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## *THE ART OF CROSS-EXAMINATION.*

Mr. E. F. B. Johnston, K.C., at the recent annual meeting of the Ontario Bar Association, delivered an address on the Art of Cross-Examination in which he has crystallized the experience of half a lifetime spent in the practice of one of the most difficult and delicate arts. He has shewn rare candour and good-will, since it is seldom that a great artist can be induced to set forth, for the benefit of others, the principles and methods which he has followed in his work. These principles and methods are not to be learned from text-books or reports, but from a patient, labourious and protracted study of human nature, its motives, passions, prejudices and limitations as disclosed in the witness box. Mr. Johnston has performed a real service to the profession, and his address, which is delightfully interesting as well as instructive, is well worth careful study by every advocate who wishes to rise above aimless, slipshod and mere playing-to-the-gallery methods of cross-examination. The text of the address, which we are glad to be able to publish, is as follows:—

Mr. President and Members of the Bar,—It is an honour to be asked to say something at the meeting of such an important body as the Ontario Bar Association is, and when you, Mr. President, asked me if I would be good enough to deliver myself upon some particular subject, I readily acceded to that request because there was no lack of subjects. If I had been left to my own devices I would have chosen one of easier essay and simpler character. But when you, sir, suggested that I should address the members of the Bar upon the Art of Cross-Examination I found then that the lack consisted, not in the subject, but in the material which should be used to make that subject presentable to a cultured and professional audience. I may be pardoned, perhaps, for saying that my own native modesty prevents me from expressing a hope

even that I shall say anything of a very startling, or, after all, of a very new character. All that I am going to say must be the crystallizing of my own experience and the observations that I have been able to make in hearing the efforts of others in the art of cross-examination. Indeed, I feel very much as the expression indicates, that was once used by Disraeli in the House of Commons after a two-hour speech by a member upon an important Colonial subject. He was replied to by the then leader of the Government, Disraeli, whose speech was noted for its brevity and point. He said, "that the honourable gentleman who had just addressed the House had said a great many true things and a great many new things, but unfortunately the true things were not new, and the new things were not true." Now, I hope, however, that I shall be able to say a few new and true things, referring to them as I go along, and make the address I shall give as practical and as much to the point as possible.

I have avoided, or will endeavour to avoid, the anecdotal stage of cross-examination, because instances of great examinations are often the result of the moment and a combination of circumstances which may never arise again. But I do think that the art of cross-examination may be resolved into certain well-defined, if not well-known, principles, and that the bearing in mind of these principles may be of some advantage to the younger men who are all, of course, looking to be great cross-examiners before they retire from professional life.

The subject, it is needless to say, is one of grave importance in the conduct of law cases—important, because it deals with the separation of truth from falsehood—important because it enables the court to be seized, or ought to enable the court to be seized, of all the circumstances of the case bearing upon the issue which the judge or jury may be called upon to try. Then another peculiar phase of it—we all recognize it, perhaps, as doubly important and as an element in a legal trial—is that it deals largely with the undisclosed. The evidence in chief, as you all know, is briefed; the evidence of the cross-examination is briefed only in the mind of the cross-examiner. Cross-examination properly

conducted becomes important in another way. It exposes bias, detects falsehood, and shews the mental and moral condition of the witnesses, and whether a witness is actuated by proper motives, or whether he is actuated by enmity towards his adversary. But, perhaps, one of the most important bearings it has is that it either corroborates your own client's version of the issue or it weakens your adversary, and here I may say is one of the cardinal elements of cross-examination. Unless you corroborate your client by your cross-examination, the chances are very largely that you strengthen the hands of the adversary. Indeed, it presents, if properly carried out, the case in an entirely new light. You hear the evidence in chief passing away without any cross-examination—that is one case—but when you hear a successful cross-examination of witnesses, the case presents a totally different aspect, and may be so developed that it comes to be in favour of your client, instead of being in favour of the person on whose behalf it was given. Now, having said this much with regard to the importance of it, let me say a word about the difficulty of it—and here is where I find myself somewhat at sea in dealing with a question of this character. Cross-examination cannot be learned; there is no royal road to the successful cross-examiner. There is no means by which the cross-examiner may become perfect in his art. Experience does a great deal, observation perhaps, does more, knowledge of human nature is, perhaps, greater than the other two combined, but there is no way in which any man at the Bar can sit down and study out cross-examination as a science in the same way as he can study the law, or the legislation of his country from a scientific standpoint.

It has always occurred to me that to a great extent cross-examination is intuitive, just as music is, just as painting is, and whilst the amateur beginning his music or his painting may not be very successful, for it requires training, practice and experience, and by and by he develops into a great musician, or a great artist, but in order to do that he must have the intuitive genius, and the faculty for that which he is doing, otherwise he will always remain an unaccomplished musician or a mediocre artist.

Even genius sometimes will not be developed along the line of study or thought or education. Education itself requires a vast amount of experience to make it effective in the hands of the cross-examiner. Then, as I said before, it becomes more difficult by reason of this fact that there must be a very delicate, sensitive, and very extensive knowledge of human nature. There must in addition to that be a very extensive knowledge of the ordinary business and personal affairs of human life, because it is by this and this alone that we reach the motives, the passions and the methods of the witnesses.

Having said this, it follows as a natural consequence that many able lawyers fail as cross-examiners. A man to be a cross-examiner does not necessarily need to be an able lawyer technically. You know from your past experience, and from looking over the records for the last 30 or 40 years, that there have been many of the ablest lawyers who could not cross-examine upon the simplest possible point. Then it is most important by reason of what we daily see, by reason of the apparent facts at every court, namely, that many cases are lost by lack of proper cross-examination, and I am sorry to say, that more cases are lost by too much cross-examination. The whole system is like a piece of delicate machinery; the skilful hand knows when to turn on the power, when to withdraw, when to change the angle or the volume of force, and having such a complex mechanism before me, it is no wonder that I approached it with a good deal of hesitation and with the thought of preparing something more in the nature of an essay than a speech from notes however copious. However, I was afraid to prepare a speech and write it out because the story of the old Presyterian minister was in my mind when he, to the chagrin of some of his followers in his tribulation sermon, read it, which was rather opposed to the feeling of the parish people, and he asked his elder after the sermon how he liked it, and he said he didn't like it at all. He wanted to know what objection he had, and the elder said: "I have three objections, first, you read your sermon; secondly, you read it very badly; and the third is, that it wasn't worth reading." Now,

that was the trouble I felt myself in, and I am rather impressed with the idea that perhaps what I have to say may not be worth saying, at any rate I am satisfied it could be scarcely worth reading to such an audience as this.

For a moment let us look at some of the methods of cross-examination, as they are practised, in the same spirit as we often hear about English as "she is spoke." One form of cross-examination which is apparent to all of us as being very ineffective, is the going over of the ground in chief. I have seen very able counsel (and without being able at all, I have done it myself, to my sorrow) take a witness, the plaintiff or the defendant as the case may be, and follow him from point to point, going over his case as developed in chief, with what result? Invariably emphasizing and giving point to the story of the witness.

Then another form which some people adopt seems to be the asking of questions at random without an objective point, and I shall deal with that more fully in a moment or two. The cross-examination in a case of that kind always appeals to one as being all abroad and ineffective. Another form which one notices very frequently, and it is done, of course, without thought, sometimes done in the absence of something better to ask, and that is the cross-examination on facts that cannot be weakened—bald, salient facts about which there is no dispute, and yet I have heard cross-examination by the hour upon those facts which no man, not even the all-powerful judge on the Bench could shake—an examination, you have all heard it—entirely devoted to attacking those particular facts. That is due to a curious psychological condition arising from the very strength of the facts, and the cross-examiner becomes irresistibly impressed with the idea that these are the things he must attack, the very things that a wise cross-examiner would fly from, would not touch under any circumstances.

Then there is another form which is rather a fishing form, that is a cross-examination upon an irrelevant matter in the hope of getting something valuable, one of the most dangerous things a cross-examiner can do, for this reason. Of course, it may be a

truism, it may be old and well-known to all of you, that it is a fact. But why dangerous? The reason is that when you begin to cross-examine upon an irrelevant matter the judge stops you at once, or as soon as he possibly can. That weakens your power at once with the witness; the jury favours him; the jury is not impressed with that condition of things, and where the judge stops the cross-examination because the examination is irrelevant, or upon an irrelevant matter, the jury naturally and very quickly come to the conclusion that you have got no case.

