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The BARRISTER

A. C. MACDONELL, D.C.L., Editor.

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The Barrister.

VOL. II. TORONTO, DECEMBER, 1896. No. 12

EDITORIAL.

It has been intimated by those who ought to know, that the learned and beloved Chief Justice of the Province of Ontario is about to take that much needed rest which his long and faithful service has so well entitled him to. The retirement of Chief Justice Hagarty, when it comes, will be a cause of regret to all, and to none more than to those who were fortunate enough to appear frequently before him. The public service will suffer a most distinct loss, and the Bench will lose one of the most able and brilliant men that ever sat upon it in this Province. John Hawkins Hagarty was a tall, slim Irish lad in his 18th year when he came to Muddy York in 1834; his father was Matthew Hagarty, Examiner of his Majesty's Court of Prerogative for Ireland.

The present Chief Justice entered upon the study of law in 1835, and in Michaelmas Term, 5 Vict., Mr. Hagarty was sworn in as an attorney and called to the Bar. From the time of his call to the Bar he enjoyed a large practice. He took his place and won his way to fame with Blake, Baldwin, Cameron, Draper, Eccles, Read and Sullivan. In 1850 he was called within the Bar and donned the silk. While at the Bar, Mr. Hagarty was at all times an enormously hard worker; was powerful before the Bench and almost irresistible before a jury. As a Judge he was always famous for his great wit and learning.

In 1847 Mr. Hagarty was elected to a seat in the Toronto City Council, but declined re-election the following year. It is not generally known that the Chief Justice has written some wonderfully sweet things in verse; in 1840 he published in *The Maple Leaf*, among other poems, "The Sea, The Sea," "Ten Thousand," and his ode on "The Funeral of Napoleon I." Nicholas Flood Davin has said of him that "a good poet was sacrificed

to the lawyer and the Judge"; but justice took him who should have been poet, patriot and statesman to herself, for in February, 1856, he was appointed Puisne Judge of the Court of Common Pleas. On 18th March, 1862, he was transferred to the Court of Queen's Bench; this dignity was retained until the 12th November, 1868, when he once more sat in the Court of Common Pleas, as Chief Justice this time. In November, 1879, he was appointed Chief Justice of the Court of Queen's Bench; and on 6th of May, 1884, he was appointed Chief Justice of the Court of Appeal. In 1887 he declined the honor of knighthood.

* * *

With this number we close our second year. In doing so, we desire to thank our friends and subscribers throughout the Province and the Dominion of Canada for the generous support they have given us. *The Barrister* next year will be brighter and better than ever. New features will be added, and new columns and departments will be opened. The past two years have been trying ones to journalists, and many a paper has had to suspend publication; but most of our law publications in England, the United States and Canada have weathered the storm.

* * *

We invite every lawyer in the Province who desires to discuss any topic of interest to the profession to use *The Barrister*. We do not ask that he should agree with us or anybody else. If he has a sincere opinion on any topic or grievance, or a simple suggestion to present, *The Barrister* is open to him.

* * *

We believe that the Bar is a power in politics, in legislation, and in every public movement in Canada. Under such circumstances the profession should be able to move together against every evil and abuse, and in favor of every reform demanded by the exigencies of the times.

* * *

The Barrister started out with a definite programme to carry out. One of the planks in its platform has been at least carried out, and in the formation of the Canadian Bar Association we hope for results that will be of benefit to the profession. What about the formation of an Ontario Bar Association?

* * *

There has been some considerable talk about the endowment fund of the Provincial University. The faculty of law of U. of T. numbers among its graduates some of the leaders of the Canadian Bar. We think a "University graduates' convention" should be held in Toronto, and a university convention of all classes of graduates might do as much for Varsity as such a gathering has done for Harvard, Cornell and Princeton. The law and medical graduates of U. of T. are scattered the world over, and we believe they

would return in large numbers at the bidding of their alma mater, and such a gathering might have far-reaching results for the benefit of the university. Call a convention of graduates and see the endowment increase largely.

* * *

A brass tablet is soon to be erected in the new Benchers' apartments at Osgoode Hall to the memory of one of Canada's sons, whose name will ever be revered in the annals of Canadian history. It is to the memory of Lieut.-Col. John Macdonell, A.D.C., Attorney-General of the Province of Upper Canada, and Military Secretary to Major-General Brock during the campaign of 1812. This will be a fitting partner to the splendid tablet already placed in the new Benchers' apartments in remembrance of Chief Justice Osgoode. Brave young Col. Macdonell fell with his general in the engagement, and is buried with him under Brock's monument. The gallant conduct of the young Attorney-General is in all the history books in the public schools of the country, and the school children read: "In one of the batteries of Fort George, amid the booming of minute guns from friend and foe, Brock and Macdonell side by side found a resting place." And again, "among those who fell in this second attempt was Brock's brave aide-de-camp, young Col. John Macdonell of Glengarry, Attorney-General of Upper Canada—a noble young man only 26 years of age, whose life was full of promise." Attorney-General Macdonell fell in the thickest of the fight, bravely leading on his troops. He had a distinguished career as a college boy, an athlete, a scholar, a lawyer, a statesman and a soldier, and was cut off early from a course that gave signs of rare brilliancy. The tablet to his memory will be a beautiful one.

* * *

A sentence in the Solicitor-General's speech at the Osgoode Bar dinner, in reference to the Ontario Bar, recalls a similar utterance of Mr. Fitzpatrick to *The Barrister* last July, while enjoying a trip to Hanlan's Point for the first time. The able Irish-Canadian advocate told *The Barrister* that Toronto was celebrated for its able Bar. The lawyers of Toronto were among the ablest in the British dominions. Speaking of our Bar he said: "It was while in England I especially noticed this; when I saw their work before the Privy Council I felt proud of the fact that I was a Canadian." This speaks well for the Ontario Bar.

* * *

We hope the Benchers will deal fairly with the law students in their petition for assistance on behalf of the new Osgoode Athletic Association. A revival in Osgoode sports would be a good

thing for the law students of Ontario. Physical training is as necessary to the law student of to-day as the legal training itself.

* * *

A subscriber in Chicago has sent us a specimen ballot for the 3rd Congressional District, 1st Senatorial District, Cook County, such as was used in the recent elections in the United States. "The Ballot" is a huge pink paper measuring 30 inches each way, and containing the names of over 350 candidates for the various offices. Among the candidates we notice the name of Miss Kate Kane Rossi, who ran for State's Attorney as the candidate of the Abolition of Female Slavery party. Surely there must be an army of Philadelphia lawyers out west to act as deputy returning officers and scrutineers.

RECENT ENGLISH DECISIONS.

NEVILL (APPELLANT) v. THE FINE ARTS AND GENERAL INSURANCE COMPANY (LIM.), (RESPONDENTS).

[House of Lords—8TH DECEMBER.

Libel—Defamation—Privilege—Statement in excess of privilege.

The Court of Appeal having decided that where in an action for libel the Judge rules that the occasion was privileged, the plaintiff cannot succeed in the action unless the jury find that the defendant was actuated by express malice, a finding by the jury that the defamatory statement complained of was in excess of the privilege is not enough.

Their Lordships (Lord Halsbury, L.C., Lord Macnachten, Lord Shand, and Lord Davey) on these grounds, and also on the ground that in fact there was no libel, affirmed the decision of the Court of Appeal (64 Law J. Rep. Q. B. 681; L. R. (1895) 2 Q. B. 156), and dismissed the appeal with costs.

MUTUAL RESERVE FUND LIFE ASSOCIATION v. NEW YORK LIFE INSURANCE COMPANY.

[102 L. T. 60; 31 L. J. 636; 41 S. J. 47.

Contract for personal services—Injunction.

H. contracted to act "exclusively" as agent for plaintiffs in a certain district so far as to tender to plaintiffs all risks obtained by him and under his control. Then H. introduced business to defendants.

