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THE Court of Appeal closed its March sittings on March 26th, after having disposed of nearly all the cases on the list. We are glad to see that all arrears have been gradually worked off, and that the Court will be in a position to take up new cases at its next sittings on May 13th.

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THE Law Society Examinations before Easter Term will take place on the following dates: Law Society Examinations—First intermediate, May 6th; Second intermediate, May 7th; Solicitor, May 13th; Barrister, May 14th. Examinations in Law School—First year, May 5th; Second year, May 9th; Honors and Scholarships, May 10th. The following statutes are prescribed by the lecturers, to be read with the work for the first year in the Law School: With Common Law and Equity—R.S O. (1887), c. 44, ss. 20 to 54. With Contracts—R.S.O. (1887), c. 122, ss. 1 to 12, and c. 123. With Real Property, R.S.O. (1887), c. 100, 102 and 108.

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IN *Canada Permanent* v. *Teeter*, lately before the Common Pleas Division Court, the effect of R.S.O. (1887), c. 102, s. 30, was considered. This section provides that no other proceedings shall be taken, without leave obtained from a Judge of the High Court or County Court, after the mortgagee has given notice demanding payment of the mortgage moneys, or any part thereof, or declaring his intention to proceed under the power of sale in his mortgage pursuant to the condition or proviso therein contained, until after lapse of the time mentioned in the said notice. In the above case the mortgage contained a proviso for possession after two months default, and also a power of sale without notice on default for two months. Default having been made for the requisite time, the plaintiffs served the defendant with notice requiring payment forthwith, and also declaring an intention of exercising the power of sale. Before the time mentioned in the notice of sale for exercise of the power had elapsed, the plaintiffs issued a writ against the defendant, who was in possession, to recover possession of the mortgaged premises. At the trial it was contended on behalf of the defendant that the above section of the Mortgage Act applied, and that the plaintiffs could not "take further proceedings upon any clause, covenant or provision contained in the mortgage until after the lapse of the time at or after which the power of sale was to be exercised, unless and

until an order had been obtained from a Judge of the County Court or of the High Court. The plaintiffs relied upon the terms of their mortgage, and submitted that as the notice contained a demand for payment "forthwith," they were not obliged to wait until lapse of the time mentioned for exercising the power of sale; that the section applied only where the demand or notice was made or given "in pursuance of any condition or proviso contained in a mortgage"; that in this case the giving of the notice was a voluntary act, as the mortgage contained a power of sale without notice, referring to *British Canadian L. and I. Company* v. *Rae*, 16 O.R., 15. The trial Judge gave judgment for the plaintiff, holding that on the above facts the said section of the Mortgage Act had no application, and his judgment was sustained on appeal to the Divisional Court.

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## *JUDICIAL SALARIES ELSEWHERE THAN CANADA.*

In his message to Congress, the President of the United States recommended an increase in the salaries of the Judges in the following words:—

"The salaries of the Judges of the District Courts are, in my judgment, inadequate. It is quite true that the amount of labour performed by these Judges is very unequal; but as they cannot properly engage in other pursuits to supplement their incomes, the salary should be such in all cases as to provide an independent and comfortable support."

This message has called the attention of the public and profession in the United States to the inadequate salaries paid to all the Federal Judges, and measures are now before Congress to make the salary of the Chief Justice of the Supreme Court $20,500, and the salaries of the Associate Justices $20,000 each; those of the Circuit Courts $9,000, and those of the District Courts from $4,000 to $7,000. A writer in the *American Law Review*, who resides in one of the small-salary paying States, suggests the following schedule of salaries, which he thinks would be a more reasonable one: To the Chief Justice of the Supreme Court $12,500, to the Associate Justices $12,000 each. If a separate Court of Appeal is established in Washington, to the Chief Justice $10,500, and to the Associate Justices $10,000 each. To the Circuit Judges $10,000 each, and to the District Judges from $5,000 to $8,000, according to their locality and judicial work.

The salaries of the Supreme Court Judges were fixed in 1789 at $4,000 for the Chief Justice, and $3,500 for each of the Associate Justices; in 1819 they were increased to $5,000 for the Chief, and $4,000 for the Associates; in 1855 they were again increased to $6,500 and $6,000; and in 1871 to $8,500 and $8,000, respectively. The last increase was in 1873, when they were fixed at $10,500 for the Chief Justice, and $10,000 for the Associate Justices, at which sums they have ever since remained. It may be assumed that a further increase of their judicial salaries will be made this year.

The State Judges do not appear to receive very high salaries, except in the more populous states and cities; their tenure of office is usually short; and they

return to practice with a judicial reputation which gives them a professional standing before the public and at the bar, and assures them a large and remunerative income in their future practice.

The New York State judiciary receive the highest salaries of all the State Judges, the Chief Justice receiving $12,500, the puisne Judges $12,000, and the Judges outside the cities $6,000, and $5 per day for travelling expenses. The New York City Judges, however, surpass their State brethren, and receive higher salaries than the Federal and State Supreme Court Judges. The New York City courts have the following staff: seven Judges at $17,500 ($11,500 paid by the city, and $6,000 by the State), twelve Judges at $15,000, five at $12,000, six at $10,000, fifteen Police Justices at $8,000, and eleven District (Division?) Court Judges at $6,000. The Brooklyn City Judges receive from $10,000 to $11,500. The Philadelphia City Judges receive $7,000; the Pittsburgh and Cincinnati City Judges, $6,000 each.

From this it will be seen that the salaries paid to the Judges who live in the larger cities are higher than in the less populous places, obviously because the incomes of lawyers in such large cities are above the average in other parts of the country, and the cost of living is higher. But as a general rule the Federal Judges are better paid than the State Judges, and have a better tenure of office. They hold their Judgeships for life or during good behaviour, and are allowed to retire from the bench after ten years judicial service, and after reaching the age of seventy years, upon their *full salary*, which is secured to them as a pension as long as they live. Notwithstanding these advantages over the State judiciary, some of the Federal Judges have resigned their offices because of the smallness of the salary. Judge B. R. Curtis, of the Supreme Court, and Judges Dillon, McCrary, and Lowell, of the Circuit Court, have resigned without pensions, each of whom has resumed practice, and realized largely increased professional incomes. Nine other Federal Judges retired on pensions equal to their full salaries.

In England the salaries of the Puisne Justices are equal to the salaries of the Prime Minister and the more important Cabinet officers; while the salaries of the Lord Chancellor, Lords of Appeal, the Lord Chief Justice, and the Master of Rolls, are much higher, and also carry the right to proportionate pensions.

Coming now to the British Colonies (and we must for the present exclude Canada), we find a more just and equitable practice regulating the salaries voted to the colonial judiciary than in the United States. We find, further, that in all the self-governing colonies, except Canada, the salaries of the Prime Minister and his colleagues are lower in amount than the salaries paid to the Judges. Taking those colonies which have the same system of responsible government as is enjoyed by Canada, we find the political and judicial salaries as follows:—

| Colony. | Population. | Prime Minister. | Chief Justice. | Puisne Justices. |
|---|---|---|---|---|
| Victoria | 1,104,288 | $10,000 | $17,500 | $15,000 |
| New South Wales | 1,042,919 | 10,000 | 17,500 | 13,000 |
| Queensland | 387,463 | 6,500 | 12,500 | 10,000 |
| South Australia | 318,308 | 5,000 | 10,000 | 8,500 |
| New Zealand | 649,349 | 5,000 | 8,500 | 7,500 |
| Tasmania | 146,149 | 5,500 | 7,500 | 6,000 |
| Cape Colony | 1,428,700 | 8,750 | 10,000 | $7,500 & $8,750 |
| Natal | 481,361 | 5,000 | 7,500 | $5,000 |

In colonies not possessing the full powers of responsible government, but which have in most cases an Elective Assembly, the salaries are as follows:

| Colony. | Population. | Prime Minister. | Chief Justice. | Puisne Justices. |
|---|---|---|---|---|
| Jamaica | 580,804 | $6,500 | $10,000 | $6,000 |
| Barbadoes | 171,860 | 7,500 | 5,000 | None. |
| Trinidad | 189,566 | 8,500 | 9,000 | None. |
| Mauritius | 369,302 | 6,750 | 8,750 | $6,000 |
| Hong Kong | 215,800 | 7,200 | 12,000 | 8,160 |

The salaries of the Judges in India are: Chief Justices, from 60,000 to 72,000 rupees per annum; and Puisne Justices from 40,000 to 45,000 rupees per annum.

By way of digression, it may be remarked that these figures also show that the more important colonies—though having a smaller population and revenue than either Canada or Ontario—pay higher, and it would seem more reasonable, salaries to their Prime Ministers and the other important Cabinet officers than either the Dominion or the Province pays. And as the cost of living in the cities has largely increased since the salaries were last adjusted, it would seem reasonable in the public interest, and in view of that increased cost, to again readjust them, as has, since 1873, been done in all our great banking and commercial institutions.

From the precedents set us by the self-governing colonies given above, we turn, with some feeling of shame, to refer to the much lower salaries paid to the judiciary in Canada. And we find that in Ontario, which is estimated to contain a population of 2,154,786, the salaries of our Judges have been fixed by the Dominion Parliament at sums below those paid by the poorest and least populous of the colonies we have cited. In view of that comparison, we are surprised that our judiciary is as efficient as we believe it to be.

There must of necessity be gradations of salary according to the class of judicial work to be performed. A Judge who has only limited jurisdiction, or who determines questions of practice and procedure in litigations, cannot expect as high remuneration for his judicial services as a Judge who has to administer justice in its highest departments. And the same is true of judicial officers, some of whom have limited functions or jurisdiction, while others have more responsible judicial powers, and determine mixed questions of law and fact in causes *inter partes*.

Where the salaries are insufficient to draw into the judiciary the most talented and the most accomplished and best read legal talent in the profession, then third-rate and down to fifth-rate men will fill them. In that event the whole community suffers, for the public are deprived of the services of those whom they employ in their individual cases, and whom it is best for the public weal should be employed as Judges.

We fear that too often the argument has been advanced by many of our public men—and sometimes by the leaders of public opinion—that it would be an easy matter to fill the judicial or other offices, even if the remuneration were smaller. The argument is true, but it is fraught with dangerous consequences to the public interest and the public service, not foreseen or discounted at their true value by those who use or hear the argument. Undoubtedly men will always be

found who would gladly take offices of trust and responsibility under government, even were the salary lower than it is, and they would take the offices though their mental abilities, professional acquirements, or habits of business would prevent them competing, with any fair degree of success, with other persons in the profession or occupation to which they belong. But such men could bring neither fitness, efficiency, nor dignity to the offices they would seek to fill, while their want of professional or other qualifications or skill would always be an element of weakness and instability to the public service, and might eventually be disastrous to the appointing executive.