Another form of cross-examination, and I may include the whole of us as being guilty of it occasionally, and that is, the cross-examination on details that are not important. Assuming that you prove something by examination of particular details, ask yourself, "Now, if I prove that fifty times over will that affect the judicial mind or will it affect the minds of the jury who are finally disposing of this matter?" If it won't, then drop it. Leave it out immediately. Another very common kind of attack upon a witness by way of cross-examination is the assumption that the witness is telling a falsehood, that he is a false witness, one of the most dangerous presumptions to work upon, because 90 per cent., nay, I hope 99 per cent., of the witnesses who go into the box to give evidence upon their oath are people who are not telling falsehoods, who are not telling anything, but what they honestly believe to be the truth.

There is another form of cross-examination which must be avoided; that is the distorting of facts. Nothing weighs as much with the tribunal, I care not whether judge or jury, than the act of counsel who seeks not to accept the facts with qualifications, but who seeks to distort the facts in order that the fact may mean something less or more than it should mean.

Then there is another very common thing, and that is laying traps for witnesses. I think that in the whole course of over 30 years' experience I have seen about two traps go off. This is a thing that I would advise my brothers at the Bar, and particularly those who are engaged in litigious practice, to avoid. It is rarely successful, and if it is not successful it always comes back

upon the poor cross-examiner, and through him upon his still poorer client.

What is the object of cross-examination? Just for a moment let us consider that, and let me put it in plain, simple English. The object of cross-examination from a litigious standpoint, not from the high moral ground of getting at the real truth and exposing falsehood and all that, but from the purely litigious, professional standpoint, may be stated as follows: First, it is to get something, no matter how small, to help your own case. If you fear further examination is dangerous and absolutely fruitless, far better leave it alone, far better to stop the witness if you feel that what you are getting is not as a fact aiding or assisting your client in the litigation. Another object is when you cannot get that which helps your client, try to get something to weaken your opponent, but that is got by a different process entirely; and the third—I put it last, although it is not he least by any means—is to endeavour, if you can, to separate the truth from the falsehood, more particularly if the truth told by your opposing witnesses would be of assistance to your case—for no cross-examiner is a common prosecutor to discover wrongdoing. Now, how should we best attain this object; in what way are we going to further the interests of cross-examination? In order to give an answer to that it will be necessary to consider for a moment, what evidence is—and I don't propose to enter upon any disquisition as to what evidence is or is not, in a legal or technical sense, but what I want to point out for the purposes of cross-examination is that evidence is not facts, but is the impression of facts, and the result of certain facts or certain things which have happened. Now, the object of cross-examination is to reform these impressions, to minimize them, to explain them, to question them if you will, to doubt them if you will. But the facts themselves are something quite apart from the evidence. There are no facts in evidence at all, because, as I have said, evidence is merely and mainly a record of facts expressed through the witness box. In law and in the trial of a case, as you all know, facts are the result of evidence and are found independ-

ently of witnesses or anybody else; that is, the judge or the jury has the mental impressions given by the witness of what he saw or heard and given to the best of his ability. The tribunal then finds the facts upon these impressions conveyed through the witness box. Now, it is important that these impressions should be watched closely in the trial of every case, and the impression of every witness in regard to the way in which he records and expresses his facts. I can illustrate it better, perhaps, in this way. By taking an imperfect photograph camera or a perfect camera improperly handled, your results depend on certain conditions. You get a photograph at a certain angle, it distorts the facts: the film is defective and it creates a wrong impression, and gives a wrong impression of the fact—unless it is properly and perfectly handled, the perspective is entirely wrong, and the whole subject is as one would say, "out of drawing." Well now, apply the photograph to the mental conviction and to the mental record; you have the angle of bias, perhaps the perspective of observation; you have the question of enmity creating a cloud or defect upon the mental film. You have the lack of opportunity in the witness as another defect in regard to his impression, and the result is that instead of getting a true picture of what the witness saw or heard, you are getting a picture which may be distorted, taken at the wrong angle, with the perspective and subject out of drawing. You may get that picture in the witness' mind, presented through the witness box, and presented honestly and fairly and conscientiously on his part. Now these impressions, in the aggregate, enable, as I said, the tribunal to get at the facts and it is the duty of the cross-examiner, it is, indeed largely, the only object of the cross-examiner, to ascertain just what the condition was, just what the mental impression was, and how it was affected by the surrounding circumstances. I can give you an example. A great many years ago when I was much younger at the Bar than I am to-day—and it illustrates my point, perhaps, better than anything I can say—there was a case tried before His Honour the late Judge McDougal. The man was charged with burglary. Now here were

the facts presented by the witnesses: A man was seen coming from the back door of a place in Toronto late at night within the burglarizing hours; his identification—there was not much question about that; his manner and conduct were such as to cause comment by the officers who took him in charge; he was evidently in great haste to escape from the house; he was arrested, unable to give any satisfactory account of himself at the moment, and some tool or other was found in his coat pocket, and the man was arrested charged with burglary—the case of the Crown apparently absolutely complete. Now that man might have been convicted and might have served his term—a perfectly plain case, but it developed on the cross-examination of certain witnesses for the Crown, and upon the evidence which was given for the defence that this was what happened: that this man was a friend of the servant of the house, that he had been in there spending the evening, and by some accident or another he had left the door open, that he was a man of very excitable temperament, and that he had, just before leaving, a row with this servant; he was running to catch a car because it was late at night, and he had to catch one before a certain time, that he was a mechanic, and he had a certain implement, a wrench or something of that kind in his pocket at the time of his arrest. In the witness box the witnesses swore to damaging evidence and the outward facts seemed to be perfectly honest, but they were at the wrong angle; the witnesses had received these impressions through a wrong perspective, and the result of it was, as I understand the case, that if it had not been for the righting of the evidence in that way or in some other way the man would have been convicted.

Then take another case and I shall be through with examples, because this is a very common case, one that is tried every day in the courts, that is, ordinary negligence on the street cars or other vehicles of that description. Now, as a rule, in that case the facts are practically undisputed, but the issue turns upon one particular circumstance, usually the rate of speed, and I am taking that just as an example. The men concerned with

the car movement swear that the car was going at six miles an hour. The man who doesn't understand the street railway system in Toronto, or at any rate, who hasn't had very much experience perhaps in cross-examination, will press the witness to increase the speed to 10 or 12, and by the time the examiner is through the witness has got it down to 5, thus shewing the danger of cross-examination. That is a fact which I have seen on more than one occasion. Now, see how near the evidence is to the facts, and what the cross-examiner should do with it. Take the collaterals. You take the trip the car had to make in the time allotted for the purpose; you take what the mortorman, or whoever he might be, was doing at the particular moment; you test him on his observation and his chance of observation—his opportunity. You shew that perhaps he had no cause to note the speed until after the accident had happened, not before. Then, there is always the question of the fear of dismissal, which would be important. Now, these facts are impressions, if I may call them facts, that is, the collaterals are impressions, and it is the duty and the business of the cross-examiner to ascertain them from his witnesses, leaving the question of speed to the witness himself. Now, that evidence as to the positive fact is due of course to a very common cause. As witnesses we study the facts, but our natures and our dispositions, and often our consciences, are more or less blurred. We may be trying to do the best we can and to tell in the witness box the very truth and nothing but the truth. The only way you can reach the true object of a cross-examiner is to ascertain from your witness the correctness, not of the fact deposed to but the absolute correctness, if you can, of the impressions from which he draws his conclusion of fact. Now, this means what? It means a great deal more than many of us very often pay attention to, and I shall try and explain it. It means the most careful preparation—a man will prepare the heads of his speech to a jury, he will often be rash enough to prepare the heads of an address to the members of the Ontario Bar Association—but few people, I venture to say, sit down and spend an hour or two hours or a day, if necessary,

summarizing and considering what method he should adopt with a particular witness in a particular case. The only way in which a man can ever hope to be a successful cross-examiner is to prepare and not wait until the moment, expecting favourable circumstances which will arise occasionally. I look upon the preparation for cross-examination as being infinitely more important, if there is a serious dispute about the facts, than the preparation of a brief. You have seen men who have gone into the witness box, you have seen them in the city of Toronto and elsewhere, who have told a story absolutely, and apparently straight and frank, and manifestly without any equivocation or any feeling of any kind whatever. You have seen that man leave the box, a wholly discredited witness. Why? Not cross-examined by the man who takes his brief and makes his notes on the margin as the witness goes along, but cross-examined by the man, whoever he might be, who has devoted hours and hours of preparation to that particular witness and who knows exactly his line of conduct and the way in which he should proceed with his art of cross-examination.