Held, that plaintiffs could not get an injunction against H. and defendants. There can be no injunction unless (1) a clear and negative agreement is expressed as in *Lumley* v. *Wagner*, 1 De G. M. & G., 604, or (2) a negative agreement is implied in terms so definite that the Court can see exactly the limits of the injunction it is asked to grant. The case is governed by *Whitwood Chemical Company* v. *Hardman*, 64 L. T. 716. (Lindley and Smith, L.JJ., affirming Pollock, B.)

THE WEST OF ENGLAND FIRE INSURANCE COMPANY v. ISAACS.

[Court of Appeal—24TH AND 25TH NOVEMBER.

Insurance (fire)—Contract of indemnity—Right of insurer to benefit of assured's contract—Payment by insurer with knowledge of contract—Omission by insurer to claim right of subrogation—Release by assured—Right of insurer to benefits assured might have received.

Appeal by the defendant from a judgment of Collins, J. The case is reported 65 Law J. Rep. Q. B. 653.

Their Lordships dismissed the appeal, being of opinion that the plaintiffs, having paid the money secured by the policy, were entitled to enforce all the remedies which the defendant had against third parties under then subsisting contracts relating to the subject matter of the insurance; and inasmuch as the defendant had, after such payment by the plaintiffs, released a third party from his liability to make good the loss, the plaintiffs were entitled to recover from the defendant the equivalent of the benefit which the assured his wife might have received from a similar the contract with the ...p so as ...y to make good the loss ...eir rese... ough the plaintiffs had ...packet the payment with know... h... of the contract, and had not at that time claimed their right of subrogation under it.

* * *

ATKINSON v. MORRIS.

[Court of Appeal—1ST AND 2ND DECEMBER.

Probate—Will - Revocation—Evidence — Duplicate — Declarations of testatrix—Admissibility of evidence of declarations of testatrix, made after execution of her will, to prove execution in duplicate and destruction of one part with the intention to revoke the will—Costs.

Appeal from a decision of Barnes, J.

Ann Keble Atkinson made her will in 1878, and thereby, after appointing executors and bequeathing sundry legacies, left her residue to her nephew. The will was duly executed and attested. At the trial before Barnes, J., and a special jury there was evidence that the will was drawn by the nephew; that he then made a copy of it which was not executed; that both original and copy remained, except for a short period, in the possession of the testatrix until her death in 1895; and that the copy was not then to be found, but the will was discovered with the signature of the testatrix and the Christian name and description of one of the witnesses crossed through with a pen, and a note appended in the handwriting of the testatrix as follows: "Null and void, A. K. A., through injustice on the part of Mrs. Emma (Atkinson and family) from time to time." There was no evidence that the will had been executed in duplicate. The defendants admitted that the will was not revoked by the erasures, but they desired to adduce the evidence of persons to whom the testatrix, after the execution of her will, had made declarations to the effect that she had executed her will in duplicate, and had destroyed one part with the intention of revoking her will. The plaintiffs agreed that this, if proved, would amount to revoca-

tion; but they contended that declarations by a testatrix made after the execution of her will could not be admitted to prove either that it had been executed in duplicate, or that it had been revoked. Barnes, J., rejected the evidence and pronounced in favour of the will, with costs against the defendants. They now appealed, and asked for a new trial on the ground (*inter alia*) of this rejection of evidence.

Their Lordships dismissed the appeal. They said that the intention of the testatrix to revoke her will was indicated in the clearest possible way; but she had not complied with the formalities prescribed by the Wills Act, so that the Court, much to their regret, could not give effect to it. The learned Judge had rightly rejected the evidence tendered. It was settled that declarations made by a testator after the execution of his will to the effect that he had executed it did not come within any of the exceptions to the rule which rejected hearsay evidence, and could not be admitted to prove the execution of his will. That applied equally to declarations that he had revoked his will in duplicate, and also to declarations that he had revoked his will. On the question of costs they would not interfere with the decision of the learned Judge, as they were affirming his judgment; and they would not give costs to an unsuccessful appellant, but the appeal would be dismissed without costs.

* * *

BRINSMEAD v. RRINSMEAD.

[101 L. T. 606.

Trade name.

If J. B. has an old established and well-known business, and another person of the same surname starts the same business in the same locality as T. E. B. (his real name) and sells that business to T. E. B. and Sons Limited, and there is evidence which induces the Court to think the transactions are fraudulent with a view to steal J. B.'s business by leading the public to think they are buying J. B.'s goods, the Court will restrain by injunction the use of the name T. E. B. and Sons Limited, and the use of the surname B. unless an express statement is always added that the parties have no connection with J. B. (Lindley and Smith, L.JJ., affirming North, J.)

* * *

IN RE STEPHENSON. DONALDSON v. BAMBER.

[Court of Appeal—26TH NOVEMBER.

Will— Class — Number— Mistake —Power to reject inaccurate number in gift to a class.

Appeal from a decision of Kekewich, J.

Robert Stephenson bequeathed all the residue of his personal estate "unto the children of the deceased son (named [illegible] of my father's sister [illegible] business [illegible] and share alike." The [illegible] father's sister had [illegible] all of whom died before [illegible] the will, and left [illegible] who were still living. [illegible] facts were known to the testator. On a summons by the executor to decide who was entitled to the residue, Kekewich, J., held that all the children named Bamber of the three deceased sons were entitled. The next-of-kin appealed.

Their Lordships allowed the appeal, and held that the gift was void for uncertainty. There was authority for saying that where

there was a clear intention on the part of a testator to benefit a whole class, but he had given a wrong number for the class, the Court would reject that inaccurate enumeration and allow the whole class to share the bequest. Here there was no manifest intention to benefit the children of all the three sons, and it would be wrong thus to extend the rule. *Hare* v. *Cartridge*, 13 Sim. 165, was of doubtful authority, but it was distinguishable.

* * *

ROWLAND v. MITCHELL.

[Court of Appeal—2ND DECEMBER.

Trade-mark—"Distinctive device" —Portrait — Patents, Designs, and Trade-marks Act, 1883 (51 & 52 Vict. c. 50, s. 10, s-s. 1.

Appeal from the decision of Romer, J., reported 65 Law J. Rep. Chanc. 857.

The plaintiff was the proprietor of a registered trade-mark, consisting of his own photographic likeness in an oval, which was printed on the wrappers used for packets of confectionery sold by him. He brought an action to restrain the defendant from imitating his wrappers, and from selling similar goods in packets got up so as to deceive the public by their resemblance to the plaintiff's packets. There was also a motion by the defendant to rectify the register by expunging the plaintiff's trade-mark. Romer, J., held that a portrait could be the subject of a trade-mark, and refused the motion to expunge.

The defendant appealed.

Their Lordships dismissed the appeal, holding that the photograph of the face of a human being could be a destinctive device within section 10 of the Act of 1888, and might therefore be properly registered as a trade-mark. If a similar photograph were in common use in the trade, or were already on the register, a portrait might be rejected as being calculated to deceive, but there was no suggestion of anything of that kind in the present case.

* * *

THORPE (APPELLANT) v. PRIESTNALL (RESPONDENT).

[Queen's Bench Division (Magistrate's Case)—4TH AND 7TH DECEMBER.

Practice—Procedure — "Instituting proceedings — Lord's Day Observance Act, 1676 (29 Car. II. c. 7)—The Sunday Observation Act, 1871 (34 & 35 Vict. c. 87).

Case stated by the stipendiary magistrate for Sheffield.