These observations are applicable to all branches of the public service where responsibility and ability are required in the execution of public offices and trusts. But to no class of public functionaries do these observations apply with greater force than to our judiciary. Upon their wisdom and learning and trained abilities depend the true interpretation of the laws; upon their integrity and firmness rest the impartiality and certainty of justice; and upon their professional industry and business habits is mainly based the rapid and economical administration of the judicial powers of the Courts. They pass judgment upon the validity or invalidity of the legislative Acts of our Parliament and Legislatures; they decide questions affecting the lives, the personal liberty, and the rights of property, of us all. Their judicial offices, if firmly held and wisely administered, will become the inner citadel of a well-governed community. And that community must be pitied which cannot look with the fullest trust and confidence to its Judges as the faithful and fearless administrators of its justice.

To efficiently discharge the judicial functions and responsibilities we have indicated, requires men to fill our judicial bench whose professional learning and research will make them experts in their knowledge of the law, and whose industry and despatch will not allow their administration of justice to illustrate, by unnecessary or vexatious delays, the maxim that "delayed justice is positive injustice."*

The men we now have on our judicial bench may be fairly said to combine—some in a greater and others in a lesser degree—the qualifications we have indicated, and are fairly and justly entitled to be more liberally and adequately remunerated for their judicial services to the public than they are at present.

It is unfortunately true, as stated in a judgment printed on p. 25 of this volume of THE LAW JOURNAL, that the judiciary which decides most important and weighty questions under our laws receives less than one-half of the compensation paid to some of the solicitors, and to many of the managers, of our commercial corporations.

In France the judicial salaries are not large, but there the number of lawyers is limited by law, and a lawyer having accumulated a reasonable competence from his professional practice will accept the crowning honour of a seat on the judicial

*An old law book says that the King in the judgment of the law is supposed to be present in all his courts when proclamation is made for dispensing justice by the Judges: "Wherefore all men, for all kinds of injuries, may have justice and right—freely without sale, fully without denial and speedily without delay."

bench, and the smallness of the salary will not be a hindrance. But we have not as yet a sufficient number of men of means, as well as fitness, from whom we can expect to fill our judicial offices without paying them an adequate remuneration for the labour and experience those offices demand. And it must be known that a Judge in this country is debarred from many avenues of speculation and financial adventure which are open to all other members of the community. Besides having regard to the character of our institutions, it is not a sound public or national policy to keep judicial salaries at so low a rate that the bench must in time come to be filled either by men who have means, or else by incompetent men who have no means, and who may be prolific in "miscarriages of justice." The position of Judge is one of great responsibility and usefulness, and it is for Parliament and the public to say whether it is wise to pay them so poorly that they cannot discharge the functions of their judicial offices free from pecuniary cares, and perhaps embarrassment.

It has been contended that the judicial salaries in other Provinces should be the same as those in Ontario. If that argument be sound, then it might be urged that the rate of judicial salaries in England or India or Australia should govern us. The true rule for regulating such salaries is the average value of fairly good professional incomes. Where localities practically fix the value of professional incomes, the judicial salaries should be regulated accordingly, taking into account also the question of the cost of living, leaving time and public opinion to work out a fair equalization.

The justice of the claim of our Judges to a better remuneration was, we believe, conceded by the Dominion Government some years ago; and in 1883 the First Minister admitted that "a strong feeling existed in the Province of Ontario that the Judges of the Superior Courts were insufficiently paid," and he further stated that the Government intended to address themselves during the recess to studying the reasons of the pressure that existed in the Province of Ontario and in Montreal, and would come down with some general scheme the next session (Commons Debates, 1883, p. 1,314). We look with hope for the fulfilment of that promise to the Judges and Parliament, and we have every reason to believe that Parliament, if asked, would be found ready and willing to do justice to our hard-worked and ill-paid Judges.

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## *COMMENTS ON CURRENT ENGLISH DECISIONS.*

The Law Reports for March comprise 24 Q.B.D., pp. 269-360; 15 P.D., pp. 25-36; 43 Chy.D., pp. 185-315; 15 App. Cas., pp. 1-51.

PRACTICE—INTERPLEADER—GOODS TAKEN IN EXECUTION—ASSIGNEE OF EQUITY OF REDEMPTION IN GOODS.

In *Usher* v. *Martin*, 24 Q.B.D., 272, the point raised was whether the transferee of the equity of redemption in certain goods and chattels, could maintain title to them as against an execution creditor under whose execution they had been seized. It was contended that he could not, under the authority of *Richards* v.

*Jenkins*, 18 Q.B.D., 451, because it was virtually setting up the *jus tertii* of the mortgagee; but it was held by Mathew and Wills, JJ., that the case was distinguishable from *Richards* v. *Jenkins*, because the claimant had a substantial interest in the goods, viz., all the property in them which was not vested in the mortgagee, whereas in *Richards* v. *Jenkins* the claimant had no title whatever to the goods.

PRACTICE—INTERPLEADER—SHARES—CHOSE IN ACTION—ORD. LVII., R. I. (ONT. RULE 1141).

*Robinson* v. *Jenkins*, 24 Q.B.D., 275, was an appeal from Lord Coleridge, C.J., and Mathew, J., staying proceedings pending the trial of an interpleader issue, under the following circumstances. The plaintiff, claiming to be the registered proprietor of certain shares in a joint stock company, employed the defendants as brokers to sell the shares for him, and for that purpose delivered to them the certificate of ownership and a transfer of the shares from himself to the defendants. He alleged that he had rescinded the employment, and claimed that the defendants did not return the documents, and the action was brought for a declaration that the plaintiff was entitled to the shares, and to compel the defendants to return the certificate and transfer. The defendants, on the other hand, applied for an interpleader order, on the ground that they claimed no interest in the shares, but that the same were claimed from them by one Bebro, and that they expected to be sued by him for their recovery. The Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were of opinion that the interpleader order had been rightly granted, that although Bebro's claim was to the shares, yet that his claim must be taken to be to everything necessary for their enjoyment, which would include the documents, and they were also of opinion that in any case a *chose in action* is a chattel within the meaning of Rule lvii., r. 1 (Ont. Rule 1141), and therefore the subject of interpleader.

PRACTICE—ATTACHMENT OF DEBTS—DIVIDEND PAYABLE BY OFFICIAL RECEIVER IN BANKRUPTCY—DEBT ATTACHABLE—ORD. V., R. 1, (ONT. RULE 622.)

In *Prout* v. *Gregory*, 24 Q.B.D., 281, a Divisional Court of the Q.B. Division (Lord Coleridge, C.J., and Mathew, J.) determined that a dividend payable by an official receiver in bankruptcy is not a debt which can be attached within Ord. xlv., r. 1 (Ont. Rule 622). We may observe, however, that the Ont. Rule 622 is wider in its terms than the English rule, and permits debts or demands to be attached which could be reached by means of equitable execution. Such a demand as the one in question could no doubt be reached by equitable execution, and therefore in Ontario might be attached.

HABEAS CORPUS—ISSUE OF WRIT AGAINST A PERSON WHO HAS NO LONGER THE CUSTODY OF THE PERSON DETAINED—ILLEGALLY PARTING WITH THE CUSTODY OF INFANT—IMPOSSIBILITY OF OBEYING WRIT.

In the case of the *Queen* v. *Barnardo* (Gossage's case), 24 Q.B.D., 283, the veteran philanthropist, Dr. Barnardo, is again the somewhat unwilling means whereby the Court of Appeal is enabled to throw light on the law of *Habeas Corpus*.

In this case the application was for a writ of *Habeas Corpus*, to compel the doctor to deliver up a child of the name of Gossage, which had been taken into one of his homes with the sanction of its mother. She had been asked to sign an agreement, permitting Dr. Barnardo to place the child in one of the colonies; but this she did not sign. Without her consent or concurrence, however, he permitted the child to be taken by a person to Canada for adoption, and did not know the address of the person who had taken the child, which had been purposely withheld from him in order to prevent interference by the child's parent. After the child had been thus disposed of, the mother authorized a demand to be made for the child by the authorities of a Roman Catholic institution in order that the child might be taken care of therein, and brought up as a Roman Catholic. With this demand, for the reasons above mentioned, Dr. Barnardo was unable to comply, and thereupon the present application was made for a writ of *Habeas Corpus*. The defendant, who appeared in person, endeavored to distinguish the case from the previous decision in the *Queen* v. *Barnardo*, 23 Q.B.D., 205 (noted *ante* vol. 25, p. 521) on the ground that in that case the writ had actually issued, and the question was whether the return was good, while in the present case the question was whether the writ should issue, and before the writ is issued it is made clear to the Court that the person detained is not in the custody of the defendant, against whom it is sought to issue the writ, and that therefore it ought not to issue, because the writ is not intended to be punitive in its operation. But the Court of Appeal (Lord Esher, M.R., and Fry, L.J.) were unanimously of opinion that the writ had been properly granted, on the ground that the defendant had illegally parted with the custody of the child, and that it would be his duty, if necessary, to go to Canada, and by advertisement or otherwise do his best to recover it, or satisfy the Court that he had done everything "that mortal man could do in the matter," in order to produce the child to the Court, not necessarily to be delivered to the rival institution, but in order that the Court might determine what should be done in the premises in the best interests of the child.

PRACTICE—PAYMENT INTO COURT WITH DEFENCE OF TENDER BEFORE ACTION—COSTS.

In *Griffiths* v. *Ystradyfodwg*, 24 Q.B.D., 307, Wills and Denman, JJ., held that when a defendant, had paid money into Court with a defence of tender before action, the plaintiff could not, on taking the money out of Court, in satisfaction, proceed to tax his costs under Ord. xxii., r. 7, because the defence of tender raised an issue in respect of which the defendants were entitled to go to trial.

EXPROPRIATION OF LANDS—COMPENSATION—OBSTRUCTION OF LIGHTS.

*In re Tilbury & Southend Railway Co., and Gower's Walk Schools*, 24 Q.B.D., 326, the decision of the Divisional Court, 24 Q.B.D., 40, (noted *ante* p. 75) was affirmed by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.).

PRACTICE—COMPROMISE OF ACTION—APPLICATION TO SET ASIDE.