Now, I should say that the one great object is to avoid any complications with the positive facts. The way to do the work in that respect would be for a man to marshal his collaterals, to see what the bearings of these collaterals are, whether it is scientific, mechanical, or ordinary, everyday occurrences. Let him study and work out the problem, let him prepare his headings and methods carefully. In these days, of course, we all know pretty well what is coming on at a trial. We have our discovery, we have our witnesses; we all know what line the man is going to take. If a counsel will only devote himself to it, and will spend an hour or two, or a day, if necessary, to prepare his method of the cross-examination of that particular person, he will find that in every case he has accomplished infinitely more than he could possibly do, no matter how crafty he may be, by trusting to the spur of the moment. I can only say that as far as I am concerned—and I don't profess to be more skilled than anybody else—I can only say that in many, many cases I have spent more than

a day, yes, I may say two days, in some particular case, where there has been an important witness, actually preparing for a cross-examination to the exclusion of everything else in business, where the issue depended largely upon the testimony of that witness.

In preparing, one has to consider this. You have to think out the end of your method. It won't do to say, this will be a clever way of putting it, or, that will be a good subject-matter of attack. The question is, Where is it going to lead you to at the end? Consider the character of the witnesses and the nature of the case, and above all we should consider the relation of the facts to each other. I have seen it—an instance does not recall itself to my mind at the moment—but I have seen where the cross-examiner has proved the fact to his satisfaction, and proved another one to his satisfaction, and with these two facts, by reason of their relation to each other, he has absolutely destroyed the efficiency of his work; therefore, it is necessary always to consider what the relation of these facts is to each other—what is probable and what is improbable or unlikely. These are matters which every cross-examiner must keep in his mind.

Then, I should say in cross-examination it is important to eliminate any concern about your own case, because the moment you are thinking about what your case is or will be, or what effect the evidence will have on your case, your mind is distracted from a subject which requires singleness of eye and purpose, and singleness of mental action. Then, I think, it is very important that we should determine a line of attack on each point. Sometimes we have to employ different methods, as you all know, to get at results; sometimes one line of attack would not suit in another; as you know, one line of cross-examination would not apply to another case at all; and, therefore, we have to so prepare and so put down on paper—and I think it is important that everything should be put down on paper,—that the eye as well as the mind will see where the thing is leading you to, that is, to prepare so that the bearing and the result are clear to the mind of the examiner. Method, of course, is largely governed by the

moment, and in that I have a short quotation here which covers the point better, perhaps, than I can say it to you, and this deals, with a counsel in the very act of cross-examining. "Be mild with the mild; shrewd with the crafty; confiding with the honest, merciful to the young, the frail or the fearful; rough to the ruffian and a thunderbolt to the liar. But in all this never be unmindful of your own dignity. Bring to bear all the powers of your mind, not that *you* may shine, but that *virtue* may triumph, and your *cause* may prosper. Like a skilful chess player, in every move fix your mind upon the combinations and relations of the game—partial and temporary success may otherwise end in total and remediless defeat."

Now, we come to the trial, and there are certain plain rules that must be apparent to most people; but yet I think the remarks upon the art of cross-examination would not be complete without some reference to them. A man may become energetic, he may apparently become scornful or satiric, or he may apparently become angry, as a cross-examiner. But the golden rule of all cross-examination is, *Never lose your temper.* There is no time in the practice of the profession, there is no incident in the history of our lives that requires a more calm, a more cool, and collected mental condition than that in which the cross-examiner is placed. And it might be that I can go on very usefully with a series of "Don'ts" in this connection, but I have only one or two don'ts noted; and these are: Don't expect a witness to fall into any trap, no matter how skilfully it may be prepared. Don't expect that you are going to smash any witness—and when I use the word "smash" I use it in the ordinary colloquial term spoken of by lawyers in conducting a vigorous cross-examination. The man who goes into the court with his brief, I care not how eminent a counsel he may be, I care not what his experience may be, I care not how good a case he may have, if he goes into court with the idea in his head that he is going to smash a witness by cross-examination, that man retires from the field defeated in nine cases out of ten, and perhaps in a larger percentage. Witnesses are knowing people; they are crafty; they know more

about their affairs and what they are talking about than you or I do; they have lived with them; they are people who are very quick of observation and they have a certain amount of cunning, and that cunning the most careful counsel sometimes is unable to circumvent even when the court and when the counsel are both convinced that the witness is not telling the truth.

Then again, one, in cross-examining, has always to keep the point in view. Immediately you lose sight of the point that you are immediately at, that moment your adversary is gaining a step or two in your direction. It is all very well to say, pick it up again. The golden rule is, when you get your point keep it, and don't let go until you are through with it. Another matter that I think counsel ought always to observe, and which I think we all ought to consider, and that is to overlook discrepancies that are not very material, because discrepancies are often the strongest evidence of truth; and yet I have heard counsel—not excluding myself—examine for want of something better to be asked, about discrepancies that I felt in my own mind if proved up to the hilt could not possibly affect the issue in the mind of the tribunal trying it. Then one has to keep not only his eye on the witness, but he has to keep his mind on the witness. The moment the cross-examiner begins to play to the gallery his client ought to discharge him and engage another. A man cross-examining, for the time he is actually cross-examining, ought to eliminate himself, ought to eliminate the public, ought to eliminate everything in the exciting moment of cross-examining, even to eliminating the judge and the jury. And so far as he is within his right and limit, and within his proper province his mind ought to be singly concentrated upon that of the witness, his eye ought to watch every move, and when he has made his progress with that witness, it is time enough for him to see whether it has satisfied either the judge or the jury. A man cannot do two things at once and do them both successfully. Further, a man should never shew disappointment. It is very hard to prevent it. When a man has a nice, carefully prepared case, and has led up to a certain point, and just when he thinks it is within his grasp, the witness goes

back on him and fires his volley, and counsel stands back staggered. It is a most dangerous thing. Juries observe—juries are quick to nctice anything of that sort—that the witness was too much for the counsel—clever man but he couldn't handle that witness, clever man as he was and that therefore the witness told the truth. Why? By an unconscious process of reasoning, which may be fallacious, but is nevertheless convincing. Therefore I say, if a counsel gets an answer that staggers him, if it takes him unawares, his proper course and his only safe course is to advance smilingly and calm, and accept it as a compliment rather than a disappointment.

Then there is another very important matter, and it is a matter that I can not deal with in detail, but I think I should mention it, and that is, never risk under any circumstances an important question that is objectionable in form. Of course there is the old theory, never ask a question unless you are sure of the answer—but that would destroy a good deal of cross-examination. That is not the way in which I put it. I put it rather that no counsel should ever risk an important question unless he knows and feels the question is proper and right in its form, having regard to form only. I will tell you why, in my judgment, this is a dangerous thing: Counsel on the other side are waiting for an opportunity at every turn to ease off their client if he is in the hands of a skilful cross-examiner. Counsel gets up very often and objects. He is asked, What is your objection? "Well, I object to the form of the question." It may or may not be a good objection, but you have defeated by your objectionable *form* of question that which you have been labouring to obtain for 15 minutes or half an hour. How did you do it? The witness has stopped, but he has heard the question, and he is given a moment or two of thought, and he knows what you are driving at no matter how cleverly you have put it, and by the time you get back to the question, the witness has got his "wind," and you get your answer, favourable, of course, to the opposing party. Then as to a critical question, I should hesitate very much to ask a really critical question as a critical

moment in the case, unless I was reasonably sure of what the answer was going to be. I would rather skirt around it. I would play with the situation if I could, I would rather avoid the main question, still leading up to it, unless I was reasonably sure that the answer to the question that was really critical was going to be in my favour.

The last and the best advice that any man can give, and the best and last advice that any man can take for his own good, is to stop when through—a thing that is seldom done. We have long examinations, caused by our present system of pleading, by the trial involving a very large number of facts, a great variety of evidence, a great many collateral matters, etc., all let in upon the ground that they have some bearing upon the issue, and the great desire on the part of the court and counsel to investigate the subject thoroughly so that there may be no question hereafter in regard to it. But if we could only nerve ourselves to this point, to make our examinations one-third as long as they are we would be very successful cross-examiners. I have often thought that there was a great deal of wisdom and philosophy in the old saying of Josh Billings, the almost forgotten American humorist, in which, in his advice to preachers, he said: "If you cannot strike oil in twenty minutes, you have either a poor auger or you are boring in the wrong place."