An information had been laid against the appellant, a barber, by the respondent, as a private prosecutor, for that he "being a tradesman or artificer, had unlawfully exercised the business or work of his ordinary calling upon the Lord's Day contrary to the form of the statute 29 Car. II. c. 7." The prosecutor had obtained the verbal consent of the chief constable to the proceedings before laying the information and obtaining the summons, but the written consent was not obtained until afterwards, but before the service of the summons. By the Sunday Observation Act, 1871 (34 & 35 Vict. c. 87), s. 1, "No prosecution or other proceeding shall be instituted (under 29 Car. II. c. 7) except by or with the consent in writing of the chief officer of police of the district, or with the

consent in writing of two justices." The facts showed that the appellant had shaved customers between 10.30 a.m. and 11.45 a.m. on Sunday, July 5 last, and had also sold one customer a newspaper. The two questions raised on the case were whether the appellant came within the description of a "tradesman or artificer," and whether the proceedings had been properly instituted under the circumstances.

The Court (Wills, J., and Wright, J.) held that the laying of the information was the point at which the proceedings were instituted, and that the written consent of the chief constable not having been obtained before that step was taken, the prosecution failed upon that point, and it became immaterial to decide the first point.

Per Wright, J.—In "East's Pleas of the Crown" (1 East, 186) information and proceeding before a magistrate are laid down as the commencement of a prosecution under the authority of *Rex* v. *Willace*, decided by all the Judges. Conviction quashed.

* * *

THE COVENTRY MACHINISTS' COMPANY (LIM.) v. HELSBY.

[KEKEWICH, J.—Chancery Division—4TH DECEMBER, 1896.

Trade name—"Swift"—Appropriation of word—Defendant passing off his goods as those of plaintiff—Interim injunction.

Motion for an interim injunction to restrain the defendant from passing off his cycles as or for the goods of the plaintiffs, by the use of the term "Swift" or "Walsall Swift."

The plaintiffs were large cycle manufacturers carrying on business in Coventry and in London, and their cycles had become very well known as "Swift" cycles. They claimed, in fact, to have a monopoly of the word "Swift" as applied to bicycles. For some four years the defendant had been selling cycles under the term "Swift," or "Walsall Swift"; but it was not until September, 1896, that the plaintiffs discovered that it was the defendant, trading as the Cash Cycle Company, who was putting these machines on the market. No evidence of any one having been deceived was given. There was evidence on behalf of the defendant of the sale of his "Walsall Swift" cycles. It was also denied on his behalf that the term "Swift" was exclusively applied to the plaintiffs' cycles, and there were affidavits to the effect that some five other manufacturers had applied the same fancy term to their machines, but no names or details were given.

Kekewich, J., said that the case raised the question whether such a simple descriptive word as "Swift," which could not be registered as a trade-mark, could be appropriated by the plaintiffs for their bicycles. The evidence was unsatisfactory as to whether the word was in common use in the trade, as stated by the defendant. If it was, there was an end to the plaintiffs' case. But, in his Lordship's opinion upon the evidence as it stood, the plaintiffs had appropriated the word "Swift," and therefore the use by the defendant of the words complained of was calculated to deceive the unwary purchaser, and the injunction asked for must be granted.

IN RE EASTMAN PHOTOGRAPHIC COMPANY.

[W. N. 158 ; 44 S. J. 48.

Trade-mark.

"Solio" cannot be registered as a trade-mark for photographic printing paper, for it refers to the character of the goods, as it indicates that sunlight is an essential characteristic of the article. (Kekewich, J.)

OSGOODE HALL NOTES.

Sittings of Courts, 1897.

SUPREME COURT OF CANADA.

Tuesday, February 16th; Tuesday, May 4th; Tuesday, October 5th. Last day for filing cases for February sittings, Tuesday, January 26th; last day for filing factums, Saturday, January 30th; last day for inscribing appeals, Monday, February 1st.

EXCHEQUER COURT OF CANADA.

Special sittings will be held on dates to be fixed, provided some case or matter is entered for trial or set down for hearing in the office of the Registrar of the Court (Mr. L. A. Audette), at Ottawa, at least ten days before the day appointed for such sitting. If no case is entered or set down the sitting will not be held.

TORONTO ADMIRALTY DISTRICT.

Sittings of Court fixed on order of local Judge when cases ready for trial.

Chambers are held at the same time and place as County Court Chambers.

COURT OF APPEAL.

Tuesday, January 12th; Tuesday, March 2nd; Tuesday, May 11th; Tuesday, September 7th; Tuesday, November 9th.

During the sittings of the Court, Chamber applications are heard any day, Saturdays preferred. When the Court is not sitting, any day can be arranged for, at the convenience of the Judge.

HIGH COURT OF JUSTICE.

DIVISIONAL COURTS.

Sittings commence on Monday of each week (except during the Long and Christmas vacations), and continue from day to day, except Saturday, until the business is disposed of. If any Monday is a holiday or is in any vacation, the Court will sit on the next juridical day.

WINTER ASSIZES.

JURY AND NON-JURY.

Toronto—Civil and Criminal—Monday, January 11th. Robertson, J.

Hamilton — Civil — Monday, January 18th. Rose, J.

London—Civil—Monday, January 11th. Boyd, C.

Ottawa—Civil and Criminal—Monday, January 18th. MacMahon, J.

WEEKLY COURT—TORONTO.

A Judge sits at Osgoode Hall every week except during vacation. The business is taken as follows:

Monday and Fridey, Chamber business; Tuesday, Wednesday and Thursday, Court business.

Law Society.

Mr. A. J. Wilkes, Q.C., of Brantford, was elected a Bencher of the Law Society on December 4th, in the place of Mr. Hardy, who, as Attorney-General, has become and exofficio Bencher, and has therefore resigned his seat as an elected member of Convocation.

The Benchers also re-appointed all the members of the reporting staff.

* * *

The Law School closed on Thursday, December 17th, and will reopen on Tuesday, January 5th, at 9 a.m. Most of the students have gone home for the holidays.

* * *

Osgoode will have three hockey teams in the O. H. A. series: senior, intermediate and junior teams. They say the whole three teams are good.

* * *

The new Benchers' apartments were thrown open on the evening of the Osgoode Bar dinner on Wednesday, December 16th. The new rooms are commodious and elaborately fitted up, the floors and walls being especially handsome. The apartments are lighted by electricity, and the whole work reflects great credit on the contractors. The Benchers have now a separate entrance of their own by way of the east wing of the building. A large brass tablet to the memory of Chief Justice Osgoode stares the visitor in the face as he reaches the top of the stairs, at the entrance to the apartments. Who would not wish to be a Bencher to enjoy this commodious retreat at the Hall?

* * *

The public debate was held on Saturday, December 5th, and was an immense success. Sir Wm. R. Meredith presided and the Hall was crowded to the doors. The debate was "The Tiger or the Lady." Dancing followed the programme. The President's inaugural address was well received; he is determined to revise everything at the Law School and is meeting with the support of the entire student body.

* * *

The Osgoode "at home" will be held on Friday, January 15th. Committees are already at work and the event will no doubt be a great success. The Literary Society will meet on Saturday, January 9th, when the "at home" business will be passed.

* * *

The Osgoode Bar dinner on Wednesday evening the 16th December, was an immense success in every way. Judges, barristers and students all enjoyed themselves. The decorations and music were all that could be desired, the singing of Mr. R. K. Barker and the Messrs. Boyd being especially worthy of notice. Judge Falconbridge made a most excellent presiding officer, and made a record breaker of an after dinner speech. His Lordship seems to be a great favorite with the student body, judging from the great reception he got. Judge Rose delighted all with his splendid oration, which bristled with patriotism. Sir William Ralph Meredith, Hon. A. S. Hardy and Mr. W. R. Riddell were well received and spoke as only they can. The Solicitor-General, Hon. Chas. Fitzpatrick, made the speech of the evening, and his after dinner speech justifies his being called "Canada's Chauncey Depew." Too much praise cannot be given for the

success of the dinner to the committee, which consisted of the President, Mr. Claude Macdonell, and Messrs. Geo. Kappele, Neil McCrimmon, Geo. Ross, J. A. Macdonald, A. J. Boyd, C. A. Moss, T. L. Church, S. B. Woods, W. J. Moore, E. H. McLean, W. Finlayson, E. G. Osler, J. T. C. Thompson, W. H. Barnum, J. G. Merrick and R. F. McWilliams.