In *Emeris* v. *Woodward*, 43 Chy.D., 185, North, J., held that where an agreement for the compromise of an action has been entered into, it cannot be set

aside upon an application in the same action, but that a new action must be brought for that purpose.

PRACTICE—AMENDMENT AT TRIAL—PLEADING JUDGMENT IN FORMER ACTION—ORD. XIX., R. 15, ORD. XXVIII., R. 1, (ONT. RULES 402, 444).

Notwithstanding the wide powers of amendment, at any stage of the proceedings, which the Court possesses, *Edevain* v. *Cohen*, 43 Chy.D., 187, shows that there are cases in which it is the duty of the Court to refuse to exercise them merely to enable a defendant to raise a technical defence. This action was brought against the defendants, Cohen and Cook, for wrongful removal of furniture. At the trial it appeared by the plaintiff's evidence that they had recovered judgment against other persons engaged in the removal. After the evidence for the plaintiff and Cohen had been taken, Cook asked to amend by setting up the judgment, and thereupon Cohen made a similar application. North, J., refused the application, and from this decision Cohen appealed, but the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) agreed that the appeal should be dismissed. Cotton, L.J., said, "I think this amendment is proposed merely to enable the appellant to avail himself of what I may call a technical rule of law, supported by the cases which have been referred to *(i.e., that a judgment against one or more of several tort feasors is a bar to an action against the others for the same cause)* and not in order to determine the real issue which ought to be determined in the action. Further, this objection was not taken and insisted upon at once by Cohen . . . it was first mentioned and the objection was first taken by counsel, who then appeared for another defendant, and it was only raised and insisted on on behalf of Cohen after substantially all the evidence had been taken, and he had taken his chance of the evidence turning out in his favor."

MORTGAGE—SALE BY FIRST MORTGAGEE—MISTAKE IN PARTICULARS—COMPENSATION TO PURCHASER —LIABILITY TO SECOND MORTGAGEE—MEASURE OF DAMAGES.

*Tomlin* v. *Luce*, 43 Chy.D., 101, is an appeal from the decision of Kekewich, J., 41 Chy.D., 573, noted *ante* vol. 25, p. 489, the propriety of which we ventured to doubt. The Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) were of opinion that the learned judge had erred as to the measure of damages. The case, it may be remembered, was one in which a mortgagee had sold under a power of sale, and, owing to a mistake in the particulars, the purchaser at the sale was awarded compensation. Kekewich, J., held that the mortgagee was accountable to a subsequent mortgagee for the full amount of the purchase money, without any deduction of the sum allowed for compensation; but the Court of Appeal decide that the true measure of liability is the amount which could have been obtained for the property had there been no mistake in the particulars.

PARTNERSHIP—POWER OF PARTNER TO COMPROMISE DEBTS—POWER TO ACCEPT SHARES IN SATISFACTION OF PARTNERSHIP DEBT.

In *Nieman* v. *Nieman*, 43 Chy.D., 198, the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) reversed a decision of Kekewich, J., on a point of partnership law.

The action was brought by one partner against another, to wind up the partnership, which had been dissolved by agreement, and to restrain the defendant from compromising a debt. The defendant having appeared in the action, applied on motion before Kekewich, J., for leave to compromise the debt in question, which was the principal asset. By the intended compromise it was proposed to form a limited company in Amsterdam, to take over the property of the debtors, consisting of certain sugar factories and coffee estates in Java, and to allot to the plaintiff and defendant fully paid-up shares in the company in satisfaction of their debts. The plaintiff objected to this compromise being carried out, but it appearing to Kekewich, J., to be for the benefit of both parties that it should be carried out, he made an order appointing the defendant receiver with liberty to compromise the debt in question as proposed. The Court of Appeal, however, decided that one partner has no implied power to bind his co-partner by accepting shares in a company (though they be fully paid up) in satisfaction of a debt due to the firm; and that the Court has no jurisdiction in an action to wind up a partnership to confer on a receiver any greater powers in this respect than a partner would have. *Weikersheim's Case*, L.R., 8 Chy., 831, which is referred to in Lindley on Partnership (5th ed.), 141, was shown to be no authority for the general proposition that such power exists; because the Court there proceeded on the ground that the power existed in that case, because it was shown to be part of the ordinary course of the business of the firm, and there had been express knowledge and assent to the transaction on the part of the partners. It would appear, therefore, from this case that the statement in Lindley, for which Weikersheim's case is cited, is put rather too broadly.

## Proceedings of Law Societies.

### *LAW SOCIETY OF UPPER CANADA.*

MICHAELMAS TERM, 1889.

*Resume* of the proceedings of Convocation.

*Monday, November 18th.*

Convocation met.

Present—The Treasurer, and Messrs. Bruce, Foy, Hoskin, Irving, Macdougall, Martin, Meredith, Murray, Osler, and Shepley.

The minutes of last meeting were read and approved.

The petition of the Osgoode Legal and Literary Society, as to the opening of the library at night, was received and read.

Ordered that the petition stand till the Report of the Finance Committee on the reference of the 9th February, 1889, and that the petition be referred to the Library Committee on the questions involved other than financial points.

The Secretary reported the resignation (by letter, which was read) of the telegraph operator, and that a temporary appointment had been made of an operator provided by Mr. Dwight.

The Secretary reported that Miss M. Wynn had applied.

Ordered that the hours of attendance for the operator be 9.30 a.m. to 5.30 p.m., with an hour for dinner, to be fixed by the Secretary, and on Saturdays from 9.30 a.m. to 2 p.m., save on judgment days, when the attendance is to be continued till half an hour after the closing of the courts.

Ordered that the salary of the operator be fixed at $30 per month.

Ordered that Miss Wynn be appointed for three months on trial.

Ordered that Miss Cameron's resignation be accepted at once.

The Report of the Solicitor of the Society was read.

Mr. Irving gave notice of motion for reference to a special committee of the question, whether the hours of business and order and arrangement thereof can be modified so as to ensure greater convenience in the conduct thereof.

*Tuesday, November 19th.*

Convocation met.

Present—The Treasurer, and Messrs. Bell, Hardy, Irving, Kingsmill, Macdougall, McMichael, Martin, Moss, Purdom, and Shepley.

The minutes of last meeting were read and approved.

Ordered, that the several applications for relief from attendance upon the lectures and examinations of the Law School be referred to the Legal Education Committee, with power to deal with them as they may think, according to the circumstances of each case, to be fair and reasonable, but upon the express understanding that no further applications be entertained by the Committee, save on grounds which may arise hereafter.

The Report of the Legal Education Committee was received and read.

Ordered for immediate consideration and adopted.

Ordered, that leave be given to introduce a rule to carry out said report.

The rule was read a first time, and is as follows:

A primary examination for candidates desiring to enter the Law Society shall be held on the third Tuesday before Hilary Term, 1890, and following days, and the subjects of the examination shall be those comprised in the curriculum heretofore in use, and the rules to the contrary are hereby modified accordingly, but no further primary examinations shall be held.

Ordered, that the rule be read a second time on Saturday, 23rd inst.

The letter of Lieut.-Col. Dawson on the subject of the closing of Osgoode Street, and the letter of the Provincial Secretary on same subject, were read.

*Resolved*, that the present opinion of Convocation is distinctly opposed to the proposed action, but that Convocation will be very glad to meet the Provincial Secretary on the subject at its meeting on Saturday next.—*Carried.*

The letter of Adam Good complaining of a solicitor was read.

Ordered, that it be referred to the Discipline Committee to enquire whether a *prima facie* case had been made out.

The letters of R. M. Williams were read.

Ordered, that the letters be referred to the Discipline Committee, in connection with the letter of 21st August already referred to the committee.

The letter of W. H. Taylor, State Librarian of Minnesota, was received and read.

Ordered, that Mr. Taylor be informed that the Law Society keeps up a set of the Minnesota Reports, and is not in a position to effect an exchange as proposed.

Mr. Martin's notice was ordered to stand till Saturday next, and Mr. Irving's notice also.

*Saturday, November 23rd.*

Convocation met.

Present—The Treasurer, and Messrs. Ferguson, Irving, Kingsmill, Lash, McMichael, Moss, Robinson, and Shepley.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

The letter of Mr. Reeve, the Principal of the Law School, on the subject of certain statements in a letter of Mr. Waldron, was presented by Mr. Moss.

Ordered, that the Legal Education Committee be authorized to utilize the large lunch-room for the purpose of the Law School, and also to purchase the necessary seats.

Mr. Moss presented the Report of the Legal Education Committee on the reference to them of petitions in connection with exemptions from attendance at the Law School.

The report was received, read, ordered for immediate consideration, and adopted.

The Report of the Special Committee on the new building in connection with the Law School was received and read.

Ordered for immediate consideration and adopted.

Ordered, that the Order-in-Council authorizing the erection of the building be entered on the minutes, and the same is as follows:

Order-in-Council, approved by His Honour the Lieutenant-Governor, dated the 8th day of November, 1889.

Upon the recommendation of the Hon. the Commissioner of Public Works, the Committee of Council advise, that the erection by the Law Society on the Osgoode Hall premises, on the site of the old boiler house, of a building for the accommodation of the students attending the Law School, etc., be approved of, such building to be erected in accordance with the plans submitted to the Commissioner. Certified,

LONSDALE CAPREOL,
*Assistant Clerk, Executive Council, Ontario.*

The letter of the Provincial Secretary on the closing of Osgoode Street was received and read.

Mr. Irving moved the second reading of the rule as to primary examinations. —*Carried.*

The rule was then read a third time and passed.

Ordered, that Mr. Martin's notice as to Law School Rule do stand till next meeting.

Ordered, that it be referred to a Select Committee, composed of the Treasurer and Messrs. Moss, Irving, Shepley, Martin, and Robinson, to consider and report on the question whether and how the hours of business and the order and

arrangement thereof can be modified so as to secure greater convenience in the conduct thereof.

Ordered, that certain Benchers having applied for the use of the dining room for the evening of the 7th December, the application be granted.

*Friday, November 29th.*

Convocation met.

Present—The Treasurer, and Messrs. Bell, Cameron, Ferguson, Foy, Irving, Kingsmill, McCarthy, McMichael, Mackelcan, Meredith, Morris, Moss, Murray, Osler, Robinson, Shepley, and Smith.

The minutes of last meeting were read and approved.

Mr. Hoskin presented the Report of the Discipline Committee on the petition of R. M. Williams; reporting that a *prima facie* case had been made for enquiry.

The report was received, read, ordered for immediate consideration, and adopted.