Coming to the closing remarks I have to make, the two or three things which I have in mind more from observation than from any particular knowledge of my own, and I have put them into the form of rules, cardinal rules indeed, conveying a great deal more perhaps on thinking them over than they do on the first utterance.

The First is—and that is largely covered by some things I have already said—the examining counsel must have a *continuity* and *concentration* of thought. If he has not that he cannot cross-examine. By concentration I mean that which eliminates and excludes every other thought excepting the subject in hand, and the witness he is dealing with. By continuity I mean that it is not in broken patches, that his concentration is not fixed here

this moment and somewhere else the next, but there should be continuity throughout the whole of his cross-examination. And that leads to the Second rule, which is, Never let the witness get away with you. You will see a witness who is being well cross-examined, but the witness whether through craft or unintentionally leads off into some other branch, and counsel follows him into that branch, and the counsel's work to the extent to which he had got before he was led away is practically nullified. If he had not permitted himself to be led away, if he had kept his witness to the point, if he had not allowed the witness to get the mastery of him and take him into some side issue, the chances are he would have done good work, but the moment the break is made, the moment the man gets the whip hand, and takes you away into a side issue your continuity is broken, your concentration is weakened, and the opportunity is gone that you perhaps have been striving to attain for half an hour with that particular witness. Then the Third cardinal rule that I should say should be crystallized is, Don't begin to cross-examine upon any point unless you have a good ground for gaining that point, and stop absolutely short when you gain it. Let me illustrate what I mean by that: A witness is called, and he is asked if he said a certain thing upon a certain occasion. In many, many cases the answer of the witness is. "No, I don't remember that I did." He asks again, "Well, think it over, didn't you say so and so?" "I don't remember. I don't remember anything about it." Counsel goes about three questions further, and the man says, "No, I never said it." Now, that is a thing that happens in almost every trial. If counsel had been satisfied to take the want of memory, whilst it may have been against the contention of the counsel, it may have been against his side of the case, it is infinitely better for counsel that a witness should not remember than that he should remember and swear point blank that he never said such a thing.

The Fourth rule is important as regards policy. It is one I have given a good deal of thought to, because one does not like to announce principles without consideration—I can only say I

have tried it in my own cases, and when I have not done it, I have always thought that I would have been better off if I had taken the rule and followed it, and that is this: Always attack your witness in the *weakest* point at the opening unless it is some complicated matter involving long accounts or something of that kind. Always attack your witness where he is least prepared or protected. And the reason for that, when you come to think of it, is very apparent. When a cross-examiner gets up to put his questions the witness is more or less nervous. In many cases he has been told, "Oh, well, wait until John Smith or James Jones, the eminent K.C. gets hold of you; he will turn you inside out in three minutes." Well, Mr. Jones gets up, and the witness has some apprehension, he is a bit nervous; he is unused to your tone of voice, and there is a complete and sudden change of style in the method of cross-examining from the method of the examination-in-chief. There is no time at all for him to get his evidence in mind, and the first moment that you strike the weakest point of his testimony under these conditions, you strike when he is least prepared for it, because in a few minutes, even a nervous witness will regain his confidence, and he feels you are not such a tremendous man after all, that you cannot turn him inside out, that you cannot smash him, and that he can hold his own fairly with you. You ask him the same question in fifteen minutes after he has become prepared, and he has everything in his mind, he says, "Yes or no," and "I will explain that to you," and he will at once explain, whereas, if he had been attacked in the first place, and you caught him just at the moment when the sudden change occurred between the methods of examination, you might have got the answer that you were seeking, and very likely a true answer, because when a witness has his time to think, knowing that he is a witness there in favour of the man who calls him, naturally and without any malevolence or without any wrong-doing on his part, his mind intuitively and unconsciously gets a sudden twist or turn that is very difficult to straighten out.

Now the danger, as I have said, is in asking too much, and

it is infinitely better that we should ask too little than too much. There is another thing that I would like to throw out for the consideration of the members of the Bar, and it is this: Never ask for mere information, because if you do you are sure to get it. I have heard many very clever cross-examiners say to witnesses, "Well, I am only asking that for my own information," but the information came with a sting that the cross-examiner didn't expect. If it is information that the cross-examiner is seeking he should read an encyclopedia and perfect himself in the knowledge sought for through a medium other than the witness.

Another thing which I desire to point out is to keep out of the unknown field. The unknown field of cross-examination is full of pitfalls and full of trouble. A man who cross-examines well upon that which he knows or has reason to believe he knows, or that he thinks exists, and who cross-examines well upon that point, is doing his whole duty to his client and to his solicitor; but the man who ventures into an unknown field, the man who goes without a lantern to his path will find that the first head that runs up against a tree is the head of the cross-examining counsel. That is so by reason of the circumstances. I do not care who the witness is. Take the farmer from the plow, take the mechanic from the bench, and put him into the box and ask him to tell a story—these men, generally speaking, although they look simple, and they are simple in their ideas, and they are limited, perhaps in their knowledge of many things—these men in nine cases out of ten, make the very best witnesses. Why? Because they are generally familiar with all the ins and outs of the subject-matter; because they know the ways of living, the methods of life, the peculiarities of that kind of life, and they know what is likely to have occurred, or what might have occurred under a set of given circumstances; they are familiar with the case, more familiar than the counsel.

Then let me strongly urge upon the members of the Bar here who take their own cross-examinations never to attack a man's character unless they have it of record. I do not know how often

in the course of my own experience, which has not been altogether limited, I have been told of a state of facts regarding character which my client supposed he was correctly representing to me, but which he was not, and at the trial I have been met with a condition of things on the part of the witness that absolutely turned the jury in his favour. Therefore, I say, it is important that if you know the record, if you have convictions against the witness, and if they are within two or three months, or even within six months, it might be safe to ask him if he has been convicted of a certain offence; but if a man has been convicted ten or twelve years ago, has served his term in the penitentiary and has come out, and is living a clean, respectable life, no counsel will ever advance the interests of his client by asking that man if he was ever convicted.

Then it is a dangerous thing to ask men—I won't say that about women—if they have any feeling or any enmity or any bias against another. They invariably answer, "No, we had a few words, but I am very friendly with him, and I would do him a good turn; he and I are not just close friends, we are friendly enough." You will sometimes get a woman who will be vindictive against her fellow-woman; but I have never seen a case where a man in the witness box has acknowledged that he was living at enmity with the litigant in the suit.

Then there is another branch which could be discussed at considerable length, and that is the examination of an expert witness, but it is impossible to go into the discussion, because it would require me to deal with the many details of it. All I can do is to say a few words of a general character with regard to it. From what I have observed and seen in regard to examinations by very eminent men, I have come to the conclusion that no counsel should ever cross-examine an expert witness unless he has as thorough a knowledge of the subject, in that particular branch of it, at least, as the expert himself. It is always safer to take practical results from experts than to examine them upon a scientific basis; and the expert man is the last man counsel should ask information from.

I have just a last word or two to add in regard to this subject, and that is counsel should always keep to the level of his witness; and I will illustrate that by a well-known story of Lord Jeffrey. The counsel, an academic man, was examining a poor Scotchman at the court in Edinburgh. It was a question of the mental capacity of the testator, and the information he desired to get from this witness was, how well he knew the deceased, and the lawyer put to the witness questions in various forms—"were you on terms of intimate relationship with the deceased?"—and the witness looked at him and said, "Eh?"; he repeated the same question, using big words, away over the level of his witness—who didn't understand the question at all. Lord Jeffrey finally became impatient and said, "Now let me ask the witness a question," and he turned to the witness and he said: "James, did you ken Sandy Thompson in his lifetime?" "Well, I did." "How well did you ken him?" "Ken him—why me and him sleepit in the same kirk for 40 years." Now there was a degree of intimacy that could not be gainsayed, and developed because Lord Jeffrey came to the level of the witness. I believe that very often questions are asked witnesses that they do not understand, and if they do understand them the complex form or high sounding words may be a pretence that they don't, and it only gives them the advantage of getting, as I say, a certain time for reflection and a certain amount of consideration before answering.