The meetings of the Osgoode Legal and Literary Society have never been so well attended before. On the evening of November 7th, when the mock parliament opened, about 175 students were present. The mock parliament, mock trial, public debate and other meetings of the society were all a great success. The mock trial, a breach of promise action, which Mr. James A. Macdonald so ably conducted, was probably the most amusing affair ever held in Osgoode Hall. The presence of Mr. Macdonald as the leading character in the trial guaranteed success to the performance. A large crowd of spectators filled the hall. The address of "Tom" White, of counsel for the defence, was the best oration ever heard by us of the younger generation in the Osgoode Lit. The President made an admirable Judge, while the jury were without exception the "toughest" looking aggregation that a Canadian counsel ever addressed. The trial will likely be repeated at the Princess Theatre next spring.

* * *

The Osgoode Lacrosse Club has organized for 1897 with these officers: Pres., McGregor Young, B.A.; 1st Vice.-Pres., C. A. Moss; Capt., C. W. Cross; Sec., W. E. Burns; Committee, the Captain, Harry German and Courtney Kingstone. Osgoode will have a great team. An eastern tour is being spoken of.

* * *

The Osgoode Association Football team have had their annual meeting, and have chosen Mr. Ernest Burns as captain for 1897.

* * *

Jim Merrick did a lot of "hustling" on the decorations for the dinner, while Ewan McLean made a record for himself as a dinner secretary.

* * *

The annual election of Osgoode's new Athletic Association was held on Wednesday, December 16th. Polling was held in the Law School during the day, closing at 4.30 p.m. A large number of barristers and officials at the hall voted, while the students' vote was quite heavy.

Messrs. Kingstone, Merrick, and W. R. Wadsworth are the first year directors, and they were returned without opposition. In the second year, S. S. Sharpe, David Mills, and Harry A. Burbidge were elected. In the third year popular Joe McDougal, of Rugby fame, headed the poll; his colleagues elected were Messrs. T. L. Church and C. A. S. Boddy. The three directors chosen by the three years, the field captains of the teams, and three delegates from the "Lit," will make up a full directorate.

* * *

The annual meeting of the Osgoode Rugby Club was held on Thursday, December 17th. There was a large attendance. These officers were elected:

Hon. President—Principal N. W. Hoyles, Q.C.

President—W. M. Lash.

1st Vice-President—T. L. Church.

Captain—Courtney Kingstone.

The Manager and Secretary will be chosen at a later date. All the offices went by acclamation except the vice-presidency, on which a ballot was taken between Messrs. W. R. Wadsworth, T. L. Church, and C. A. S. Boddy.

AN IMPORTANT JUDGMENT.

We are indebted to one of the counsel engaged in the case of *Johnson et al. v. The Dominion Express Company* for a copy of the judgment of Mr. Justice Rose, recently delivered. In view of the importance of this case to the profession and the public, we have published the judgment in full in our present issue. We understand that notice of appeal was given and subsequently withdrawn. The judgment is, therefore, to be taken as the existing law in Ontario upon an important branch of the law of express carriers and express service.

JOHNSON ET AL., TRADING UNDER THE NAME OF THE NATIONAL PACKAGE DESPATCH COMPANY,

Plaintiffs,

—AND—

THE DOMINION EXPRESS COMPANY,

Defendants.

ROSE, J.]

The plaintiffs are not incorporated. The defendant company is a common carrier. This action is brought to compel the company to carry the goods tendered to it by the plaintiffs, to be carried, and for damages for refusing to carry them.

It appears that the defendant company has obtained facilities from the Canadian Pacific Railway Company by means of a contract, under which the defendant is bound to maintain an express service over the whole line of the Railway Company, guaranteeing the Railway Company about $300,000 a year, and actually paying them in one year about $400,000. Under this contract, and generally for the purpose of carrying on the business, the defendant company has in its employ over 700 agents. It has established a rate of charges or tariff, varying the charges according to the weight of the parcels. Its most profitable business is the carrying of small parcels short distances. Its most onerous and least profitable business is the maintaining of agencies at distant points to which very few parcels are sent, this part of the business being carried on often at a loss. The carrying of small parcels under 30 pounds in weight constitutes, if I remember correctly, about 40 per cent. of the whole business.

The plaintiffs have established agencies in Toronto and elsewhere at convenient points not far from Toronto, where the largest amount of business will ordinarily be done, and practically confine themselves to carrying parcels under 30 pounds in weight, preferring parcels under 10 pounds. They charge for carrying these parcels much less than the ordinary and regular charges by the defendant company, charg-

ing for some parcels, say ten cents, for others fifteen cents, and for others twenty cents, where the defendant company would charge at least twenty-five cents a parcel.

The plaintiffs' custom is to gather together a number of these smaller parcels, put them in hampers or packed parcels, and tender them to the defendant company, to be carried on the tariff charged for parcels under 100 pounds in weight, paying for such packed parcels very much less than would be charged for the several parcels if sent separately.

The plaintiffs' counsel stated that the intention of the plaintiffs was, if possible, to solicit and obtain all the business that was to be done in the carrying of parcels under 30 pounds in weight, and to take such business away from the defendant company.

The defendant company asserts the right to decline to carry packed parcels for the plaintiffs. Secondly, it asserts the right to charge for each parcel according to the ordinary rates, and to require from the plaintiffs a statement of the number of parcels placed in the packed parcels.

It is admitted that if the defendant company has the right to charge for each parcel in the packed parcel, it may require from the plaintiffs a statement of what the packed parcels contain.

The plaintiffs assert the right to demand of the defendant company the carriage of the packed parcels at the same rates as any other parcel similar in size and weight would be carried under the defendants' tariff, without reference to the fact that such packed parcels contain several parcels, addressed to different persons, to be delivered by the agents of the plaintiffs for reward in that behalf.

It is manifest that if the plaintiffs succeed in business they will deprive the defendant company of the most lucrative part of its business, and will compel it to carry parcels at a loss so that the plaintiffs may make a profit; and Mr. McCarthy, for the plaintiffs, admitted that the result of the plaintiffs' claim, if tenable, would be that the company might be compelled at the instance of the American Express Company, a rival corporation, to carry all the light and profitable business of such American Express Company, making use of the facilities which it, the defendant company, has obtained from the Canadian Pacific Railway Company, to its own detriment if not destruction, and to the profit of its rival.

The plaintiffs rely on decisions in England as to packed parcels. It is to be noted that nearly all the cases cited depend upon what is called the equality clause of the Railway Acts, and upon the principle "that where a railway company carries on some other business, it must, in respect of such business, be taken to be, quoad the railway, in the position of third parties." See note to Article 275, Macnamara's Law of Carriers, page 355. The note further states: "Many of the cases decided by the Court of Common Pleas under section 2 of the Railway and Canal Traffic Act, 1854, were applications for an injunction by carriers competing with railway companies, and complaining that in sending goods by railway, and in carting them to and from railway stations, the companies subjected them to disadvantages, and gave

themselves and their agents preferences which were undue. The same ground of decision as stated in this article will be found in all the carriers' cases."

The general principles of law governing common carriers may be found stated by Mr. Justice Blackburn in *G. W. Ry. Co.* v. *Sutton*, L. R. 4 E. & I. Ap. at p. 236. The learned Judge said:

"At common law, a person holding himself out as a common carrier of goods, was not under any obligation to treat all customers equally. The obligation which the common law imposed upon him, was to accept and carry all goods delivered to him for carriage, *according to his profession* (unless he had some reasonable excuse for not doing so), on being paid a *reasonable* compensation for so doing."