Mr. Hoskin moved that the matter of the petition be referred to the Committee, for investigation in the usual way.

Ordered accordingly.

Mr. Osler, from the Reporting Committee, reported the letter of the editor on the state of the Reports, which was received and read.

Mr. Irving, from the Library Committee, presented a report on the petition of the Osgoode Legal and Literary Society, referred to it, which was received and read.

Mr. Murray, from the Finance Committee, reported that the cost of carrying out the report of the Library Committee would not exceed two dollars per night.

Ordered that the library be opened for the use of those who are entitled to use it between the hours of 7.30 and 10.30 p.m. (except during vacations), under such regulations as the Library Committee may prescribe. That this arrangement be made as a renewed experiment, and that with a view to the ascertainment of the results a record be kept of the attendance. That the Library Committee have power to provide for the closing of the library on any special occasion.

The letter of H. R. Hardy, as to a grant for the legal chart, was read.

Ordered, that a grant of $100 be made on the same terms as last year.

The letters of Mr. Carroll, acccompanied by communications from Messrs. Beaumont and Ross, charging Mr. P. Heaslip with practising in the Surrogate Court, and complaining thereof, was received and read.

Ordered, that the question be referred for enquiry and report to a select committee, composed of Messrs. Meredith, Mackelcan, Lash, and McCarthy.

The letter of Lieut.-Col. Dawson, and others, on the closing of Osgoode Street, was received and read.

Ordered, that a select committee be appointed to confer with the Provincial Secretary as to the proposed concession, and after such conference to report their opinion as to what should be done, and that the said committee be composed of Messrs. Murray, Kingsmill, Foy, Mackelcan, and Ferguson.

*Saturday, December 7th.*

Convocation met.

Present—The Treasurer and Messrs. Bruce, Fraser, Irving, Kingsmill, Martin, Moss, Murray, Osler, Purdom, and Smith.

The minutes of last meeting were read and approved.

Mr. Moss presented the Report of the Legal Education Committee.

The report was received, read, ordered for immediate consideration, and adopted.

Mr. Osler presented the Report of the Reporting Committee on the subject of the new digest.

The Report was read, received, and ordered for immediate consideration.

Ordered, that the proposed digest shall not include the appendix to Robinson & Joseph's Digest.

Ordered, that the Committee be requested to present a further report on the points discussed at the next meeting, and that further consideration of the matter be deferred till then.

Mr. Martin's notice,as to Law School, was ordered to stand till next meeting.

The letter of Mr. C. Durand was received and read.

The letter of Mr. G. S. Holmested, as to water rates for ground used by Tennis Club, was read.

Ordered that the amount paid by the club for this and last year be refunded, but that they be notified that no further payment of water rates will be made by Convocation.

HALF YEARLY MEETING.

*Tuesday, December 31st.*

Convocation met.

Present—Sir Adam Wilson and Messrs. Ferguson, Foy, Hoskin, Irving, Kingsmill, McCarthy, McMichael, Martin, Moss, Murray, Osler, Robinson, Shepley, and Smith.

In the absence of the Treasurer, Mr. Irving was appointed chairman.

The minutes of last meeting were read and approved.

The Secretary read a letter from the Registrar of the University of Toronto, dated 19th September, 1889, to remind Convocation that the Society is entitled to appoint one representative to the Senate of the University, and that the term of the former representative had expired.

Ordered, that Mr. Moss, Q.C., be re-appointed a member of the Senate of the University of Toronto.

Mr. Hoskin, from the Discipline Committee, reported that they had considered the complaint of Mr. Keefer against a solicitor, and are of opinion that a *prima facie* case has not been shown, and that there is no necessity for any investigation.

The report was adopted.

Mr. Hoskin drew the attention of Convocation to the fact that Mr. George Macgregor Gardner had given notice of an application to the Legislature for an Act to authorize his admission as a barrister and solicitor.

Ordered, that Mr. Irving and Mr. Hoskin do appear at the proper time, and oppose such application.

Mr. Hoskin drew the attention of Convocation to a Certificate of 6th December, 1889, issued by the Registrar of the Chancery Division, H.C.J., relating to Mr. J. P. MacMillan.

Ordered, that the chairman of the Discipline Committee do ascertain if the order can be amended so as to comply with Rule 119 of the Society, and if amendable, that he ask that it be amended.

Mr. Shepley drew the attention of the Benchers to a memorandum of Convocation of 15th February, 1889, relating to the accommodation to be afforded for the robing of practitioners.

Mr. Osler presented the Report of the Reporting Committee.

The report was received, read, considered and adopted.

Mr. Martin moved pursuant to notice certain Rules set out hereafter.

The Rules were read a first time.

Ordered, that they be printed, distributed to Benchers, and come up for a second reading on the first Tuesday of Hilary Term, 1890.

Mr. Shepley gave the following notice:

That at the first meeting of Convocation in Hilary Term next, he will move that the Finance Committee be requested to report to Convocation upon the direction given that committee 15th February, 1889, to enquire and report whether further accommodation can be provided in Osgoode Hall for the clothing of practitioners in attendance at the hall, and to report what, if any, difficulties exist in the way of making such provision.

Convocation adjourned.

(Sd.) J. K. KERR, *Chairman Journals Committee.*

# Correspondence.

## *WHO MAY SOLEMNIZE MARRIAGE?*

*To the Editor of* THE CANADA LAW JOURNAL.

Since the appearance, by your kind indulgence, in the C.L.J. of the 1st February, of my letter on the Lawless-Chamberlain marriage, I have found an additional argument in favor of my contention that marriages by superannuated clergymen and ministers, of all denominations, are voidable. The interest aroused by my first letter justifies, I think, the production of this the second.

The Revised Statutes of Ontario, 1887, chap. 40, section 7 (descended from 10, 11 Victoria chap. 14, section 16), reads:—"7. Every clergyman, teacher, minister or other person authorized by law to baptise, marry, or perform the funeral service in Ontario, shall keep a registry showing the persons whom he has baptised, or married or have died *within his cure and belonging to his congregation.*" The italics are mine. Surely no uninterested, reasonable and law-abiding person will support the claims of these superannuated clerics,—*who are without cure or congregation,*—and admit that they have authority under the law to solemnize marriage.

We cannot understand why superannuated ministers should even claim, much less be allowed, the privilege of doing ministerial work, or—what is sweeter to them—the privilege of exacting fees for such work. Can a Barrister practise his profession if not on the Roll of the Law Society? Can a member of Parliament expect to retain the franking privilege when he has been elected to stay at home? Can a retired military or naval officer, on his own motion, put on his uniform, attend the parade of a military force, and insist on exacting obedience from those whose rank was inferior to that he retired from, and then charge for his day's service?

To put an end to the operations of these ordained Canadian Gretna Green blacksmiths, I would respectfully suggest that registers be kept for each church or congregation or religious community in Ontario; that duplicate registers be kept in the nearest Court House, Town Hall or Post Office or Bank, as thought safest and best; and that the person who keeps the original register, or has charge of the same, shall keep the duplicate copy duly and regularly posted.

R. J. W.

# Notes on Exchanges and Legal Scrap Book.

## *THE REJECTION OF HEARSAY EVIDENCE.*

It may well be doubted if the extremely artificial rules of the admissibility of testimony before judicial tribunals have been productive of anything but harm. Had they never existed, a vast amount of learned case law built on unstable foundations, and much of it very doubtful common sense, would never have come into existence, and a great deal of injustice arising out of the application of these rules would not have been inflicted upon litigants. Until recent years there were two great branches of technical restrictions to testimony in courts of law which had no counterpart in common life. They were the Incompetence of witnesses themselves upon the ground of interest, and the Incompetency of parts of witnesses' evidence on the ground that it was hearsay. Both were based upon the same foundations: the distrust of the capacity of jurymen to detect falsehood, and the fear of the perjury of witnesses. The incompetency of witnesses on the ground of interest is now a thing of the past, except perhaps in the case of a prisoner and the husband or wife of a prisoner in criminal trials. These are, however, sometimes placed upon other grounds. We propose to consider whether the present system of rejecting parts of witnesses' testimony on the ground of hearsay ought not also to go. If there were at the present moment no rejection of hearsay in our Courts, and it were suddenly proposed to adopt the present extraordinary mass of technicalities which form the rules of evidence on the subject, such a proposition would probably meet with derision on all hands.

It is desirable to mention here that it is often said hearsay testimony is rejected on the ground that it is irrelevant. This is not a correct view, we venture to think, although justified by authority, for hearsay is often most relevant; in fact, any hearsay connected with the issues must be relevant, and to say it is

irrelevant is merely a disguised way of saying that hearsay is rejected because it is not considered sufficiently trustworthy or *competent* to be placed before the jury, in exactly the same way that formerly witnesses who had an interest in the verdict were not considered sufficiently trustworthy or competent for their evidence to be taken into consideration.

Sir Henry Maine, in his essay on the "Theory of Evidence," points out that the great bulk of the present rules of evidence "were gradually developed as exceptions to rules of the widest application which prevented large classes of testimony from being submitted to the jury. The chief of these were founded on general propositions of which the approximation to truth was but remote. Thus the assumptions were made that the statements of litigants as to the matter in dispute were not to be believed, that witnesses interested in the subject-matter of the suit were not credible, and that no trustworthy inference can be drawn from assertions which a man makes merely on the information of other men." All these objections rested upon the insufficient appreciation of the capacity of jurymen to discriminate between that testimony which was worthy of credit and that which was not; although by a very contradictory line of thought the jury has always been, and is to the present day, held to be pre-eminently the tribunal for determining the facts in cases of fraud or direct conflict of testimony.

The alleged reasons for the rejection of hearsay and of witnesses on the ground of interest being of the same general character, though possibly differing in degree, we will shortly remind our readers of the history of the gradual admission of interested persons as witnesses, and the objections formerly urged to these changes in the law. This will throw much light upon our present subject, and will, we think, form a strong argument in support of our contention that the rejection of hearsay is a mistake.

Prior to 1833 every person having an interest, however minute, in the result of the proceedings was absolutely barred from being a witness. The law had so little confidence in the capacity of jurymen to detect fraud, and so little faith in the integrity of witnesses, that lest any untruth should be presented to the jury, a law of evidence had gradually grown up the net result of which was that in the great majority of cases every one who knew most about a matter in dispute was rejected as incompetent. Yet this extraordinary state of affairs was not merely tolerated, but justified by many able lawyers; and the public, to some extent guided by and following the lawyers, acquiesced in this, to us, viewing it by the light of subsequent events, most iniquitous state of the law. The fearful havoc played with the fortunes of the litigants when in court can easily be imagined, and also the large proportion of cases where the parties had to submit in silence to wrongs because they knew or were advised they would have no evidence to produce which the court would hear.