In concluding I will add that a general division might be referred to, and that is what I might call a direct and indirect method of cross-examination. I shall only point that out because you can consider for yourselves exactly how it works. The direct examination deals with the aggregate; the indirect is of a psychological character and deals with the foundation of items which, brought together, form the aggregate without putting the question of aggregate. As an instance of direct cross-examination, that is coming to the aggregate at once, I can point to a very forcible, perhaps the most forcible example we ever had at the Canadian Bar—the late Mr. B. B. Osler. As to the indirect or

psychological course of cross-examination, I can point to a man who was a past master in that—the late Mr. D'Alton McCarthy. You know their methods. You know the difference between them—one went direct taking the aggregate as a whole, and dealing with that with the witness; the other laid his plans and drove his stakes as he went along, caring nothing whether in the aggregate the witness admitted the contention or not. The counsel had got the individual circumstances from which the court and the jury would draw the aggregate conclusion.

A writer named Cox, fifty years ago, put the case of cross-examination perhaps as well as any man could put it, and he says: "In considering these remarks on cross-examination, the rarest, the most useful and the most difficult to be acquired of the accomplishments of the advocate, we would again urge upon your attention the importance of calm discretion. In addressing the jury you may sometimes talk without having anything to say, and no harm will come of it. But in cross-examination every question that does not advance your cause, injures it. If you have not a definite object to attain, dismiss the witness without a word. There are no harmless questions here; the most apparently unimportant may bring destruction or victory. If the summit of the orator's art has been rightly defined to consist of knowing when to sit down, that of an advocate may be described as knowing when to keep his seat. Very little experience in our courts will teach you this lesson, for every day will shew to your observant eye instances of self-destruction brought about by imprudent cross-examination. Fear not that your discreet reserve may be mistaken for carelessness or want of self-reliance. The true motive will soon be seen and approved. Your critics are lawyers, who know well the value of discretion in an advocate, and how indiscretion in cross-examination cannot be compensated by any amount of ability in other duties. The attorneys are sure to discover the prudence that governs your tongue. Even if the wisdom of your abstinence be not apparent at the moment, it will be recognized in the result. Your fame may be of slower growth than that of the talker, but it will be larger and more enduring.

Now let me add one or two words of my own. Remember that cross-examination is a duty we owe to our clients, not a matter of mere personal glory or fame. Remember that regard must be had for the true administration of justice, and that justice must not be defeated by improper cross-examination. Remember that we owe an obligation to the State which gives a monopoly to our profession, and that we should render that to the State which inures to the benefit of the public. Remember also that in cross-examination we owe a duty to ourselves, and that we are bound to give the best that is in us in that most difficult art, however we may fail in the result; and so, if we fulfil all these obligations our names will be re-called as those who lent honour and dignity to our profession; we will be remembered as those who regarded fairness as one of the great elements of advocacy, and whose talents and genius were not aimed at self-glorification, but were used to establish truth, to detect falsehood, to uphold right and justice, and expose the wrongdoings of dishonest men.

## *REVIEW OF CURRENT ENGLISH CASES.*



JUDGMENT CREDITOR—ISSUE OF EXECUTION AFTER DEBT PAID—SEIZURE—ABSENCE OF MALICE—TRESPASS.

*Clissold* v. *Cratchley* (1910) 1 K.B. 374. In this case the defendant had recovered a judgment against the plaintiff. The defendant's solicitor had an office in the country and also in London. A fi. fa. was issued by him from his London office in ignorance that the debt had been paid at his country office on the same day but shortly before the issue of the fi. fa. The writ endorsed to levy the amount of debt and costs was delivered to the sheriff and a seizure made when the solicitor was informed that the debt had been paid, and at once withdrew the writ. The defendant (the plaintiff in the present action) then brought this action against the solicitor and his client to recover damages for improperly levying execution after the judgment had been satisfied, or in the alternative for trespass. It was found that neither the solicitor or his client had acted maliciously. The County Court judge who tried the action held that the defendants were liable and gave judgment against them for £15; but the Divisional Court (Darling and Phillimore, JJ.), came to the conclusion that in the absence of malice the defendants were not liable, and dismissed the action.

MASTER AND SERVANT—RIGHT TO TERMINATE EMPLOYMENT—NOTICE.

*Re African Association and Allen* (1910) 1 K.B. 396. This was a special case stated by arbitrators. By an agreement between the African Association and Allen made in May, 1907, the latter was employed by the association as their clerk or trade assistant in Africa, for two years, at a salary of £250 a year; provided that the association might at any time, at their absolute discretion, terminate the agreement at an earlier date if they desired to do so. Allen proceeded to Africa and entered on the employment and continued therein until September, 1907, when, without any previous notice, the association terminated the agreement, and the sole point stated for the opinion of the court was whether they could thus terminate the agreement without any prior notice; and the Divisional Court (Lord Alverstone, C.J.,

and Bucknill and Bray, JJ.) were unanimously of the opinion that although the association had a discretionary right of dismissal, it did not enable them to dismiss without first giving a reasonable notice which was an implied term of their exercising the right.

TRUSTEE IN BANKRUPTCY—FIDELITY BOND—SURETY—LIABILITY FOR DEFAULT OF PRINCIPAL—FORFEITURE OF REMUNERATION BY TRUSTEE—SET-OFF.

*The Board of Trade* v. *The Employer's Liability Assurance Corporation* (1910) 1 K.B. 401. In this case a point of some interest on the law of principal and surety is involved. The facts were that a trustee and his surety (the defendant corporation) had entered into a bond for the due performance of his duties by the trustee in a penal sum of £500 (subsequently reduced to £100), whereby the surety in case of default by the principal was bound to make good any loss or damage occasioned by such default. The principal improperly retained a sum of money in his hands for some years, and on it being discovered was removed from office, and his remuneration as trustee was forfeited, and he was charged with penal interest on the sum retained. The penal interest exceeded £100. The principal made good the sum retained, but did not pay the penal interest, which the plaintiffs claimed to recover to the extent of the penalty of the bond from the surety. The defendant claimed that the penal interest was not a loss or damage within the meaning of the bond, and also that the amount of the principal's remuneration should be set off against the penal interest; but Phillimore, J., held that the penal interest was a loss or damage within the bond, and that the defendant association was liable for the full amount of the penalty of £100; and the remuneration having been forfeited by the principal, it could not be set off in their surety's case as claimed.

CHARTER-PARTY—LOADING TIME—EXCEPTIONS—"ANY OTHER CAUSE BEYOND CHARTERER'S CONTROL"—CONSTRUCTION—"EJUSDEM GENERIS"—DEMURRAGE.

*Thorman* v. *Dowgate SS. Co.* (1910) 1 K.B. 410. This was an action by the charterer of a vessel against the owner, in which the plaintiff's claim was admitted; but the defendant's set up a counterclaim for demurrage. The ship was chartered to proceed to Alexandra Dock at Hull, and there load a cargo

of coal in 120 hours. By the agreement of the parties there were excepted from the loading time, Sundays, holidays, strikes, frosts, or storms, any accidents stopping the working, loading or shipping of the cargo, restrictions or suspensions of labour, lock-outs, delay on the part of the railway company, either in supplying wagons or loading the coals, "or any other cause beyond the charterer's control." The ship arrived at Alexandra Dock, and notice was given of its readiness to load on 23rd July, but owing to the presence of other vessels which had previously arrived and were waiting to load, the turn of the ship to come under a loading tip was not reached until 1st August. The defendants claimed demurrage from 23rd July to 1st August. The plaintiffs contended that the delay was occasioned by a cause within the exception, "any other cause beyond the charterer's control"; but Hamilton, J., who tried the action, came to the conclusion that the delay in question was not of the same kind as any of the specified causes mentioned in the exception, and was, therefore, not within the exception, and that the plaintiff was consequently liable for the demurrage claimed.

# REPORTS AND NOTES OF CASES.

## Dominion of Canada.

### SUPREME COURT.

Ex. C.] LEGER *v.* THE KING. [Mar. 11.

*Construction of statute—7 & 8 Edw. VII. c. 31, s. 2—Government railway—Fire from engine—Negligence—Damages.*

By 7 & 8 Edw. VII. c. 31, s. 2, the Government of Canada is liable for damage to property caused by a fire started by a locomotive working on a government railway whether its officers or servants are or are not negligent and by a proviso the amount of damages is limited if modern and efficient appliances have been used and the officers or servants "have not otherwise been guilty of any negligence."

*Held*, DAVIES, J., dissenting, that the expression "have not otherwise been guilty of any negligence" means negligence in any respect and not merely in the use of a locomotive equipped with modern and efficient appliances.

Sparks from a locomotive set fire to the roof of a government building near the railway track, and the fire was carried on to and destroyed private property. The roof of this building had on several previous occasions caught fire in a similar way, and the government officials though notified on many of such occasions had only patched it up without repairing it properly.