To create a liability on the part of a common carrier to carry goods tendered to him for carriage, it must appear that he has professed to carry such goods, for "a person may be a common carrier of one thing, while he is not a common carrier of another": Macnamara, Article 19, page 12; and, secondly, the compensation tendered must be reasonable.

Mr. Justice Blackburn in the Sutton case, at page 239, said: "The consignor in the present case was what has been called an 'intercepting carrier,' competing with the defendants in one of the most lucrative branches of their traffic. They would have an intelligible motive for wishing to clog his trade, and I do not see that there would be anything immoral or improper in their doing so by any legal means." The decision in that case turned upon the clauses of the Railway Act, and it does not assist to analyze or discuss the judgments apart from such clauses. But I find language in the judgment of Mr. Baron Bramwell, the dissenting Judge, which, I think, may be used as pertinent to the enquiry whether in this case it was reasonable for the plaintiffs to demand of the defendant company the carriage of packed parcels for the purpose of their business at the same rates as other parcels of like size and weight would be carried for under the tariff of the company? At page 253, that learned Judge said: "The plaintiff is a carrier and forwards the property of others, never his own. The wholesale houses are not carriers, and principally forward their own goods. The plaintiff forwards all sorts of goods—no doubt principally drapery, but still he does forward all sorts. The wholesale houses do not. *All* the plaintiffs' packages are packed. All those of the wholesale house are not. According to the evidence of Hill only 50 to 100 out of 700 to 1,000. The plaintiff is paid for what he forwards. The wholesale houses are not. What they do, they do for their mutual accommodation, and that of their friends and customers. What the plaintiff does is for profit." The pertinency of such language as to the enquiry, whether or not the demand of the plaintiffs is a reasonable one in this case, is apparent when one considers the evidence tendered on behalf of the plaintiffs, that the company carried similar packed parcels for wholesale houses and other customers at the rates which the plaintiffs are willing to pay, and which they contend were reasonable. I am not convinced that the defendant company knew that any wholesale house was making a business

of sending packed parcels, and certainly if they did send packed parcels, the language of Mr. Baron Bramwell points out the difference between the carriage of goods for such houses and the carriage of goods for the plaintiffs.

The case of *Crouch* v. *The G. N. Ry. Co.*, 11 Ex. 742, was pressed upon me as a decision upon the question of the common law liability to carry packed parcels at a reasonable rate, and as a decision not depending upon the equality clauses. Pollock, C.B., in that case said, at page 750, "Whether or not the defendants were entitled to charge extra for parcels is, in my opinion, a question of fact and not of law." The jury, in that case, had found the fact for the plaintiff, and the Court would not interfere.

The facts in that case are not the same as in this, and the finding there cannot control the finding here.

It is my duty, as judge of the fact, to take into consideration all the facts and circumstances upon which the defendant company relied, or may reasonably be held to have relied, or may be entitled to rely, in fixing the tariff or rates for carriage. Surely if the fact was that the wholesale houses and the customers generally would send from any given point, say the city of Toronto, a very large number of small parcels separately packed, that would be something to be considered in determining what would be a fair charge for each parcel, so as to give the company a fair revenue and a fair profit; and if the company, in fixing its rates, knew that instead of sending the parcels separately packed, the wholesale houses had combined to send all their small parcels in packed parcels, the different houses sending to one packer, so that one large packed parcel might be made up for any given point, it would reasonably take that fact into consideration in determining at what rates it would carry such a packed parcel. Would it not be absurd to say otherwise, because the rates must be determined on the basis of a living profit?

No such case as the one before us could have been in contemplation of the defendant company. That a number of persons should combine to carry on a business in competition with the defendant, to take from it the most profitable part of its business, to make use of its capital and facilities for its destruction, cannot be assumed to have been considered or provided for by the company in fixing its present tariff. Nor do I think that the plaintiffs, or any of the public, could for a moment fairly argue or assert that they believed or were led to believe that the defendant company profess to carry such packed parcels, or was an association doing business in such a manner.

In the United States it has been held that a common carrier is not bound to allow its cars or boats or vehicles or premises, to be made use of by a rival concern for the purpose of soliciting away its business or of establishing a rival business, and it was held that a railway company did not hold itself out as a carrier of express companies, or as giving such facilities, or, as put by one of the Judges, as a common carrier of common carriers. I refer to the Express Cases, 117 U. S. Reps. p. 1.

As, therefore, the defendant company was not bound to carry except according to its profession, was entitled to discriminate, was not confined by any rule or regulation as to the charges it might make, providing they are reasonable, it seems to me that the question comes down simply to this: Did the defendant company hold itself out as a carrier to carry goods for persons in the position of the plaintiffs, and for the purposes for which the plaintiffs desired them to be carried; and secondly, if it did, does the tariff rate or rates charged to others on the evidence before me establish that the amount tendered by the plaintiffs was a reasonable amount, or that the defendant company might not well charge for each parcel in a packed parcel according to its ordinary rates?

I find as a fact that the rates tendered by the plaintiffs, or which they were willing to pay, were not reasonable under the circumstances. I do not find it necessary to determine whether or not the defendant has the right absolutely to decline to carry parcels so packed for the plaintiffs; but I say I do not think the defendant ever intended to hold itself out to the public as a carrier of the goods of a rival express company, making use of its capital and its facilities for doing business for the purpose of the aggrandizement of such rival and to the destruction of its own business. An argument which would lead to the conclusion that Mr. McCarthy candidly, but boldly, avowed on behalf of his client seems to me so unjust as to show that it is not logically sound.

In my opinion the action should be dismissed with costs.

Dalton McCarthy, Q.C., and D. L. McCarthy, for the plaintiff.

C. Robinson, Q.C., S. H. Blake, Q.C., and Angus MacMurchy, for the defendants.

HUMOUR OF CANADIAN BENCH AND BAR.

Counsel (opposing application for new trial based on affidavits) —"My Lord, I submit that no attention should be paid to such bald-headed affidavits."

R——e, J. (interrupting) — "Mr.— that is no epithet to use in this Court."

* * *

H. C. J.—Motion for judgment in action for construction of will and administration. Bequest "to the Sisters of Charity of Hamilton." Argument that inasmuch as there is no such incorporation or association as the Sisters of Charity, the bequest is void.

Hamilton counsel, endeavouring to support the bequest, argues that it may be good as a bequest to individuals in Hamilton answering the description of Sisters of Charity.

Toronto counsel, opposing the bequest: "So far as I am aware Charity only had originally two sisters, viz., Faith and Hope, and these ladies ceased to reside in Hamilton many years ago."

* * *

During the 1891 term of the Law School, Mr. Drayton was lecturing on Easements by Prescription.

Student—"Do you not think, sir, that the expression 'prescription' smacks rather of medicine than of law?"

Mr. Drayton—"You are quite right, Mr. A——; but the time required to acquire an 'Easement' differs by a few years."

* * *

Enter student with affidavit, with which he tries to convince the Registrar of one of the old Divisions that a certain act was done towards the end of May.

Says the Registrar—"What is the language of the affidavit?"

Student reads—"That the plaintiff did in the end of May, 18—," etc., etc.

The Registrar—"Does he specify which end of May it was?"

Student explains that it does not.

"Well," says the Registrar, "I cannot allow that, for it might allude, you know, to either end of May."

* * *

Question as to where an action to recover the price of certain law books should be tried, which books were supplied to a county library. Counsel objects that the case should not be sent to the County of Oxford, as the Judge there happened to be interested in a similar question.

The Court—"Why not remit it to some one of my learned brothers of the County Courts who does not use law books, he cannot be interested."

* * *

"Brought to a Vote."