In 1833 the first inroad upon the exclusion of evidence on the ground of interest was made by 3 & 4 Will. IV, c. 42, sec. 26, which enacted that "in order to render the rejection of witnesses on the ground of interest less frequent, if any witness should be objected to as incompetent on the ground that the verdict or judgment in the action would be admissible in evidence for or against him, he

should nevertheless be examined, but in that case the verdict or judgment should not be admissible for or against him or any one claiming under him." A much larger step was taken ten years later, in 1843, by Lord Denman's Act, by which all persons (with a few exceptions) were made competent witnesses, excluding only the parties to the suit and the husband or wife of the party.

But the lawyers and the public now began fully to awake to the mistaken policy of rejecting relevant testimony on the ground of interest, and in 1851 all parties to a suit and other interested persons became competent and compellable to give evidence, with the exception of husbands and wives. In 1853 husbands and wives of parties and interested persons became competent witnesses. The consequence of these reforms, for we may now well call them reforms, as no one would suggest a return to the old system, may be shortly summarized as follows:—For centuries a mass of legal lore had been accumulating, of which the learned deductions and discriminations had misled generations of lawyers; to look into the law was to lose all clear vision of the real necessities of the case, and to become confounded with a huge structure of ingenious conclusions and distinctions, based upon dubious assumptions. In fact, after this vast amount of labor and this fearful havoc among litigants for centuries, we have come to the conclusion that the natural instinct of the juryman was right, and that the method he adopts in his daily life, and which he would adopt in court if he were permitted to follow his own inclination, of hearing all the persons connected with the dispute, is the right one.

The juryman is not afraid of being deceived if left to his own methods; he is quite aware of the motives to dishonesty with interested parties, and is watchful and suspicious of fraud where there is interest, but by hearing them, even if they distort the evidence or swear falsely, he feels he knows more and is better able to give a true verdict. Shall we not carry our faith in the juryman's discernment a little further, and trust him with all the witness has to say, including hearsay, so long as he keeps to the point, and thus bring our law of evidence very close to his own unconscious rules? The juryman gives credit to his customers, invests his money, and generally carries on all the transactions of his life upon statements and representations often entirely hearsay, and this hearsay comes from persons who may have personal prejudices or a strong interest in misrepresentation. The juryman does not refuse to listen to these statements because "hearsay is no evidence," but is only too glad to receive information from any source, and generally succeeds in estimating it at about its right value. Thus, in a court of law, we have hearsay withheld from the juryman lest he might be deceived, when he spends a large part of his daily efforts in assessing it at its true value, and is thus peculiarly able to draw correct inferences from such testimony.

Apart from these general considerations and the argument they make for the admission of hearsay, we propose to consider shortly in detail the objections which are urged against this description of testimony, and to point out that many of them are more imaginary than real. We do not wish to deny that there is much weight in some of the objections, just as there was in the objections to

witnesses on the ground of interest, our contention being that on the whole more harm than good is done by rejecting hearsay.

We cannot state the case against ourselves more tersely or forcibly than by quoting a paragraph from Pitt Taylor's Evidence, 8th edition, vol. i. p. 509, which incorporates the expressions of the American Chief-Justice Marshall, in the case of *Mina Queen and Child* v. *Hepburn*, 7 Cranch's Reports, Supreme Court, U.S.:—

"That this species of evidence is not given upon oath, that it cannot be tested by cross-examination, that is supposes some better testimony, which might be adduced in the particular case, are not the sole grounds for its exclusion. Its tendency to protract legal investigations to an embarrassing and dangerous length, its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced with impunity under its cover, combine to support the rule that hearsay is inadmissible."

To take these objections in their order:—

It is quite true that hearsay testimony is not *on oath*, in the sense that the witness does not swear to the truth of the statements made to him, but only to truth of his report of the statements. But it is this true report which the jury want, just the same as they want the true report of what the witness himself said, although at the time he was speaking he may not have spoken truly. If the statements be important, and the person who made them be called at another stage of the trial, the witness's account will corroborate or contradict that person's testimony, and if he cannot be called, very important points in the case may be excluded. Moreover, this objection cannot be of much practical value, as under the curious exception of "admissions" to the general rule excluding hearsay, these hearsay statements are constantly accepted, and are of the greatest value in checking the evidence of the opposing party and also of the witness himself.

Whether or no a true report is given of statements made to the witness is probably as easy a matter to *cross-examine* to as the statements of the witness himself, or his account of his doings. Certainly the witness himself will be more easily detected in falsehood if he is to give a continuous account of his conversations and doings, than if he be able to shelter himself by only disclosing a part.

It is only sometimes true that hearsay "*supposes some better evidence which might be adduced in the particular case.*" Frequently, through death, ill-health, or absence at a distance, or other cause, no other evidence of a particular fact is obtainable, and then great injustice may be done by its exclusion. But much turns on the word "better."

Possibly *A*'s own account in the witness-box of what he said or did is, if he be a reliable witness, of more value than *B*'s report of *A*'s account to him. But just as "admissions," that is, hearsay evidence of statements by the parties to the suit, are very valuable checks upon the evidence of the parties, so hearsay evidence from *B* of what *A* said may be of great value, especially if much turn upon *A*'s evidence. Moreover, *B*'s memory of what *A* said to him is just as likely to be accurate as his memory of what he himself said, and if *A* be absent through death, ill-health, or distance, or other cause, then *B*'s evidence of *A*'s

statements is surely most material matter to be taken into consideration by the jury with the other circumstances of the case. It is true this may be obtained in cross-examination, but if so, is there sufficient reason to reject it in examination-in-chief? To do so makes *A*'s statements evidence at the option of one party and not the other.

We do not believe that the admission of hearsay evidence would in general tend to *protract judicial investigations;* we believe that in many cases it would shorten them. In some cases where other evidence is not forthcoming, or where the hearsay was particularly important, it might prolong a trial, but under these circumstances it cannot be contended that because important evidence takes time it should be rejected. The same objection operated with far more weight against the admission of interested parties as witnesses. In most cases we believe that the completeness of the witnesses' testimony and the greater speed with which it could be given without constant interruptions, would enable counsel to rapidly pick out the real points in dispute, instead of having to fish about for them in lengthy cross-examinations.

As to the "*intrinsic weakness of hearsay and its incompetency to satisfy the mind as to the existence of the fact,*" we entirely agree with this objection to a large amount of hearsay which might be offered in evidence. But the answer is very simple. When hearsay is offered which is "*incompetent to satisfy the mind of the existence of a fact*" it is irrelevant, and like other irrelevant evidence it would be excluded at once by the judge. We are advocating the admission of relevant hearsay, not of irrelevant hearsay, any more than of any other irrelevant matter. Only when the hearsay was likely to throw some light on the issues would it be admitted. Our contention is that much hearsay which would greatly assist the decision of issues of fact is rejected under the existing rules of evidence, and that such relevant hearsay ought not to be rejected.

Lastly, "*of the frauds which may be practiced with impunity under its cover,*" we do not believe in them. That false hearsay evidence should be successful is not more likely than that false evidence of any other kind should mislead the jury. But we do believe that fraud is sometimes covered by the rejection of hearsay. We have faith in the discernment of the jurymen when they hear all; they are used in their ordinary transactions to assess the value of hearsay, and we believe that the jury are more likely to arrive at a correct decision when everything is before them than when a part is kept back. An untruthful witness is soon detected, especially if he be made to tell his whole story.

The practice of the old Ecclesiastical Courts and of the Court of Chancery was very lax compared with the rigid rule of exclusion in the Common Law Courts, and notwithstanding the great aversion to hearsay in our legal system, there is still the remarkable exception of interlocutory applications, where hearsay evidence is allowed to be read. This is very inconsistent, for if hearsay is dangerous and misleading, as is commonly supposed, why admit it in interlocutory matters any more than at the trial? It is sometimes given as a reason that interlocutory applications come before a judge alone, but if this is so why is not hearsay admissible testimony at the trial by a judge alone? And if so, are

not twelve jurymen generally held to be collectively as able to detect falsehood and fraud in a witness as a judge?

We have always for simplicity spoken of the issues being decided by a jury, but our remarks apply equally to a trial before a judge alone; indeed, with even more force, if we accept the generally received view, as illustrated by the acceptance of hearsay in interlocutory applications, that the judge could reject those parts of the evidence which are not worthy of credence with more facility than a jury, a view in which we must, however, confess that we do not concur.

Sir Henry Maine's essay, from which we have already quoted, dwells principally upon the Indian Evidence Act of Sir James Stephen, and the historical influence of English rules of evidence upon Indian law, and does not direct itself, except incidentally, to the consideration of how far these rules are expedient in themselves. But he seems to regard these rules of more value as a guide to the mind in assessing testimony when given than in rejecting it. Thus he writes: "An Equity judge, an Admiralty judge, a Common Law judge trying an election petition, an historian, may employ the English rules of evidence, particularly when stated affirmatively, to steady and sober his judgment, but he cannot give general directions to his mind without running much risk of entangling or enfeebling it, and under the existing conditions of thought he cannot really prevent from influencing his decision any evidence which has been actually submitted to him, provided that he believes it." Again he writes: "The system of technical rules fails whenever the arbiter of facts—the person who has to draw inferences from or about them—has special qualifications for deciding on them, supplied to him by experience, study, or the peculiarities of his own character, which are of more value to him than would be any general direction from book or person. For this reason a policeman guiding himself by the strict rules of evidence would be chargeable with incapacity and a general would be guilty of a military crime." We think that the juryman has in his daily experience qualifications for the assessment of testimony which are of more value than "any general direction from book or person." Just as the policeman maytrack a thief by taking advantage of hearsay, when he would not do so if he followed the rules of judicial inquiries, so we think the jury would often scent the truth and real motives of the parties to a proceeding from testimony which is now not allowed to be submitted to them.

It is a noteworthy fact that nearly all the cases which are quoted as authorities for the rejection of hearsay, show upon the face of them that the whole question in dispute could not have been satisfactorily submitted to the jury without taking into consideration the very evidence which it is decided the law does not admit. In an inquiry outside a court of law the evidence rejected would have been considered most material and relevant, and in many cases the jury might have come to a different decision had the whole of the evidence been before them. Can it be seriously suggested in these cases, that the jury would have been deceived by hearsay evidence of no value, more than by other false testimony which may have been admitted? The indirectness of testimony, the interest of witnesses, the facility to perjure, are all circumstances which arouse the suspicion and watchfulness of the jury to the utmost.

