pageant—clearer
swells the funeral strain,
From the barrier arch of Neuilly pours the
giant burial train,

Dark with eagles is the sunlight—darkly
on the golden air
Flap the folds of fated standards, eloquently mourning there—
O'er the pomp of glittering thousands,
like a battle phantom flits
Tatter'd flag of Jena, Friedland, and
Austerlitz.

Eagle-crown'd and garland-circled, slowly
moves the stately car,
'Mid a sea of plumes and horsemen—all
the burial pomp of war—
Riderless, a war-worn charger follows his
dead master's bier—
Long since battle-trumpet roused him—he
but lived to follow here.

From his grave 'mid ocean's dirges, moaning surge and sparkling foam,
Lo, the Imperial Dead returneth! lo, the
Hero-dust comes home!
He hath left the Atlantic island, lonely
vale and willow tree,
'Neath the Invalides to slumber, 'mid the
Gallic chivalry.

Glorious tomb o'er glorious sleepers! gallant fellowship to share—
Paladin and Peer and Marshal—France,
thy noblest dust is there!
Names that light thy battleannals—names
that shook the heart of earth!
Stars in crimson War's horizon—synonymes of martial worth!

Room within that shrine of heroes! place,
pale spectres of the past!
Homage yield, ye battle-phantoms, Lo!
your mightiest comes at last!
Was *his* course the Woe out-thunder'd
from prophetic trumpet's lips?
Was *his* type the ghostly horseman shadow'd in the Apocalypse?

Gray-hair'd soldiers gather round him,
relics of an age of war,
Followers of the Victor-Eagle, when his
flight was wild and far;
Men who panted in the death-strife on
Rodrigo's bloody ridge,
Hearts that sicken'd at the death-shriek
from the Russian's shatter'd bridge;

Men who heard the immortal war-cry of
the wild Egyptian fight—
"Forty centuries o'erlook us from yon
Pyramid's gray height!"
They who heard the moans of Jaffa, and
the breach of Acre knew—
They who rush'd their foaming war-steeds
on the squares of Waterloo—

They who loved him—they who fear'd him
—they who in his dark hour fled—
Round the mighty burial gather, spell-
bound by the awful dead!
Churchmen—Princes—Statesmen—War-
riors—all a kingdom's chief array,
And the Fox stands—crowned Mourner—
by the Eagle's hero-clay!

But the last high rite is paid him, and the
last deep knell is rung—
And the cannons' iron voices have their
thunder-requiem sung—
And, 'mid banners idly drooping, silent
gloom and mouldering state,
Shall the Trampler of the world upon the
Judgment-trumpet wait.

Yet his ancient foes had given him nobler
monumental pile,
Where the everlasting dirges moan'd
around the burial Isle—
Pyramid upheaved by Ocean in his lone-
liest wilds afar,
For the War-King thunder-stricken from
his fiery battle-car!

When we read these martial lines we say here is a poet descended from a race of soldiers, and struck with its strength of description and deep religious fervor of tone, we know that the singer was inspired, and regret that the blind goddess should have captured him whom the muse should have wed. But Justice took him who should have been poet, patriot and statesman to herself, for in February, 1856, he was appointed judge on which occasion the press said, "Mr. Hagarty has neither political connections or party services to secure him favor; he was doubtless selected for the high and responsible office of judge as one in whom talent, integrity and experience most abound and were best united." His acceptance of this position severed the partnership which had long existed between himself and Mr. Crawford, the firm name being Hagarty & Crawford, and while his old partner was to advance in politics and ultimately became Lieutenant Governor of Ontario, he was destined for high honors in the judiciary of our country, first appointed puisne judge of the Court of Common Pleas on February 5th, 1856, he was transferred to the Court of Queen's Bench 18th March, 1862. This dignity was retained until the 12th of November, 1868, when he once more sat in the Court of Common Pleas, but as Chief Justice of that Court. In this capacity he continued to serve the ends of justice until the 13th of November, 1879, when he was appointed Chief Justice of the Court of Queen's Bench. On the 6th of May, 1884, he was appointed Chief Justice of the Court of Appeal for Ontario. In 1887 he declined the honor of knighthood.

That his talents and disinterestedness have been fully appreciated in the highest quarters is evidenced by the fact, that in 1887 he was offered

knighthood, but the Chief Justice is one of the few in Canada who to this kind invitation replied "*Nolli Epescopai.*" It may be said that Canada has sustained a great loss in that the service of one so gifted should have been denied her in the state, but with a system such as ours this cannot be the case under our federal constitution the law is represented and there can be no doubt that the presence of men so able, vigorous and just are of greater benefit to the country, situated where the courts can calmly reconsider the often hasty and mistaken verdict of the hustings. It is upon such men that Canada must depend if she is not to be cursed with constant appeals to bigotry and intolerance, if her constitution is not to be placed in constant jeopardy by some flamboyant catholic or excited protestant, and it is our hope that the greatest men will ever be found in Canada's time of need in the people's court of last resort, the judiciary of the country.