*Held*, reversing the judgment of the Exchequer Court (12 Ex. C.R. 389) that the government officials were guilty of negligence in having a building with a roof in such condition so near to the track, and the owner of the property destroyed was entitled to recover the total amount of his loss.

Appeal allowed with costs.

*Teed*, K.C., for appellant. *Chrysler*, K.C., for respondent.

Ry. Board.] [Feb. 15.

C.P. RY. CO. *v.* CITY OF TORONTO.

*Railways—Jurisdiction of Board of Railway Commissioners—Highway—Construction of statute—R.S.C.* 1906, *c.* 37, *ss.* 2(2) — *Deviation of tracks—Dedication — User — "Public way or means of communication"—Access to harbour—Navigable waters.*

Prior to 1888 the G.T. Ry. Co. operated a portion of its

railway upon the "Esplanade" in the city of Toronto, and in that year, the C.P. Ry. Co. obtained permission from the Dominion Government to fill in part of Toronto harbour lying south the "Esplanade," and the general public eased along the pro- which it did. Several city streets abutted on the north side of the "Esplanade," and the general public eased along the prolongations of these streets, with vehicles and on foot, for the purpose of access to the harbour. In 1892 an agreement was entered into between the city and the two railway companies respecting the removal of the sites of terminal stations, the erection of over-head traffic bridges and the closing or deviation of some of these streets. This agreement was ratified by statutes of the Dominion and provincial legislatures, the Dominion Act providing that the works mentioned in the agreement should be works for the general advantage of Canada. To remove doubts respecting the right of the C.P. Ry. Co. to the use of portions of the bed of the harbour on which they had laid their tracks across the prolongations of the streets mentioned, a grant was made to that company by the Dominion Government of the "use for railway purposes" on and over the filled-in areas included within the lines formed by the production of the sides of the streets. At a later date the Dominion Government granted these areas to the city, in trust to be used as public highways, subject to an agreement respecting the railways, known as the "Old Windmill Line" agreement, and accepting therefrom strips of land 66 feet in width between the southerly ends of the areas and the harbour, reserved as and for "an allowance for a public highway." In June, 1909, the Board of Railway Commissioners, on application by the city, made an order directing that the railway companies should elevate their tracks on and adjoining the "Esplanade" and construct a viaduct there.

*Held*, GIROUARD and DUFF, JJ., dissenting, that the Board had jurisdiction to make such order; that the street prolongations mentioned were highways within the meaning of the Railway Act; that the Act of Parliament validating the agreement made in 1892, did not alter the character of the agreement as a private contract affecting only the parties thereto, and that the C.P. Ry. Co., having acquired only a limited right in the filled-in land, had not such a title thereto as would deprive the public of the right to pass over the same as a means of communication between the streets and the harbour.

Appeal dismissed with costs.

*Armour*, K.C., and *MacMurchy*, K.C., for appellants, C.P. Ry. Co. *Blackstock*, K.C., for appellants, G.T. Ry. Co. *Dewart*, K.C., and *Chisholm*, K.C., for respondents.

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Ex. C.] CUNARD *v.* THE KING. [Feb. 22.

*Expropriation of land—Water lots—Contingent value—Crown grant—Statutory authority.*

The Dominion Government expropriated, for purposes of the Intercolonial Railway, lands in Halifax, N.S., including a lot extending into the harbour. This lot could be made very valuable by the erection of wharves and piers for which, however, it would be necessary to obtain a license from the government of Canada as they would obstruct navigation. The title to the water lot was originally by grant from the Government of Nova Scotia, but no statutory authority for making such grant was produced. $10,000 was offered by the government for all the lands and allowed by the Exchequer Court. The owners appealed, claiming a much larger amount.

*Held*, DUFF, J., dissenting, that under the circumstances the owners were not entitled to compensation on the basis of the water lot being utilized for wharves and piers, and if they were the amount tendered was sufficient.

*Held*, also, that a Crown grant of land cannot be made without statutory authority.

Judgment of the Exchequer Court (12 Ex. C.R. 414), affirmed.

Appeal dismissed with costs.

*Harris*, K.C., for appellant. *Newcombe*, K.C., Deputy Minister of Justice, for respondent.

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# Province of Nova Scotia.

## SUPREME COURT.

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The Full Court.] [April 2.

HIRTLE *v.* THE TOWN OF LUNENBURG.

*Municipal corporation—Defect in sidewalk—Contractor—Municipality not liable for misfeasance of.*

A contractor who was employed by the Dominion Government to construct a concrete sidewalk around the post office in the

town of L. excavated the sidewalk preparatory to putting in the concrete, and as a temporary crossing for the public and the men employed in carrying on the work, laid down a piece of plank, one end of which rested on the curbstone and the other end on the ground near the entrance to the post office. The evidence shewed that the plank was defectively placed, and that it fell a number of times in consequence, and that it fell while plaintiff was crossing it, causing the injuries for which the action was brought. There was no evidence to shew that the town or the town authorities participated in the doing of the work, or that they were applied to for or gave a permit for the opening up of the sidewalk, although they had knowledge that the work was being done.

*Held*, that under the circumstances mentioned the town was not liable for any act of misfeasance on the part of the contractor or his principal.

*Maguire* v. *Liverpool* (1905) 1 K.B. 767 followed.

*Mellish*, K.C., and *Lane*, in support of appeal. *J. J. Ritchie*, K.C., and *Chesley*, K.C., contra.

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The Full Court.] [April 2.

FINKLESTEIN v. GLUBE.

*Attorney and client—Settlement of case out of court by parties —Costs.*

Where the parties to an action, after the same has been set down for trial, without the knowledge of their respective solicitors, settled the action out of court, and there was an application by plaintiff's solicitor for leave to tax his costs, or, in the alternative, for leave to continue the action for the purpose of recovering costs against defendant.

*Held*, that the rule is clear that such an application can only be successful where there is good ground for holding that there was collusion between the parties for the purpose of cheating the solicitor out of his costs.

*O'Connor*, K.C., in support of appeal. *J. D. Davison*, contra.

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The Full Court.] [April 2.

THE CHAMBERS ELECTRIC, ETC., CO. *v.* THE PATILLO CO., LTD.

*Electric light company — Recovery for current supplied — Schedule rates—Options.*

In an action by plaintiff company to recover for electric light

supplied to defendants' place of business (wholesale), plaintiffs' claim covered two periods of time during which light was supplied under different schedules. The charge for the first period included a charge per K.W. for the energy supplied and a "readiness to serve charge" of ten cents for each socket.

*Held* (following the *Chambers Electric Co.* v. *Cantwell*, 6 E.L.R. 529, for the reasons there given), that the charges were recoverable.

As to the second period plaintiffs' schedule included, among other subjects, "wholesale places, banks, offices, etc., using light up to 6 o'clock p.m., and a good deal in the evenings.

*Held*, that defendants' place of business was clearly embraced in this description.

Also, that it was not relevant that one or two other descriptions in the schedule, which had to do with other subjects, were not very definite.

The schedule contained, at the end of it, provisions for certain options to be given to customers to enable them to come in and make special agreements in lieu of the rates previously fixed.

*Held* that this was valid in the absence of anything in the statute to prevent a customer from contracting himself out of the first provisions, and that such offers to customers did not in any way invalidate the fixed rates which were to prevail unless one of the options was accepted, and in the absence of anything in the evidence to shew that the rates under the optional provisions were higher than the fixed rates.

*Held*, also, that where under the schedule consumers were to be entitled to a discount of 10 per cent. "for payment of account within five days" defendant must shew that no account was rendered to be entitled to claim the discount as of right.

*Mellish*, K.C., in support of appeal. *S. D. McLellan*, contra.

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Russell, J.] REX *v.* CROWLEY. [April 4.

*Canada Temperance Act—Excessive costs—Habeas corpus.*

The defendant was convicted for selling intoxicating liquor contrary to Part. II. of the Canada Temperance Act by a stipendiary magistrate at Pictou, and was adjudged to pay a penalty of $50 and $13.45 costs, and in default of payment was imprisoned, etc. Included in these costs were items of 50 cents for "preliminary hearing" and 25 cents for "preliminary evidence" under Cr. Code s. 655 as amended by 8 & 9 Edw. VII.

c. 9(D.), and for $1.40 for "28 fols. evidence at 5 cents" taken on the trial of the complaint. On motion for the prisoner's discharge on the return to a habeas corpus,

*Held,* that the justice exceeded his jurisdiction in taxing these items against the defendant, which were not only not allowed, but forbidden by s. 770 of the Cr. Code, and in awarding imprisonment until they, with the penalty, were paid, and that the defendant was entitled to be discharged from custody. *Ex parte Bourque,* 31 N.B.R. 509; *R.* v. *Elliott,* 12 O.R. 524; *R.* v. *Laird,* N.W.T. Reps. 105, and *Ex parte Myers,* 32 C.L.J. 371, referred to.