The two cases quoted in Sir James Stephen's "Digest of the Law of Evidence," as authorities for the proposition that hearsay is in general inadmissible testimony, are: *Sturla* v. *Freccia*, L. R. 5 App. Cas. 623, and *Stobart* v. *Dryden* 1 M. & W. 615. *Sturla* v. *Freccia* was a suit to ascertain the next-of-kin of an intestate; the principal question was as to the identity of Mangini, the father of the intestate, with a person of that name who was born at Quarto, near Geneva. Mangini had applied to his Government, in 1789, to be appointed diplomatic agent in England. His Government handed his application over to a committee for report as to the propriety of the appointment. In the course of the report which was rendered he was described as "a native of Quarto, of about forty-five years of age," and it was also stated that the facts had been ascertained from persons well acquainted with him. The House of Lords held that this report was inadmissible on the ground that it was hearsay evidence, and not within any of the recognized exceptions. In this case there was strong suspicion that the report had been tampered with, and it is very likely that a judge or a jury would not have been satisfied to accept its statements; but to decide that this document was not to be considered by the tribunal at all, never mind how unimpeachable it might have been, was a decision as entirely contrary to one's ideas of the common-sense way of conducting an inquiry into the birthplace and identity of Mangini, as it might have conduced to a wrong decision on the facts if the document had been irreproachable. We think that a perusal of *Stobart* v. *Dryden* will also lead to the conclusion that the evidence rejected as hearsay ought to have been submitted to the jury.

It is frequently contended that a legal inquiry must, in its nature, be of a different character to an inquiry in common life, but we fail to see any essential difference as regards the kind of testimony which should be admitted, or only hearsay should be suppressed before a court of justice when it is often valuable testimony in the affairs of every-day life and a large part of the business of the world is carried on upon hearsay statements. In a court of justice there are greater powers for the discovery of the whole facts by the compulsory examination and cross-examination of witnesses, and the production of documents, hence the greater facility to detect fraud. If, therefore, hearsay is accepted outside a court of law as valuable testimony it certainly ought to be accepted inside.

As no one would now propose a return to the old system of excluding witnesses as incompetent, on the ground of interest, so we contend that if hearsay were once admitted no one would suggest a return to the present cumbrous rules by which it is rejected as incompetent. The exclusion of witnesses and the exclusion of hearsay have both arisen from the same mistrust of the discernment of juries. The exclusion of witnesses has been shown to be a mistake by experience, though long strenuously opposed by great authorities; we believe that the admission of hearsay would also be justified by experience.

The rejection of hearsay proceeds upon principles and exceptions which are extremely difficult of apprehension and which have no counterpart in common life. The rejection of hearsay often leads to the suppression of most important and valuable testimony. The very cases which are the authorities for the rejection are examples of the injustice of this practice.

The attention of jurymen is strained and often defeated by the discontinuity in the proof of a witness; the witness himself is flurried by constant interruptions in the thread of his evidence; full reports of conversations often become impossible; a fraudulent witness is less easily detected in his evasions or perjury because his narrative is so artifically told, and thereby the rejection of hearsay often becomes the cover of fraud.—*Law Quarterly Review.*

## DIARY FOR APRIL.

1. Tues....County Court Non-Jury Sittings, except in York.
4. Fri.....Good Friday.
5. Sat.....Canada discovered 1499.
6. Sun.....*Easter Sunday.*
7. Mon.....County Court Sittings for motions begin. Surrogate Court Sittings.
8. Tues....County Court Non-Jury Sittings, except in York.
12. Sat.....County Court Sittings for Motions end.
13. Sun.....*First Sunday after Easter.*
14. Mon.....County Court Non-Jury Sittings in York.
15. Tues....Princess Beatrice born 1857.
16. Fri.....President Lincoln assassinated 1865.
20. Sun.....First Newspaper in America 1704.
23. Wed.....*Second Sunday after Easter.*
25. Fri.....St. George's Day.
27. Sun.....St. Mark.
27. Sun.....*Third Sunday after Easter.*

# Early Notes of Canadian Cases.

## *SUPREME COURT OF JUDICATURE FOR ONTARIO.*

## HIGH COURT OF JUSTICE.

### *Queen's Bench Division.*

Div'l Ct.] [March 8.

HAMILTON *v.* GROESBECK.

*Master and servant—Injury to workman by unguarded saw—Action for negligence—"Moving," meaning of, in s. 15 of Factories' Act, R.S.O., c. 208—"Defect," meaning of, in s. 3 of Workmen's Compensation for Injuries Act, R.S.O., c. 141.*

By s. 15 of the Factories' Act, R.S.O., c. 208, it is provided that all belting, shafting, gearing, fly-wheels, drums, and other moving parts of the machinery, shall be guarded.

*Held*, that the word "moving" is used in its transitive sense, and signifies "propelling," and that no duty is imposed by the section upon owners of saw mills to guard the saws which are propelled by the moving parts of the machinery.

By s. 3 of the Workmen's Compensation for Injuries Act, R S.O., c. 141, where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if he had not been engaged in his work.

*Held*, that the want of a guard to a saw was not a defect within the meaning of this provision

Such a defect must be an inherent defect, a deficiency in something essential to the proper use of the machine.

And where a workman in a saw mill was injured by being thrown against an unguarded saw, and it was shown that a guard would have prevented the injury;

*Held*, that an action for negligence was not maintainable against the owners at common law, nor by virtue of either of the above mentioned statutes.

*Aylesworth* for the plaintiff.

*J. S. Fraser* for defendants.

### *Common Pleas Division.*

MACMAHON, J.]

BROWN *v.* DAVY.

*Donatio mortis causa—Gift inter vivos—Evidence of—Board, nursing, and attendance on parent—Right to recover for.*

J. W., who was inflicted with cancer on the face and neck, in September went to his married daughter's at the city of K., and was tended and nursed by her and another daughter. In November he was joined by his wife, who remained with him until his death, which took place in January following. Nearly three months after he had been at defendant's, another daughter asked him to give defendant the price of a piano, when he said he would not do that, but, pointing to a box in which he kept some money and promissory notes, and which he kept locked, retaining the key, said it was defendant's, to do what she liked with; but it appeared he had reference merely to satisfying defendant for her care and attention, saying there was sufficient for all. No change was made in the possession of the box and its contents, the same continuing in J. W. up to the time of his death, taking what money he required for his own use and for presents to his wife and daughters, the defendant at his request sometimes taking out money for him for such purposes. The notes were never alluded to except in the way indicated.

*Held*, that neither a good *donatio mortis causa* nor gift *inter vivos* to defendant was shewn; but that J. W.'s intention was that defendant should be paid for her services; and

she was accordingly allowed for the board and attendance of J. W., as well as for the board of his wife.

*Macdonald*, Q.C., and *Machar* for the plaintiff.

*McIntyre* for the defendant.

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Div'l Ct.] [Dec. 21, 1889.

HAMILTON *v.* MASSIE.

*Central prison—Rules creating indictable offence, authority to make—Section of Act imposing penalty, indictment under—Handcuffing, when justifiable.*

Under the authority conferred by s. 6 of R.S.O., c. 217 (1877), on the inspector of prisons, to "make rules and regulations for the management, discipline and police of the central prison, and for fixing and prescribing the duties and conduct of the warden and every other officer or servant employed therein," the following rule was made, providing, amongst other things (Rule 201), "that any officer or employee who should knowingly bring, or attempt to bring, in to any prisoner any tobacco, should be at once dismissed and criminally prosecuted"; and (Rule 219) that employees of contractors must strictly conform to all rules and regulations laid down for the guidance of guards or employees of the prison, and any infractions of such rules and regulations by such employees will be promptly dealt with." By s. 27 of the Act, any person giving any tobacco to any convict (except under the rules of the institution), or conveying the same to any convict, shall forfeit and pay the sum of $40 to the Warden, to be by him recovered in any Court of competent jurisdiction.

The plaintiff, a workman in the central prison, in the employment of B., a contractor therein, was detected conveying tobacco to a convict, whereupon M., the Warden, directed McG., a constable, to arrest him, which he did, and though under no apprehension of plaintiff making any attempt to escape, handcuffed him, and led him through the public streets of Toronto to the police station. On the charge preferred the plaintiff was indicted.

*Held*, that the plaintiff was subject to an indictment, and therefore the arrest was legal.

Per GALT, C.J., and ROSE, J.—Under s. 6, authority was conferred to make the rules, and for disobedience thereof the plaintiff was subject to indictment, the remedy not being limited to that prescribed by s. 27.

But, per ROSE, J., in view of the opinion of MACMAHON, J., as to the effect of s. 27, that question was not of much importance, the result being the same whether indicted under the rule or statute.

Per MACMAHON, J.—The power conferred by s. 6, is limited to the objects therein expressed, and does not authorize the making of a rule to conflict with s. 27, or which would cause an offence to be created indictable at common law, but that the plaintiff was, by virtue of s. 25 of R.S.C., c. 173, subject to indictment under s. 27, the remedy thereunder not being limited to the recovery of the penalty.

*Held*, however, that under the circumstances the handcuffing was not justifiable, and the defendant, McG., was liable in trespass therefor; but no liability therefor attached to M., as the evidence failed to shew that he was any party to it.

*McGillvray* for the plaintiff.

*Bigelow* for the defendants.

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Div'l Ct.] [Dec. 21, 1889.

WATT *v.* CLARK.

*Malicious prosecution—Termination of Criminal proceedings—Evidence of—Right of defendant to prove plaintiff guilty of the criminal charge laid.*

In an action for malicious prosecution, the claim was that defendant did, on the 8th of December, charge plaintiff with having on two or three occasions committed wilful perjury. The magistrate reserved his decision at the time, but on defendant preferring further charges of a similar character, the magistrate upon these and the former charges committed the plaintiff. When the matter came before the grand jury at the assizes, the prosecutor caused four charges to be laid against plaintiff, which included the charges laid on the 8th December, and which the grand jury ignored.

*Held*, that it sufficiently appeared that there was a termination of the prosecution in the plaintiff's favour.

The learned Judge ruled that the defendant could not produce evidence to contradict plaintiff on his statement as to the perjury, or to establish the fact of the perjury having been committed.