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LEGAL ANTIQUITIES.—"When I was Chancellor," says Lord Bacon, "I told Gondomar, the Spanish Ambassador, that I would willingly forbear the honor to get rid of the burthen; that I had always a desire to lead a private life." Gondomar answered that he would tell me a tale: "My lord, there was once an old rat that would needs leave the world; he acquainted the young rats that he would retire into his hole, and spend his days in solitude, and commanded them to respect his philosophical seclusion. They forebore two or three days; at last, one hardier than his fellows ventured in to see how he did · he entered and found him sitting in the midst of a rich Parmesan cheese."

### *COLLUSION.*

The new Divorce Law of Victoria has produced such a harvest of undefended divorce cases that it is by no means surprising to find voices uplifted against the new departure, nor to find among the condemnatory utterances protests from the Archbishop of Melbourne and the Chief Justice. There can be very little doubt that a large number of marriages have been dissolved only by means of the most shameless collusion between the parties. No one with any experience of our Courts has the least doubt that this process is daily going on, and it is one which, humanly speaking, it is impossible to prevent. The unusual duty is imposed upon the Court of "satisfying itself" upon facts not necessarily brought before it by the parties. By the *Marriage Act* 1890 (following the English Act of 1857).


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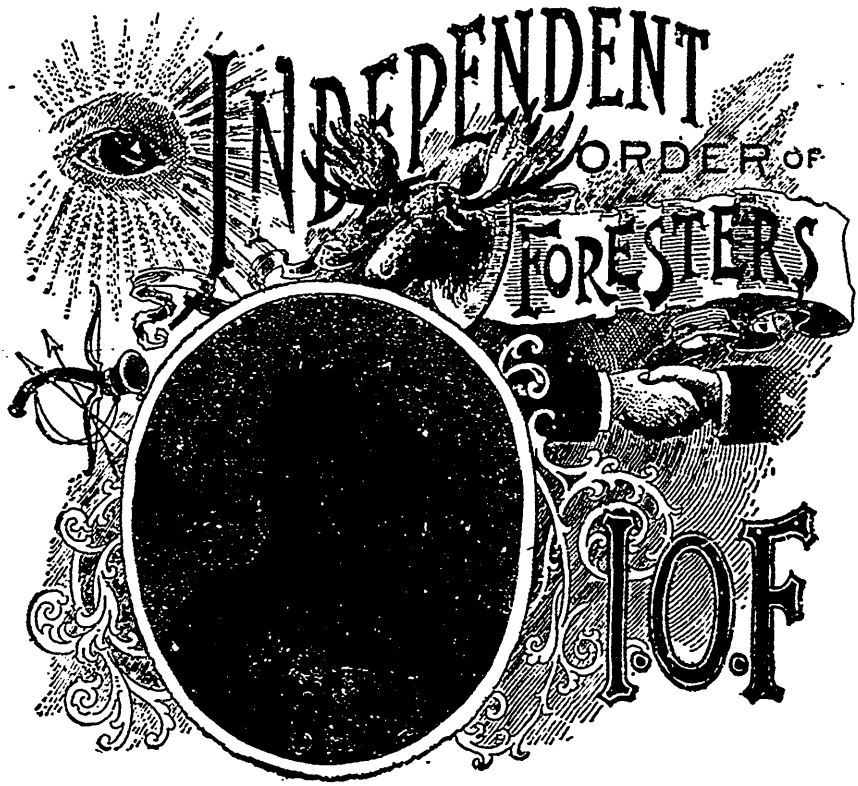


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| | No. of Members. | Balance in Bank. | | No. of Members. | Balance in Bank. | | No. of Members. | Balance in Bank. |
|---|---|---|---|---|---|---|---|---|
| October, 1882 | $80 | $ 1,145 07 | January, 1888 | 7,811 | $ 86,102 42 | January, 1894 | 54,481 | $838,857 89 |
| January, 1883 | 1,134 | 2,769 58 | January, 1889 | 11,618 | 117,599 88 | February, " | 55,149 | 875,860 06 |
| January, 1884 | 2,216 | 13,070 85 | January, 1890 | 17,026 | 188,130 80 | March, " | 56,559 | 876,230 08 |
| January, 1885 | 2,558 | 20,992 30 | January, 1891 | 24,466 | 283,907 20 | April, " | 58,339 | 911,-23 93 |
| January, 1886 | 3,648 | 31,082 52 | January, 1892 | 32,303 | 405,798 18 | May, " | 59,007 | 924,707 04 |
| January, 1887 | 5,804 | 60,325 02 | January, 1893 | 43,024 | 588,597 85 | June, " | 61,000 | 951,571 62 |

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