G. R. Sims, the playwright, tells this story about Switzerland. A referendum was approaching its completion. The votes had been given and the chairman was ready to declare the figures. In this moment of anxious expectation, when the fortunes of the country were at stake, a voice from the public gallery was heard crying, "Waiter." The result was instantaneous. The whole sovereign assembly of the Swiss people rose to its feet as one man, and answered, "Yes, sir."

* * *

An English lawyer, who had a habit of dropping his "h's," was one day prosecuting, before Mr. Justice Lawrance, a man for stealing, among other things, a halter. Constantly and consistently he spoke of "'alter," and after an hour or so of this the Judge summoned the clerk of assize and seriously asked him: "Is this the Crown Court?" "Yes, my lord; I believe so," was the answer of the wondering official. "Thank you. I am relieved. I thought I had found my way into an ecclesiastical tribunal.—*Argonaut.*

THE TORONTO POLICE COURT.

We dropped into the Toronto Police Court the other day and witnessed the trial of some fifteen students of a sister college who were charged with disorderly conduct. It appears according to the indictment that the fifteen were at their college dinner, and after it was over they all felt happy and proceeded up Yonge Street returning to their homes singing songs, etc., until they had their names taken down. On enquiry we learn that the students in question were not

noisy at all. From our experience in this case we found Crown Attorney Curry a most able, courteous and patient official, and we think the Bar will agree with us in saying that he has given entire satisfaction to one and all. Our object, however, is to criticize rather freely the afternoon's proceedings of this modern Russian Court, which totters very closely on the verge of "a howling pharse," to use the language of the street, which is peculiarly expressive here. Magistrate Miller was on the bench; a kindly, well-meaning and level-headed man. At his side stood the "deputy"—in the person of His Lordship the Rt. Hon. Wm. Stewart—who has the reputation of knowing more law than a Justice of the Peace. The deputy is magistrate, Queen's counsel, Crown counsel, prosecutor-general, and a countless list of other things, all in himself. He pitched his voice in a high key for one of judicial bearing; and the students prepared their humorous systems to witness him deliver the judgment of the Court in their case, which was to the effect: "I am deputy, I run this Court." The deputy was very shaky in his English. This officer makes it his business to see that counsel have no rights when the afternoon Court is on. The deputy determines what is evidence and what not. It is time the Police Commissioners taught this officious officer a lesson; citizens complain, prisoners complain, the Bar is openly insulted, while this untamed czar deals out Russian law. We object to this man practising law. He practices as prosecuting counsel daily in the Toronto Police Court. The Court ought either to be abolished or else conducted properly. We had occasion to notice this officer's conduct some months ago for the way he told a barrister to sit down or he would put him out of the Court altogether. Such is the afternoon Police Court; such is the deputy; such are the rights of barristers in this Court. We believe that many of the convictions made in this Court would not stand in the higher Court, as the evidence is taken down irregularly. The deputy gives evidence openly without being sworn, and his unsworn testimony is reserved and admitted as evidence. He is a regular digest of case law, and well deserves the name of Toronto's Justinian. We would like to know if his name is on the roll as a practising barrister; also if he has paid his fees. The deputy's conduct at the morning session is somewhat the same as we have described his afternoon behaviour to be.

BOOK REVIEWS.

A publication from across the border that cannot easily be laid by, once it is taken up, is "Flashes of Wit from Bench and Bar" (Collector Publishing Co., Detroit, 1895). This is a collection of the best legal anecdotes, which have been carefully compiled by William C. Sprague, a well-known legal writer, and a member of the Detroit Bar. Some

of the stories are old, mainly because they have been largely printed in the press since this book was published, but the great bulk of the volume is deliciously new. The work has been carefully done, and each tale is culled down so as to be brief and much to the point. Many would do most excellently for after dinner speakers, or one wishing to enforce a political argument might well supplement it by such an illustration as: "First Lawyer,— "Will you take something with me?" Second Lawyer, — "No, thank you. You have been so long in the business that you would be suspected the moment it was missed." Such truisms also constantly appear as: "It is a wise judge that knows his own order;" or aphorisms as: "Do not preach when you practice." The book is not of course a necessity, but will be valuable to anyone who enjoys a laugh after a hard day's tussle with the Court, or after long interviews with importunate clients.

* * *

Judge Donovan, of Detroit, has chosen for his latest work a title which scarcely does justice to the volume. The book before us is his "Speeches and Speech Making" (Collector Publishing Co., Detroit, 1895). The Judge shows most clearly in the preface, where he expounds the reason for and the occasion of the issuing of this volume, that he himself is no mean master of his mother tongue, and that of itself guarantees the excellence of his compilation. Gathered between the covers are extracts from the most famous speeches in the history of the English language, while the learned author has been at great pains to search the annals of Congress, and the columns of the press, for examples of brilliant rhetoric which have escaped the gaze of the more careless public. The result is a collection of eloquence of every style and of every manner, denunciatory, pathetic, persuasive, sarcastic, patriotic, humorous and poetic. One can study with convenience the various styles and the various speakers, and by careful comparison can find for himself the strong points of each. To one anxious to become able to stand on his feet, and to address an audience with effect, the many words of advice which the Judge himself supplies will be most useful. One paragraph especially appeals to the profession of the law, as it contains a truth which is becoming realized more and more: "The leaders in a general assemblage of men, suddenly summoned together to decide almost any question of public interest, will be composed largely of lawyers."

THE VOICE OF LEGAL JOURNALISM.

Extracts from Exchanges.

The Torrens System of Land Titles.

This experiment, which promised such excellent results in Cook County, Illinois, where it was adopted a few years ago, has been declared unconstitutional

by the Illinois Supreme Court. The system is, we believe, of Australian origin, where it is said to have proved wonderfully successful in simplifying and cheapening the transfer of titles to real estate. We had hoped that, like the system of balloting, for which we are indebted to the same source, this Australian idea would find congenial soil in America, and that the Cook County experiment would lead to the general adoption of the system throughout the United States.

The ground upon which the Illinois law encountered the condemnation of the Court was, that it conferred judicial powers upon the Recorder of Deeds and his examiners, in contravention of that clause of the State Constitution which prescribes that the judicial power shall be vested in certain Courts.—*Virginia Law Register.*

* * *

Judge and Jury.

In *Regina* v. *Mourques,* on October 23rd, at the Central Criminal Court, Mr. Justice Wright tried a prisoner for killing a woman by shooting her; the jury found the prisoner not guilty of murder, but guilty of manslaughter. The Judge, it is reported, then asked them if they thought the prisoner had any intention of doing the deceased any harm by firing at her. The jury said they were not unanimous; and the Judge intimated that in passing sentence he should give effect to what he understood to be the opinion of the majority—viz., that the accused had some intention to inflict bodily harm. It is a bad precedent to cross-examine a jury on their verdict, or to act on the opinion of a section of the jury. In this particular case the want of agreement threw some doubt on the correctness of the verdict as returned; and we venture to suggest that a Judge abdicates his functions if in passing sentence he has any regard except to the verdict, the facts as disclosed on the trial, and such matters in mitigation as are urged before sentence is passed. We have not yet come to the system adopted by many American States of putting sentence as well as verdict under the control of the jurors.—*The Law Journal (England).*

* * *

Retention of Depreciated Investments.