*Power,* K.C., for the prisoner. Nem. con.

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Lawrence, J.] [April 8.

REX *v.* BUBAR.

*Canada Temperance Act—Costs of commitment—Habeas corpus.*

The defendant was convicted by two justices of the peace for the county of Pictou for a second offence against Part II. of the Canada Temperance Act, and was adjudged to forfeit and pay a penalty of $100 and costs, and in default of payment distress, and in default of distress, imprisonment, etc., unless the said sums and costs of distress and of conveying to jail were sooner paid. On motion for a habeas corpus,

*Held,* that as the costs of conveying to jail are distinct from the costs of commitment, the conviction was bad (*Reg.* v. *Vantassel,* 34 N.S.R. 84), for not including the costs "of commitment" under s. 738(a) of the Code, and that the prisoner should be discharged. *Reg.* v. *Doherty,* 32 N.S.R., p. 238, per MEAGHER, J., referred to.

*Power,* K.C., for the motion. Nem. con.

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Laurence, J.] [April 8.

THE DOMINION COAL CO., LTD. *v.* BOUSFIELD ET AL.

*Corporation—Striking employees—Interference with workmen —Remedy by injunction.*

A large number of workmen in the employ of the plaintiff company stopped work as a means of compelling the company to "recognize" a labour organization known as the "United Mine Workers of America," with which they were connected, and after going out "on strike" concertedly and systematically

interfered with the workmen who remained in the employ of the company by assaulting and otherwise molesting them, by following them on the streets in a disorderly manner, by "picketing" the places where the company carried on its business and the places where its workmen resided with the object of inducing the men who remained to leave the employ of the company and others from entering such employment.

*Held*, that plaintiff company was clearly entitled to be protected by injunction in such case pending the trial of the action.

*Mellish*, K.C., in support of application. *W. B. A. Ritchie*, K.C., contra.

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Laurence, J.] [April 8.

McLeod *v.* The St. Paul Fire & Marine Ins. Co.

*Marine insurance—Freight—Loss by perils insured against—Unreasonable delay in effecting repairs.*

Plaintiff insured against loss by perils of the sea the freight to be earned on a cargo of potatoes shipped on board a vessel of which he was owner and master from Prince Edward Island to New York.

While on her voyage the vessel was overtaken by a storm and put into a port in Nova Scotia in a damaged condition, and with her cargo wet with sea water.

The defendant company brought the vessel to Halifax, and after some delay discharged the cargo and repaired the vessel, and after selling a portion of the cargo re-shipped the balance and sent it forward to its destination.

*Held*, that the defendant company having dealt with the cargo in such a way as to prevent plaintiff from earning freight was liable for the loss so occasioned, and also for detention due to unreasonable delay in effecting repairs to the vessel.

*Bell*, K.C., and *Terrell*, for plaintiff. *W. B. A. Ritchie*, K.C., for defendant.

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Laurence, J.] A. *v.* B. [April 8.

*Assessment and taxation—Exemptions—Educational institutions.*

The Halifax City Charter, s. 335, exempts from taxation buildings used as "a college, incorporated academy, schoolhouse, or other seminary of learning."

*Held*, not to apply to a private school for the education of young people in certain branches of commercial education, con-

ducted wholly under the direction, management and control of the proprietors for their own benefit as their source of income.

*O'Connor*, K.C., in support of appeal. *Bell*, K.C., contra.

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The Full Court.] [April 9.

THE SILLIKER CAR CO. *v.* DONAHUE.

*Company—Organization—Variation between prospectus and charter—Action for calls—Laches.*

The defence to an action to recover calls on stock subscribed for by defendant in the plaintiff company was that defendant agreed to take the shares in question subject to conditions set out in the prospectus, and that the powers taken by the company in the memorandum of association filed at the date of incorporation were wider than those proposed by the prospectus.

*Held*, assuming that wider powers were taken as alleged, that it was not open to defendant, after laying by for a period of upwards of two years to raise the objection, that he could not be heard on the point, and that he was properly held liable as a shareholder.

*O'Connor*, K.C., in support of appeal. *Allison*, contra.

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# Province of Manitoba.

## COURT OF APPEAL.

Full Court.] [March 7.

ROBERTSON *v.* NORTHWESTERN REGISTER CO.

*Promissory note—Presentment for payment—Waiver of—Liability of maker when note not presented at place where payable—Bills of Exchange Act, R.S.C.* 1906, *c.* 119, *s.* 183—*Holder in due course—Renewal note as acknowledgment of liability on original—Liability of company on note made by officer.*

Action by indorsees of promissory note given by defendant company to the payees for value. The plaintiffs took the note during its currency as security for an advance to the payees. The note was payable at the Bank of Hamilton, Winnipeg. At its maturity the secretary-treasurer of defendant company went to the office of the payees and gave them a renewal note without

inquiring for the original. The payees then negotiated the renewal note and the defendant company afterwards paid it.

The trial judge was satisfied upon the evidence that the original note had been presented for payment before action, but he nonsuited the plaintiffs on the ground that they, being shareholders in the payee company, were personally bound by the wrongful action of that company in taking the renewal note.

*Held*, per PERDUE and CAMERON, JJ.A.:—1. That the nonsuit was wrong, as there was nothing to shew that the plaintiffs were not holders in due course.

2. That the action of the defendants in giving the renewal note and subsequently paying it amounted to an acknowledgment that the original note was made with their authority, and that they were liable on it, and was also a waiver of presentment of it.

Per CAMERON, J.A.:—1. That, under s. 183 of the Bills of Exchange Act, presentment of the note for payment before action was not necessary, following *Merchants Bank* v. *Henderson*, 28 O.R. 360, and *Freeman* v. *Canadian Guardian Co.*, 17 O.L.R. 296, and dissenting from *Warner* v. *Symon-Kaye*, 27 N.S.R. 340, and *Jones* v. *England*, 5 W.L.R. 83.

2. That the defendants were liable on the note although it was not duly made under their by-laws as innocent holders of negotiable securities are not bound to inquire whether certain preliminaries which ought to have been gone through have actually been gone through.

*Imperial Bank* v. *Farmers' Trading Co.*, 13 M.R. 42, and *Re Land Credit Co.*, L.R. 4 Ch. 469, followed.

Per RICHARDS, J.A.:—That it was necessary to prove presentment before action, and this had not been done.

Per PERDUE, J.A.:—That there was sufficient evidence of presentment before action.

Appeal allowed and verdict entered for plaintiffs with costs.

*C. S. Tupper*, for plaintiffs. *Symington*, for defendants.

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Full Court.] REX *v.* HOWELL. [March 7.

*Criminal Code, s. 778—Summary trial of indictable offence—Information to be given prisoner by magistrate when offering election as to mode of trial—New trial.*

A police magistrate proceeding, under s. 778 of the Criminal Code, to offer a prisoner charged with an offence, for which he cannot be tried summarily without his consent, his choice as to

the mode of trial, should give the prisoner all the information set forth in paragraph (b) of sub-s. 2 of that section as re-enacted by 8 & 9 Edw. VII. c. 9; and, if he omits to inform the prisoner that he has the option "to remain in custody or under bail, as the court decides, to be tried in the ordinary way by the court having criminal jurisdiction," he does not acquire jurisdiction to try the prisoner summarily, although he consents thereto, and a conviction following will be quashed as made without jurisdiction.

*King* v. *Walsh*, 7 O.L.R. 149, followed.

Prisoner not discharged, but ordered to be brought again before the magistrate for the taking of proceedings de novo.

*Dennistoun*, K.C., for the Crown. *Howell*, for prisoner.

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Full Court.] [March 7.

ISBISTER *v.* DOMINION FISH CO.

*Negligence—Fire on vessel—Absence of precaution against spreading of fire—Dangerous conditions—Failure to warn passengers to escape.*

Appeal from judgment of METCALFE, J., noted, ante, p. 38, dismissed with costs, RICHARDS, J.A., dissenting.