*Held*, that the ruling without qualification was too broad; for though a defendant in an

action for malicious prosecution is not bound to prove the plaintiff's guilt as charged in the criminal proceedings, still he is at liberty to do so if it be necessary to establish reasonable and probable cause; but as it appeared that notwithstanding the ruling the defendant was not precluded from adducing such evidence, the ruling was of no importance.

*Pegley* for plaintiff.

The defendant in person.

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FERGUSON, J.]

TRUSTEES OF SCHOOL SECTION 24 OF TOWNSHIP OF BURFORD *v.* TOWNSHIP OF BURFORD AND TRUSTEES OF SCHOOL SECTION 23 OF BURFORD.

*Public schools—Formation of school sections—Map of—Evidence of—Land belonging to one school section assessed to another section—Rolls finally passed—Claim for moneys paid out of municipal loan fund.*

As evidence of the formation of school sections in a township by the municipal council thereof, a rough sketch or map designated "school section map, township of B.," but without signature, seal or date, was produced from the proper custody, and had the appearance of being very old, and there was no other map to be found. That in 1888, before this action was commenced, which was in 1889, but after the commencement of the agitation which gave rise thereto, the municipal council passed a by-law "to make alterations in school section map," and authorized the clerk to correct said school section map, etc.; and that when any difficulty arose as to boundaries of school sections recourse was had, at least in some instances, to this map.

*Held*, that this map must be assumed to be drawn in pursuance of the statute, and therefore afforded evidence of the original division of the township into school sections by the township council.

School section 24 complained that for the years 1883 to 1887 certain lots which formed part of that section had not been assessed therefor, but had been assessed as part of school section 23, and the taxes therein levied and paid over to section 23, and that section 24 was entitled to be paid these taxes either by the township or by section 23. In each of these years, so far as regards these matters, the rolls were finally passed by the Court of Revision and certified by the clerk, etc.

*Held*, that school section 24 could not now maintain such claim, for they were bound by sec. 57 of R.S.O., c. 180 (1877), under which the rolls as finally passed by the Court of Revision, etc., were valid and binding on "all parties concerned," school section 24 coming within their designation, but apparently they were not entitled to the notice provided for by sec. 41.

School section 24 also claimed that by reason of certain lots claimed to belong to that section being assessed as part of school section 23, section 24 did not get its proper share of the interest of the money paid the township to equalize townships that had not borrowed from the municipal loan fund, which was distributed according to the population of the school section. The contention of section 24 being to a great extent erroneous, and the amount which they might be entitled to infinitesimally small, and the amount having been distributed in good faith, the Court refused to interfere.

*Bowlby* for the plaintiffs.

*Harley* for the Township of Burford.

*Wilkes* for school section 23.

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Div'l Ct.] [Dec. 21, 1889.

MASON *v.* NORFOLK RY. CO.

*Agreement for sale of land—Obstruction to land by railway company—Rights of vendor and purchaser as to damages.*

The plaintiff was in possession of certain land under an oral agreement of purchase at $450, payable in bricks, deliverable as demanded, of which $100 worth had been demanded and delivered. The defendants, without making any compensation therefor, built their railway in front of the land so as to interfere with the plaintiff's right of access, whereupon this action was brought, and damages recovered by the plaintiff, he being treated as entitled to the whole estate in the land, and the injury permanently reducing the value of the land.

*Held*, that the company were trespassers, and could not justify the acts complained of under the statute; that the trespass was a continuing one, and fresh damages accrued, and a new right of action arose every day; that substantial damages were recoverable for the disturbance of the possession, but, in a first action, only nominal damages for the injury to the reversion;

though, if the obstruction was continued thereafter, vindictive damages might be recovered to compel the removal of same; that if the defendants desired to prevent the bringing of fresh actions the matter should be put in train for assessment of damages.

*Held*, therefore, that the damages here were not properly assessed; and a new trial was directed.

*Semble*, that the damages for injury to the reversion belong to the vendor, and leave was given to add him as a party plaintiff.

*Robb* for the plaintiff.

*E. D. Armour* for the defendants.

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Div'l Ct.] [Dec. 21, 1889.

FREEMAN *v.* FREEMAN.

*Will—Validity of—Mental and physical capacity of testator—Donatio mortis causa, sufficiency of.*

F., who owned a valuable farm in this Province, on which he and his family lived, raised $705 by mortgage on it, and went to the United States to obtain medical advice, as he was suffering from headache and tumour in the throat, which incapacitated him from work; and resided there with a married daughter till his death. In October a son, N., who had been living in the United States for a number of years, came to see him, and went with him to an attorney to have his will drawn, whereby his property was to be left to defendant and N., but on the attorney's ascertaining the existence of his wife and other children, persuaded him not to draw it up then. On the 8th November they again went to the attorney's, where a deed was executed by F. to N., for the express consideration of $705 and to assume the mortgage, but no money was paid, and it apparently was an arrangement to enable the son to sell the property for F., but as F.'s wife, who was named as a party, refused to execute, the matter fell through. Nothing was said at this time about the will. In December, while F. was very ill in bed, the attorney, at the request of the defendant's husband, attended to draw F.'s will, which the husband said was to be in the defendant's favor. F. was asked by the attorney if he wished his will drawn, when he nodded his head, and a will was then drawn up as the husband had instructed, which was read over to F. when, as the attorney said, F. informed him he wished N. included in it, and a new will was drawn up, devising his whole property to defendant and N., and read over to F., who, the attorney stated, said it was all right. He was then lifted up in a sitting position, but on his appearing to write with difficulty, he was asked by the attorney whether he wanted assistance, when he nodded his head, whereupon the attorney took the top of the pen and guided his hand, and the signature was written in that way. The attorney and the doctor in attendance both said they considered he had sufficient mental capacity to make a will. He was, however, very weak, both physically and mentally, and it was questionable whether he understood the purport of the will, namely, that he was devising away all his property; his understanding, if he had any, was that he was merely disposing of a sum of $500 on deposit in a bank. On the day previous, F. had requested defendant to get him the deposit receipt, when he gave it to her, telling her he wanted her to take care of him, and after payment of his debts and funeral expenses, to divide the balance between defendant and N., and that he was going to make a will. The receipt was changed to her name in the bank, and the amount deposited to her credit, which she subsequently used.

*Held*, that under the circumstances, the will could not be supported, but that there was a good *donatio mortis causa* of the $500.

*Moss*, Q.C., and *White* for the defendant.

*M. Wilson* for the plaintiff.

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Div'l Ct.] [March 8.

BARBER *et al.* v. MCKAY *et al.*

*Registration of subsequent deed — Priority — Proof of valuable consideration.*

Registration of subsequent deed will not give priority over another deed prior in point of time from the same grantor, unless a valuable consideration is proved.

*Bain*, Q.C., for the appeal.

*W. T. Allan* contra.

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ROBERTSON, J.] [Feb. 8.

RE BUSH.

*Executor and trustee—Removal of— Trustee Act, 1850—Practice.*

Where there is anything to be done under a will appointing an executor, which comes within the province of the executorship, there is no

authority to remove him from office as executor and to appoint another in his place.

*In re Moore, McAlpine* v. *Moore*, 21 Chy.D., 778, distinguished.

A petition to remove a trustee should be entitled "In the matter of the Trustee Act of 1850."

*J. M. Clark* for the petitioner.

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BOYD, C.] [Feb. 20.

RE CENTRAL BANK AND HOGG.

*Winding-up proceedings — Infant stockholder repudiating liability as contributory—Laches —Acquiescence.*

H. signed the petitioner's (his daughter's) name to a stock subscription book of a bank, paid the calls, received the dividend cheques, which were endorsed by the daughter at her father's request. The bank was put into liquidation by winding-up proceedings, and the order for call against contributories was made on 31st October, 1888. The petitioner came of age January 31st, 1889, and took proceedings to have her name removed from the list October 30th, 1889.

*Held*, that there was no authority to justify fixing her with liability, and she was discharged as a con ributory.

*Hoyles* for the petitioner.

*Hilton* contra.

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## *Chancery Division.*

BOYD, C.] [March 14.

SIBBALD *v.* GRAND TRUNK RY. CO.

*Practice—Death between verdict and judgment —New trial—Jurisdiction.*

Where, since verdict and before judgment in action for damages against a railway company, one of the parties to whom damages were awarded died, and the verdict was now moved against, on the ground of excessive damages,

*Held*, that the Court had power to order a new trial.

If such damages are given as are likely to work injustice in case death intervenes between verdict and judgment, the Court has the power to interfere by granting a new trial.

*Shepley* and *Burns* for the plaintiff.

*B. B. Osler*, Q.C., and *Nesbitt* for the defendants.

Div'l Ct.] [March 8.

SHAW *et al v.* MCCREARY *et al.*

*Married woman—Separate estate—Liability of wife for husband keeping a wild animal on wife's property—R.S.O., c. 132, s. 14.*

Plaintiff was attacked, on the public street, and injured by a bear, which had escaped from the premises of the defendants (husband and wife), where they resided. The husband had brought the bear home, and confined him in a yard, without objection on the part of the wife. The premises were the separate property of the wife.

In an action against the defendants, in which a verdict was rendered against the husband alone, the trial Judge having directed the jury that the wife was acting under the dominion of her husband, and consequently was not liable, and dismissed the action as against her,

*Held* (reversing Galt, C.J., C.P.), that a married woman may be liable for torts committed by her, unless acting under the coercion of her husband, which was not proved here, and that R.S.O., c. 132, ss. 3 and 14, gives her all the rights of a *feme sole* in respect of her separate property against all the world, including her husband, and that if she wished to escape the liability which attaches to the keeper of wild animals, her duty was either to have the bear destroyed or to have it sent away, and a new trial was ordered as to the wife, unless a consent be given to allow the verdict to include both defendants.

*R. L. Fraser* for the plaintiffs.

*W. N. Miller*, Q.C., for the defendant, Mary McCreary.

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## *Practice.*

ROBERTSON, J.] [Jan. 31.

IN RE SOLICITORS.

*Solicitor and client—Costs of unnecessary proceedings—Disallowance of—Proceeding by writ of summons where summary application sufficient—Administration order.*

The solicitors instituted an action on behalf of a young woman, one of two residuary legatees and devisees under a will, against the executors and trustees, for an account. Upon the pleadings, charges of negligence in getting in rents, etc., and of refusal to account, were made

against the defendants, and it was stated that a release was obtained from the other residuary legatee in the absence of his solicitor, immediately after his coming of age, by taking advantage of his necessities.