The importance of the decision of the Court of Appeal in *Cocks* v. *Chapman* to trustees who hold mortgages of real property as part of their trust estate is very great. Scores of trustees must be in the same position as the trustees in that action—viz., the holders of mortgages of agricultural land as an investment which, though authorized by the terms of their trust, is hopelessly depreciated in value. It has often been asked, What are such trustees to do? They can bring actions on the covenants for payment in the mortgage-deeds, with the probable result of driving the mortgagors into bankruptcy; they can sell at a serious loss; they can foreclose and find themselves saddled with derelict farms for which no tenants will apply, and which they cannot cultivate themselves for lack of capital. Lastly, they can hold on and hope for better times. The test of their conduct is the old one of honesty and prudence. No one can expect a trustee to be a prophet, and to

foretell that a farm which let for £500 in 1880 will with difficulty bring in an income of £150 in 1896. As long as the land was a satisfactory security no breach of trust was committed by not calling in the money; and when the bad times grew worse it was worse than useless to bring pressure on the mortgagors. Trustees must show in such cases that, whatever course they took, they had reasonable grounds for taking it; and it will not be incumbent on them to prove conclusively that no proceedings could by any possibility have been effectual to recover the full value of their investment, if they can show that they have exercised a fair judgment under the circumstances with regard to the course which they have actually adopted. The Court of Appeal appear to have given no opinion on the point decided by Mr. Justice Kekewich in the Court below, that s. 4 of the Trustee Act, 1893, Amendment Act, 1894, was not retrospective; the Lords Justices probably considered that, even if they differed from Mr. Justice Kekewich (which there is no reason to suppose they did), the section in question was hardly wide enough in its terms to meet all the circumstances of the case which was before them.—*The Law Journal (England).*

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Contrasts in Court.

This advocate, in confidence so weak
He scarce can muster breath enough to speak,
And gets each sentence by a painful wrench,
Wears in his hat more wit than half the Bench.

This other, self-assertive, shallow, loud,
Would still harangue his Judges like a crowd,
Though Cicero himself were seated there
In full robed splendor in his ivory chair.

—Wendell P. Stafford in *The Green Bag.*

* * *

Fire Insurance and Subrogation.

It is well settled that a policy of fire insurance is a contract of indemnity, and that the insurer on making good the loss is entitled to stand in the place of the insured. If, therefore, at a subsequent time the person insured receives from another source compensation for the loss which he has sustained, the insurer can recover from him any sum which he may have received in excess of the actual amount of the loss. Thus if a landlord insures against fire by a policy which covers gas explosions, and the tenant's covenant to repair contains an exception for the case of fire only, the insurers can recover the amount of the insurance money from the landlord in the event of the demised premises being damaged by gas and of the tenant reinstating them in pursuance of his covenant. And in *Castellain* v. *Preston* the Court of Appeal held that the doctrine of subrogation as between insurers and insured is applicable in its largest possible form; in the words of Lord Esher, "the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has

been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured can or has been diminished." This definition seems at first sight sufficiently extensive, though Lord Esher guarded himself by saying that, if it is not so, he must have omitted to state something which ought to have been stated. And it must now be supplemented by the corollary that the insurer is entitled to recover from the insured the full value of any rights or remedies against third parties which the insured has renounced, and to which, but for such renunciation, the insurer would have a right to be subrogated. This seems to be the result of the recent case of *The West of England Fire Insurance Company* v. *Isaacs*, in which the company recovered the amount which they had paid to the defendant in respect of damage by fire to a warehouse of which he was tenant; the defendant having for his own reasons released his landlord from a covenant to make good such damage, and thereby having deprived the company of their right of subrogation.—*The Law Journal (England)*.

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Dangers of Circumstantial Evidence.

"Speaking of circumstantial evidence," said an old attorney, while in a reminiscent mood the other day, to the writer, "I am free to confess that I consider it hardly the thing to hang a man on, though it has been done in many cases. I can recall an instance when I was a youngster of 12 or 14, in which my father, who was a leading criminal lawyer, defended a man who was hanged on merely circumstantial evidence. The facts were as follows: Living just in the edge of our town was a man of wealth, who had a grand old house, occupied only by himself and servants. There were various stories about how rich he was and what large amounts of money he always kept near him, but he was never disturbed until one night after midnight there was a terrific disturbance in the old house, accompanied by pistol shots, and when the people who came to see what the matter was, got in, they found the owner dead with a bullet through his eye, and the butler with his hands full of jewelry and watches, lying in the doorway of the old gentleman's room with a bullet somewhere in his head, but he wasn't dead.

His revolver lay by his side, and as far as could be seen, the whole story was told right there. The butler, who had been in the house only about six months, had attempted to rob his master, had been caught in the act and shot, but had killed the old man in the fight. That was the only translation of it, and there was no other for several days, because the butler had a very serious wound and was delirious for a week. However, it was not fatal, and as soon as he was at himself he made a statement to the effect that he had been awakened in the night by footsteps, and had taken his pistol, which had only two loads in it out of five, and gone down into the hall below to see what the noise was.

He noticed that his master's door was partly open, at the far end of the hall, and hurried to-

ward it. As he approached it he heard his master speak to some one asking who was there, and with that there was a pistol shot, and he jumped into the room, grabbing a burglar as he did so, and at the same time getting a shot in the head from his master's pistol. Beyond that he remembered nothing more. His story was generally disbelieved, for there was no evidence of any other person in the house with evil designs, and all the plunder that he had not caught in his hands was lying on the floor about him, so that there was no apparent reason why a burglar should be there. All the doors were found locked, by those who came in response to the alarm, and there were absolutely no signs of any burglarizing from the outside.

Another strong point was, that the bullet which was found in the butler's head exactly fitted the pistol of his master, showing conclusively that it was the master and not the burglar who shot him. This was the condition of the affair when my father took charge of it, and though he really believed the butler's story and tried to prove it, he could not do it and the man was finally hanged. A year later a burglar was shot by a policeman in the city nearest to us, and he confessed on his death bed that he was the murderer of our rich man. He had hidden in the house early in the evening, had collected all he could of jewelry and other portable valuables, and was about getting out when he was caught both by the old gentleman and the butler, and that the butler had got the bullet intended for him, as he had run into the room just as the old man fired. Dropping everything in his sudden surprise, he had rushed down stairs and hidden in the hallway, from where he had slipped out as soon as the front door was opened. In the excitement, he was not observed, and he got away without any trouble at all, as the nearness to the city made strangers so common that their presence excited no suspicion. I'll never forget that incident and I'll never be in favor of the death penalty on circumstantial evidence, I don't care how strong it is. Even lynch law is less unjust," and the writer felt that the attorney was more than half right.—*Chicago Law Journal.*

* * *

The students who study law at University College are lucky, for they may do so under the auspices of Mr. Birrell, and this means that the proportion of jam to powder is usually large. Mr. Birrell in the course of his introductory lecture delivered on Monday last, declared that the best idea of life in the olden times at the Inns of Court was to be gained from the brief but lively reminiscences of Mr. Justice Shallow, formerly of Clement's Inn. Very happy was his description of the great English lawyers, not as jurists or philosophers, but "advisers of particular men in particular difficulties at particular fees." These were never prompted to take to the law by the motives which often made men take to the army, the sea, or the church—the love of adventure or of glory or the fear of God. Men usually hated law when they began it. The poet Gray even went so far as to say that nobody was "amused or even not disgusted at the beginning." This we doubt. We believe that men of a certain turn

of mind are often hugely delighted at the nicety, the acuteness, and the fine edge of the points which they find discussed in such books as "Smith's Leading Cases." When, too, they have the instinct for style, the problems of conveyancing are extremely attractive. To draft a clause which falls neither into the right-hand ditch of ambiguity nor the left-hand one of verbiage is a very pleasant exercise.—*London Spectator*, Dec. 12.

RECENT ONTARIO DECISIONS.

Important Judgments in the Superior Courts.

GRAVELLE v. MERO.

[THE MASTER-IN-CHAMBERS, 11TH DECEMBER.

Undertaking embodied in consent order can only be varied by consent.