*Hogel*, K.C., and *Blackwood*, for plaintiff. *Affleck*, and *Kemp*, for defendants.

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## KING'S BENCH.

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Metcalfe, J.] RE MOORE. [February 23.

*Extradition—Extradition Act, R.S.C.* (1906), *c.* 155, *s.* 16—*Proof of foreign law—Affidavit evidence, use of—Grand larceny—Evidence of guilt, sufficiency of—Criminal Code, s.* 686.

1. Proof of the foreign law is not necessary to shew that "grand larceny" is included in the crime of larceny mentioned in the extradition treaty between the United States and Great Britain.

*In re Murphy*, 22 A.R. 386, followed.

2. When, at the close of the evidence for the demanding country, at the hearing of an application for extradition under the Extradition Act, R.S.C. (1906), c. 155, the judge calls on

counsel for the accused for his defence, a committal subsequently made will not be set aside on habeas corpus, on the ground that the judge did not formally ask the accused if he wished to call any witnesses, as required by s. 686 of the Criminal Code.

3. Notwithstanding the wording of s. 16 of the Extradition Act, affidavits sworn to in the foreign state may be received and acted on in extradition proceedings, following the practice adopted in *Counhaye Case*, L.R. 8 Q.B. 410, and in many Canadian cases.

4. When a charge of larceny is made in respect of a sum of money alleged to have been received by the accused from the prosecutor to be accounted for, and to have been fraudulently converted by the accused to his own use, sufficient primâ facie evidence of the payment by cheque of the money to the accused is not given without the production of the cheque or the receipt given by the accused, in the absence of any deposition of an official of the bank in which the cheque was drawn.

*Reg.* v. *Burke*, 6 M.R. 121, and *Re Harsha* (No. 1), 10 Can. Cr. Cas. 433, followed.

The evidence contained in the affidavits being in this respect and otherwise insufficient to establish a primâ facie case against the accused, he was held entitled to his discharge on habeas corpus.

*Phillips* and *Chandler*, for State of Washington. *Hagel*, K.C., and *Blackwood*, for prisoner.

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Metcalfe, J.] ANDREW *v.* KILGOUR. [March 7.

*Animal ferœ naturæ—Raccoon—Liability of owner for damages done by.*

A raccoon is an animal ferœ naturæ and a person who keeps one in a town is liable in damages for any injury inflicted by it on a neighbour upon escaping from captivity although the animal has been kept in the defendant's house for a long time, and was supposed to have been tamed.

Hale's Pleas of the Crown, vol. 1, p. 430, and *Filburn* v. *People's Palace, etc.*, L.R. 25 Q.B.D. 258, followed.

*McLeod*, for plaintiff. *Bowen*, for defendant.

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Mathers, C.J.] COPELIN *v.* CAIRNS. [March 22.

*Practice—Security for costs—Application to set aside præcipe order for—King's Bench Act, rule* 988.

Rule 988 of the King's Bench Act, R.S.M. 1902, c. 40, does

not prevent a non-resident plaintiff, against whom an order for security for costs has been taken out on praecipe, from moving to set aside such order upon any ground otherwise open to him; it merely provides a means whereby such a plaintiff, wishing to move for summary judgment, may, by paying $50 into court, proceed with such motion without fully complying with the praecipe order.

*Walters* v. *Duggan*, 17 P.R. 359, followed.

*Collison*, for plaintiff. *Burbridge*, for defendant.

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Mathers, C.J.] [March 22.

HAINES v. CANADA RAILWAY ACCIDENT CO.

*Accident insurance—Proviso against liability if deceased came to his death while under the influence of intoxicating liquor—Condition that notice of death must be given within ten days thereafter.*

When last seen alive, 21st November, 1908, the deceased was under the influence of intoxicating liquors and the probabilities were that he met his death by drowning on the same day, as nothing was seen or heard of him until his body was found in the river in the following spring, greatly decomposed, but without any mark of violence.

The policy sued on contained a provision upon which the defendants relied, namely, that, if deceased met his death while under the influence of intoxicating liquors, the claimant should only be entitled to one tenth of the amount of the policy.

*Held*, that the onus was upon the defendants, and that, as there was no evidence to shew exactly when the death took place, they had failed to make good that defence.

*Canadian* v. *American Accident Co.*, 25 S.W.R. 6, followed.

*Held*, however, that defendants were entitled to succeed on their objection that notice of the death had not been given to them by or on behalf of the insured within ten days after the death, as required by the policy, although no one knew of the death until months afterwards.

*Castle* v. *Lancashire, etc., Ins. Co.*, 1 T.L.R. 495, followed.

*Kentzler* v. *American Mutual*, 60 N.W.R. 1002, distinguished.

*Trueman*, for plaintiff. *Fullerton*, for defendants.

Metcalfe, J.] BURLEY *v.* KNAPPEN. [March 28.

*Jurisdiction—Action against non-resident for cancellation of agreement of sale of land not in jurisdiction—Provision for cancelling agreement by mailing notice to purchaser "at post office."*

In an action brought by a resident of the province as vendor against the purchaser, although he is a non-resident, for specific performance of an agreement executed within the jurisdiction for the purchase of land though out of the jurisdiction, under which the payments were to be made within the jurisdiction, the courts acts in personam and, if there is default in payment of subsequent instalments, has jurisdiction to order that the purchaser perform his contract within a time to be fixed, and that, in default, the contract be rescinded, and any money already paid thereon forfeited to the plaintiff.

*Piggott,* 127, 128, and *Grey* v. *M. & N.W. Ry. Co.,* 11 M.R. 48, followed. A provision for cancellation of an agreement of sale after default and forfeiture of money already paid by mailing a notice to the purchaser "at ——— post office" is ineffective and should be altogether disregarded.

*Cooper* and *Hogg,* for plaintiff. *McLaws,* for defendant.

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Metcalfe, J.] [April 6.

PRAIRIE CITY OIL CO. *v.* STANDARD MUTUAL FIRE INSURANCE CO.

*Fire insurance policy—Condition requiring notice of loss to be given in writing forthwith.*

A provision of a fire insurance policy requiring the insured to give notice in writing of any loss to the company forthwith as a condition precedent to the liability of the company must be strictly complied with; and, if the insured fails to give such notice, he cannot recover on the policy even in a case where the company was advised of the loss on the same day by a telegram from its agent which was acknowledged by letter from the head office the next day, and the company's agent at once employed a professional adjuster to investigate the loss and report to the company.

*Bell Bros.* v. *Hudson's Bay Insurance Co.,* 2 Sask. L.R. 355, followed. The receipt by the company of a statutory declaration by the insured giving particulars of the loss, 17 days after the fire, was not a compliance with the condition requiring notice in writing "forthwith."

*The Queen* v. *Justices of Berkshire*, 4 Q.B.D., per COCKBURN, C.J., at p. 471, and *Atlas* v. *Bramwell*, 29 S.C.R., at p. 545, followed.

*Chapman* and *Green*, for plaintiffs. *Affleck* and *Kemp* for defendants.

## Bench and Bar.

### *JUDICIAL APPOINTMENTS.*

The Honourable Désiré Girouard, a puisne judge of the Supreme Court of Canada, to be the Deputy of His Excellency the Governor-General, for the purpose of assenting, in His Majesty's name, to any bill or bills passed or to be passed during the present Session of Parliament. (March 15.)

## United States Decisions.

NEGLIGENCE.—Crossing Accident: If both plaintiff and defendant could have prevented the accident, but neglected to do so, their negligence was concurrent, and the last chance doctrine would not apply.—*Bruggeman* v. *Illinois Cent. R. Co.*, Iowa 123 N.W. 1007.

PARENT AND CHILD.—Liability for Torts of Child: Relationship alone does not make a parent answerable for the wrongful acts of his minor child; but it must appear that he approved such acts, or that the child was his servant or agent.—*Brittingham* v. *Stadiem*, N.C. 66 S.E. 128.

PRINCIPAL AND AGENT.—Personal Injuries: In general when a person acts avowedly as an agent for another who is known as the principal, his acts and contracts within the scope of his authority are considered the acts and contracts of the principal, and involve no personal liability.—*Roach* v. *Rutter*, Mont. 105 Pac. 555.

RAILROADS.—Duty to Stop and Listen: One having a right to cross a railroad track need not stop to look or listen before crossing, in order to discover whether a train is approaching.—*Chesapeake & O. Ry. Co.* v. *Patrick*, Ky. 122 S.W. 820.