At the trial, judgment was given in the usual terms of an administration order, reserving further directions and costs, and by the judgment on further directions, the plaintiff was given the general costs of the action against the defendants, saving, however, costs incurred by the plaintiff proceeding by writ of summons instead of by summary application for an administration order, and the plaintiff was ordered to pay the extra costs occasioned to the defendants by such proceeding.

*Held*, that no question was raised by the plaintiff which could not have been disposed of in the Master's office; and, under the circumstances, in the absence of any evidence to shew that the client had, with knowledge of the practice of the Court and the risk she ran, expressly instructed the solicitors to proceed in the way they did, with knowledge of the practice of the Court and the risk she ran, they could not tax against her any more costs than they would have been entitled to had they proceeded by notice of motion instead of by writ of summons.

*Scanlan* v. *McDonough*, 10 C.P., 104, specially referred to.

*Bain*, Q.C., for the solicitors.

*William Davidson* for the client.

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FALCONBRIDGE, J.] [Feb. 24.

IN RE SOLICITOR.

*Costs—Taxation between solicitor and client—Retaining fees—Special circumstances.*

The solicitor acted on behalf of a client in defending him upon a charge of arson and in bringing actions against two insurance companies to recover for a loss by fire. At the time the solicitor's services were required the client had no money, and no prospect of getting any, and in consequence of the risk the solicitor ran of getting nothing and losing a considerable sum for disbursements, the client offered him a retaining fee, to be paid out of the insurance moneys when recovered, and it was agreed between them that such fee should be $150 for the two actions, the amount claimed in the actions being about $1,250.

*Held*, upon appeal by the assignee of the client for the benefit of creditors from the taxation of the solicitor's costs, that under the exceptional circumstances of the case the amount of the retaining fee was not unreasonable.

*D. Armour* for assignee.

*J. B. Clarke* for solicitor.

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Q.B. Div'l Ct.] [March 8.

IN RE SOLICITOR.

*Solicitor and client—Taxation of Costs—Place of reference—Agency work done in Toronto—R.S.O., c. 147, s. 32.*

*Held*, affirming the decision of STREET, J., 13 P.R., 276, that a reference for taxation of bills of costs between solicitor and client may properly be directed to one of the taxing officers at Toronto, even where the business charged for in the bills, with the exception of agency work done in Toronto, was all done in an outer county.

The words of s. 32 of the Solicitors' Act, R.S.O., c. 147, "any of the business charged for in the bill," include business performed at Toronto by the agent of the principal solicitor.

ARMOUR, C.J., inclined to the contrary opinion, but deferred to that of the other members of the court.

*C. J. Holman* for solicitor.

*Shepley* contra.

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Q. B. Div'l Ct.] [March 8.

VILLAGE OF FORT ERIE *v.* FORT ERIE FERRY R. W. CO.

*Issues—Separate trials of questions arising in action—Rule 655—R.S.O., c. 44, s. 52, s-s. 12.*

An action brought to enforce the performance by the defendants of a certain by-law passed by the plaintiffs, and also the performance of a duty imposed by the Railway Act, came on for trial without a jury, and the trial Judge decided to try the first branch of the case separately, and after hearing evidence upon it, held that the by-law was not legally binding upon the defendants, and dismissed the action without hearing evidence on the second branch.

*Held*, that Rule 655 must be read in conjunction with s. 52, s-s. 12, of the Judicature Act, R.S.O., c. 44; and this case was not one calling for an application of the Rule by directing separate trials of the questions raised.

A new trial was therefore ordered.

*Osler*, Q.C., and *German* for plaintiffs.

*A. G. Hill* and *Aylesworth* for defendants.

Q. B. Div'l Ct.] [March 8.

ELLIOT *v.* MCCUAIG.

*Courts — Divisional Court — Jurisdiction in County Court action—Order for arrest.*

A Divisional Court has power, under Rule 1051, to set aside or vary an order for arrest made by a County Court Judge in a County Court action.

*Pepler* for the plaintiff.

*Plaxton* for the defendant.

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Mr. DALTON.] [March 8.

BUILDING AND LOAN ASSOCIATION *v.* BETZNER.

*Chattel mortgage—Affidavit of bona fides sworn before execution.*

This was an interpleader application made by the Sheriff of Waterloo to the Master in Chambers, on the 7th March, 1890.

THE MASTER IN CHAMBERS.—In the interpleader arising out of this case it has been agreed by the parties that, instead of making an interpleader order sending this case for trial, I should consider the matter — being indeed simply a question of law — and give a final order disposing of the rights.

The claimant is a lady who advanced $1,000 on the security of a chattel mortgage, and the question is now between this mortgagee and a judgment creditor who claims to seize for his debt upon a *fi. fa.* the goods covered by the mortgage. The sheriff has interpleaded. The case, as respects the mortgagee, appears to be strictly honest and correct. The money was advanced on the 7th of the month on the mortgage security agreed to be given. It happened that the parties to the mortgage resided in different places, so the business was conducted through agents. And so by misfortune it turned out that the mortgagee swore to the statutory affidavit necessarily to be made by the mortgagee, on the 13th of the month, whereas the mortgage was not executed by the mortgagor until the following day—the 14th.

I am bound by authority exactly in point. On the 15th October, 1885, the Court of Appeal held in a case of *Reid* v. *Gowans*, which came from the County Court of Hastings, that a chattel mortgage made on the 13th, the same statutory affidavit as to which was made by the mortgagee on the 8th, was invalid. In that case, as in the present, the claim of the mortgagor was perfectly honest, but the mortgage was held bad.

If parties choose to dispute the rights of a mortgagee in such a case, they may be in a legal position to do so.

My order will be the usual final order in interpleader protecting the sheriff, and ordering him to sell the goods under the *fi. fa.* The claimant to pay all costs of the interpleader, of the sheriff, and the plaintiffs.

Because the decision given on the argument by the Court of Appeal has not been reported, I now give my decision in writing, that there may appear in the reports a reference to the case on this point.

*R. V. Clement* for the sheriff.

*A. Cassels* for the execution creditors.

*Crooks* for the claimant.

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ROBERTSON, J.] [March 10.

FOWLE *v.* CANADIAN PACIFIC R. W. CO.

*Discovery—Examination of officer of railway company—Section foreman.*

In an action to recover the value of horses killed by a train on the defendants' railway, it was alleged by the plaintiff and denied by the defendants that the latter had failed to erect and maintain proper fences on either side of the railway where it crossed the plaintiff's property.

*Held*, that the foreman who had charge of the fences on the railway in the section which included the *locus in quo*, subject to the orders of a roadmaster, was not an officer of the defendants' who could be examined for discovery.

*Knight* v. *Grand Trunk R. W. Co.*, *ante* p. 90, and *Leach* v. *Grand Trunk R. W. Co.*, *ante* p. 91, followed.

*C. J. Holman* for plaintiff.

*A. MacMurchy* for defendants.

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MACMAHON, J.] [March 12.

SIMPSON *v.* MURRAY.

*Dismissing action—Want of prosecution—Rule 647—Default of entry for two sittings—Notice of trial for second sittings.*

Where the plaintiff was in default for not giving notice of trial for the Autumn Assizes, but the defendant did not move to dismiss the action, and the plaintiff gave notice of trial for the Winter Assizes, but neither party entered the action for trial,

*Held*, that the action could not be dismissed for want of prosecution, under Rule 647.

*McDougald* v. *Thomson*, 13 P.R., 256, followed.

*W. M. Douglas* for plaintiff.

*W. H. Blake* for defendant.

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MACMAHON, J.] [March 17.

ONTARIO BANK *v.* TROWERN.

*Judgment debtor—Examination of—Return of nulla bona.*

Notwithstanding changes made in the practice, as to examining judgment debtors, embodied it Rule 926, a judgment debtor is not under the new, any more than under the old practice, examinable, until the judgment creditor has placed a *fi. fa.* in the sheriff's hands, and it has been returned *nulla bona*, or the sheriff has notified the judgment creditor that, if called upon to make a return, it would be *nulla bona*.

*Walter Barwick* for plaintiff.

*Wm. Macdonald* for defendant, F. P. Lee.

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## FIRST DIVISION COURT OF THE COUNTY OF MIDDLESEX.

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MACKENZIE, JJ.] [Jan. 3.

STRUTHERS *v.* WATSON AND HALLIDAY, GARNISHEE.

A judgment for damages for conversion of goods which were exempt from seizure under execution was attached in this action by garnishee summons. It was contended, on behalf of the plaintiff, that the point was governed by *Jones* v. *Thompson*, 2 B. & E., 63, and *Dresser* v. *Johns*, 6 C.B.N.S., 429, which decide that, while unliquidated damages cannot be attached, yet a judgment for such damages is liable to attachment.

*Held*, that having regard to R.S.O., c. 64, ss. 1-5, exempting certain goods from seizure under execution to prevent debtors and their wives and families from being deprived of the necessaries of life, the said judgment was not liable to attachment for debt. Judgment for the garnishee accordingly.

# Law Society of Upper Canada.

## LAW SCHOOL—HILARY TERM, 1890.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

### CURRICULUM OF THE LAW SCHOOL.

*Principal*, W. A. REEVE, Q.C.

*Lecturers*, E. D. ARMOUR, A. H. MARSH, LL.B.

*Examiners*, R. E. KINGSFORD, LL.B., P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum:

FIRST YEAR.

*Contracts.*

Smith on Contracts.
Anson on Contracts.

*Real Property.*

Williams on Real Property, Leith's edition.

*Common Law.*

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

*Equity.*

Snell's Principles of Equity.

*Statute Law.*

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

*Criminal Law.*

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

*Real Property.*

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

*Personal Property.*

Williams on Personal Property.

*Contracts and Torts.*

Leake on Contracts.
Bigelow on Torts—English Edition.

*Equity.*

H. A. Smith's Principles of Equity.

*Evidence.*

Powell on Evidence.

*Canadian Constitutional History and Law.*

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

*Practice and Procedure.*

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

*Statute Law.*

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on eacy Monday, Tuesday, Wednesday, and Thursdah

from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

*Contracts.*

Leake on Contracts.

*Real Property.*

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

*Criminal Law.*

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

*Equity.*

Lewin on Trusts.

*Torts.*

Pollock on Torts.
Pmith on Negligence, 2nd edition.

*Evidence.*

Best on Evidence.

*Commercial Law.*

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

*Private International Law.*

Westlake's Private International Law.

*Construction and Operation of Statutes.*

Hardcastle's Construction and Effect of Statutory Law.

*Canadian Constitutional Law.*

British North America Act and cases thereunder.

*Practice and Procedure.*

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

*Statute Law.*

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.