Judgment on motion by plaintiff to postpone trial, which should have taken place on November 16th at Goderich pursuant to order made herein on 6th October, 1896, and on cross-examination by defendants, J., J., and D. Mero, to dismiss action with costs for non-compliance with undertaking given by plaintiff as a term of order of 6th October. Held, following *Australasia Co.* v. *Walter*, W. N., 1891, p. 170; *Davis* v. *Davis*, 13 Chy. D., 861; *Attorney-General* v. *Tomline*, 7 Chy. D., 388, that there is no power to relieve plaintiff from undertaking, which was embodied in a consent order, which can only be varied by consent. Also held that plaintiff's motion being so determined, and following *Finnegan* v. *Keenan*, 7 P. R., 385, there is no course open but to give effect to defendants' motion, and action therefore ordered to be dismissed with costs, including the costs of this motion. D. Armour, for plaintiff. W. E. Middleton, for defendants, Jane, Joseph, and David Mero.

* * *

KATRINE LUMBER CO. v. LANCASHIRE INS. CO.

(AND FOUR OTHER ACTIONS BY THE SAME PLAINTIFF AGAINST DIFFERENT INS. COMPANIES.)

[MEREDITH, C.J., MACMAHON, J.—Divisional Court.—7TH DECEMBER.

Discretion order of Court below, non-interference with.

W. M. Douglas, for defendants, appealed from order of Falconbridge, J., in Chambers, affirming order of Master in Chambers refusing to consolidate the actions, and reversing order of Master in Chambers changing venue from Hamilton to Parry Sound. W. Nesbitt and R. McKay, for plaintiffs, contra. The Court held that both the consolidation and the change of venue sought were in the discretion of the Judge below, and it was impossible to say that the discretion was wrongly exercised. Appeal dismissed. Costs in cause. Order to be without prejudice to any application which may be made to the Judge at the trial, under rules 652 and 655, as to the trial of the actions together.

KATRINE LUMBER CO. v. LIVERPOOL AND LONDON AND GLOBE INS. CO.

(AND FOUR OTHER CASES.)

[MEREDITH, C.J., 15TH DECEMBER.

Practice—15th statutory condition—Wilful act or neglect—Acts of omission or commission, particulars of, when ordered.

Judgment on appeal by defendants from order of Master in Chambers requiring them to deliver further and better particulars of the defence. The actions were brought to recover the loss alleged to have been sustained by plaintiffs by the destruction and damage by fire of a mill and other buildings, and a stock of lumber, shingles, lath, and slabs, against which the defendants had insured the plaintiffs by the policies sued on. The defences were that the plaintiffs' claim was vitiated by the 15th statutory condition, because certain statements in a statutory declaration forming part of the proof of loss were false and fraudulent; that the fires were not caused by the wilful act or neglect, procurement, means, or contrivance of the manager of the plaintiff company or any officer; that the schedules attached to the declaration of the manager contained as particular an account of the loss as the nature of the case permitted, and that the account was just and true. Held, that the plaintiffs were entitled to know what acts of omission or commission the defendants intended to charge the plaintiffs' manager with as constituting the negligence imputed to him, and in what way the fires were caused by his procurement means, or contrivance of the manager; but that the defendants could not be required to give, without disclosing their evidence merely, further particulars as to the alleged false and fraudulent character of the statement as to the origin of the fire; nor should further particulars have been required as to how the declaration that the fire was not caused by the wilful act of the manager was false and fraudulent, it being sufficient to say that the fire was caused by his wilful act. Held, also, that the particulars delivered of the alleged falsity and fraud of the declaration as to the extent of the loss were sufficient, the defendants stating their inability to say by how much the plaintiffs had overstated the loss on each of the classes of articles, but intimating that the loss as a whole had been overstated by $8,000, and that that over-statement was fraudulently made. Costs in the cause. W. M. Douglas, for defendants. R. McKay, for the plaintiffs.

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STEVENSON v. GRAHAM.

[MEREDITH, C.J., 4TH DECEMBER.

Opinion against the practice of granting ex parte injunctions in certain cases.

Masten, for plaintiffs, moved to continue until the trial of the action the interim injunction granted by local Judge at Ottawa, restraining defendant Alexander Graham from encroaching or advancing in the excavation of pits for clay on lot letter I, concession D, river front, in the township of Nepan, any nearer to the road allowance than three and two-thirds chains from said road allowance. The plaintiffs claim that the lease under which defendants' assignor claimed the

right to excavate has become forfeited for breach of covenant not to assign or sublet without leave, if a new lease with restrictions, granted to the defendant, executor of deceased lessee, be held to be not yet in force. Aylesworth, Q.C., for defendants, contra. The learned Chief Justice expressed a strong opinion against the granting of ex parte injunctions in cases of this kind. Motion refused with costs. Leave given to serve short notice of a similar application on present and further material on Tuesday next.

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STAFFORD v. TOWN OF LEAMINGTON.

[ROSE, J., 25TH NOVEMBER.

Practice—Examinations for discovery—Limitation of costs of —Excessive as to number and length.

Judgment on application by plaintiff for a fiat for costs of examination of defendants for discovery. The action was the common one against a municipality for damages sustained by plaintiff falling into an excavation in the highway. The persons making the excavation were joined as defendants. At the trial, before Armour, C.J., the plaintiff was first given judgment for $75 damages, and County Court costs, without a set-off in favour of defendants. The plaintiff was first examined for discovery at the instance of the corporation, and secondly, at the instance of other defendants. The defences were by separate solicitors, but both of these solicitors attended on each examination. The examination of plaintiff at the instance of defendant corporation covered 27 typewritten pages, and at the instance of the other defendants, 23 pages, in all 50. In both of the examinations many of the questions were practically identical. Then the plaintiff proceeded to examine on appointment, the mayor, reeve, deputy reeve, town clerk, and five councillors, and one of the individual defendants. The examination of these persons covered more than 83 pages. Rose, J.—This case is an example of what seems to me an abuse of the right to examine, and points to the necessity of some restriction being placed upon the power to examine, pursuant to an appointment, without an order. Most of the persons examined by the plaintiff were not persons properly examined, and appointments should not have been given for their examination. Appointments should be given for such persons only as would be ordered to attend if an order were applied for. I do not know on what principle the parties proceeded. The rule as to the necessity of obtaining a Judge's fiat for the allowance of the costs for examination for discovery is a salutory one, and I am glad to say, in the many cases coming before me, I have not before met with so great indiscretion on the part of all concerned as in this case. I cannot allow more than two appointments for examinations by the plaintiff, and 30 pages of the examination, and in allowing so much I think I am treating the plaintiff liberally. In view of what I have pointed out, it is to be hoped that the solicitors for all parties will be able to justify their action to their clients in case they render a bill for such services between solicitor and client.

PARKS v. BAKER.

[MR. CARTWRIGHT, Official Referee, 30TH NOVEMBER.

Security for costs—Health officer—R. S. O. c. 73, s. 1—Benefits of enactment not to be evaded by other allegations.

Judgment on application by defendant Northmore under 59 V. c. 18, s. 7 (O.), for an order for security for costs, on ground that anything done by said defendant in matter out of which action arose was done in his capacity as a health officer, and that he is therefore within provisions of R. S. O. c. 73, s. 1. Held, that the benefits of these enactments are not to be evaded by alleging a conspiracy, and that as appears by material filed it was clearly the duty of applicant to act as the public health officer. Order to go "that the plaintiff do give security for costs of the defendant Northmore in the action." Costs of motion to be costs in cause. R. McKay, for defendant Northmore. C. J. Holman, for plaintiff.

[On appeal, Falconbridge, J., affirmed the above order.]

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RANDALL v. REID.

[MR. CARTRWIGHT, Official Referee, 2ND DECEMBER.

Practice of adding father of infant plaintiff as a party in negligence action—No necessity for.

Judgment on application by infant plaintiff to add his father as a party plaintiff. Held, that it is not necessary to have father added as a party plaintiff; that infant plaintiff can recover all the damages he is entitled to by reason of the alleged negligence of defendants, and that in any case, father is debarred from bringing an action under Workmen's Compensation Act, owing to lapse of more than six months since accident occurred. Motion dismissed. Costs to defendants in any event. J. Hales, for plaintiff. W. H. Hodges, for defendants.

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