Canada Law Journal.

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DIARY FOR OCTOBER.

15. Fri.....English law introduced into Upper Canada, 1792.
16. Sat....C. C. York term ends.
17. Sun....*17th Sunday after Trinity.*
21. Thur...Battle of Trafalgar, death of Nelson, 1805.
24. Sun....*18th Sunday after Trinity.*
25. Mon...Battle of Balaclava, 1854.
26. Tues..Primary examination for students and articled clerks. Sittings of Supreme Court Canada begin.
28. Thur..Graduates seeking admission to Law Society to present papers.
31. Sun....*19th Sunday after Trinity.*

TORONTO, OCTOBER 15, 1886.

WE would suggest to the County of York Law Association, the propriety of putting a telephone up in the library in the Court House, so that members of the profession with offices in the near neighbourhood might the more conveniently use the library, and yet be always easily summoned back to their offices when required. The convenience of this would, we submit, far outweigh any inconvenience arising from the use of the telephone in the room.

FURTHER consideration of Rule 599 has, we believe, led the judges of the Chancery Division to the conclusion that the practice of filing reports in the office of the Masters by whom they are made is erroneous, and that they should be filed in the office of the Local Registrar, or Deputy Registrar, or Deputy Clerk of the Crown, at the place where the Master making the report holds office. We do not think this conclusion is likely to simplify the difficulties referred to *ante* p. 234. The only remedy is the abrogation of the Rule, and restoring the former practice in Chancery. We are afraid this new ruling will only make "confusion worse confounded."

A Mr. J. Eliot Hodgkin, of Richmond, England, writes to *Pump Court* that he has in his possession the following letter, which will be of interest to all those who hail from "Osgoode Hall":—

TEMPLE COFFEE HOUSE,
15th May, 1794.

The Immortal Jupiter congratulate the Lord Chief Justice Osgoode on his appointment.

Snowdon Barne (*President*), Nat. Bond, J. Floud, B. Bathe, Wm. Pott (?), W. Syer, V.P., Edward Cotton, T. Partington, Richard Legard, Jno. Touchet, H. Tripp, H. C. Litchfield.

To the Honourable William Osgoode, Chief Justice of Quebec.

We have no information as to who or what this Jovian person or club may be. Perhaps some of our readers may have heard of it.

THE FACTORIES' ACT.

THE Provincial Government has we see at last taken heart of grace, and in the *Gazette* of the 9th instant has issued the proclamation of the Lieutenant-Governor declaring that the 47 Vict. c. 39, known as "The Factories' Act," shall go into full force and effect from and after the 1st day of December next. No doubt the question of the constitutionality of this Act, about which there has been considerable doubt, will soon be raised in a formal manner. Considering that two years and a half have elapsed since the Act was placed on the statute book, the Government cannot be accused of any rash haste in bringing it into force, on the contrary, ample time has been taken for considera-

tion, and it remains to be seen whether the conclusions which have been reached will be sustained by the Courts.

STATISTICS OF LITIGATION.

THE Inspector of Legal Offices has collected some statistics of legal business, which are printed in his last annual report; and from them we learn that during the year ending 31st December, 1885, there were in all 7,119 actions commenced by writ of summons in the High Court; of these 4,376 writs were issued from the Q. B. and C. P. Divisions, and 2,743 from the Chancery Division, the greatest amount of business being of course transacted in Toronto, where 1,832 actions were commenced: next comes St. Thomas, with 611 suits, (for reasons give below we think there is a mistake) then London, with 522, and then Hamilton, with 411. There is one feature about these statistics which is deserving of notice, and that is the fact that notwithstanding Rule 545 providing for the alternate issue of writs in the three Divisions of the High Court, according to the figures given by the inspector, a large preponderance of these actions appear to have been commenced in the Chancery Division. According to the number of writs stated to have been issued in the Q. B. and C. P. Divisions, 2,188 writs ought to have issued in the Chancery Division; but according to the inspector's return 2,743 writs actually issued in that Division, or 555 more than the proper proportion, or about one-fourth more than issued from either of the other Divisions. On looking through the figures, however, we think it possible this result is really due to some mistake. In Elgin 101 writs are said to have issued in the Q. B. and C. P. Divisions, and 510 in the Chancery Division. We are inclined to think that a cypher has been improperly added to these figures, and that 51 instead of 510 is the correct number of writs issued in the Chancery Division in that county. If we are correct, this would account for 450 of the apparent surplus of writs in the Chancery Division, but we do not see how the remaining 100 suits are to be accounted for, consistently with the proper observance of Rule 545.

There is another item in the Inspector's report deserving of observation. While 3,074 cases were entered in the Procedure Book in the Q. B. and C. P. Divisions, 1,624 were entered in the Chancery Division. These figures we understand to indicate the number of suits which proceeded to the pleading stage in the different Divisions. But when we come to the number of cases tried, we find 753 cases were tried with a jury, and 401 without a jury, in the Q. B. and C. P. Divisions, whereas only 14 cases were tried with a jury, and 425 without a jury in the Chancery Division. The recent Rules, 590-592, may possibly be found to make a change in the future statistics of this branch of business.

Turning to the statistics of the sheriff's offices we note a fact which appears to us somewhat surprising. Although 2,190 writs against goods appear to have issued out of the High Court, only 210 sales under such writs took place. In other words, only about 10 per cent. of all writs of *fi. fa.* goods culminated in an actual sale of goods by the sheriff. The writs against lands numbered 1,649, but the sales of lands under execution only number 43. While $66,105.16 was realized by sale under executions against goods issued from the High Court, and $19,842.15 under *fi. fas.* against lands, we find that $992,838.97 was realized under executions without sale. In the County Court on the other hand we find while $38,588.64 was realized by sale under *fi. fas.* goods, and $7,062.21 under *fi. fas.* lands, only $68,345.46 was realized under executions without a sale.

COMMON LAW EQUITY.

The case of *Weir* v. *The Niagara Grape Co.*, 11 O. R. 700, appears to us to furnish a specimen of what may be called "common law equity," or the kind of law which a common law lawyer is apt to mistake for "equity."

The case before the court was a very simple one. The plaintiff, on 31st March, 1884, being mortgagee of the lands in question, under several mortgages, took from the mortgagor, John Kievell, a release of his equity of redemption in consideration of the amount due on the mortgages. The mortgages and the release of the equity of redemption were all taken without notice of an agreement which Kievell, the mortgagor, had made with the Niagara Grape Co. for the purchase of certain vines planted on the mortgaged property, and by the terms of which agreement the vines were to remain the joint property of Kievell and the Company until paid for; and in the event of Kievell alienating the land before the price should be paid, it was to form a lien on the land. This agreement was made in 1882, but was not registered until after the plaintiff's conveyance of 31st March, 1884; and the object of the suit was to obtain a declaration that the agreement of 1882 was fraudulent and void as against the plaintiff, and to have the agreement of 1882 removed from the register as a cloud upon the plaintiff's title.

Under the circumstances the court conceded, as it would be impossible to do otherwise, that the agreement of 1882 is, under the provisions of sec. 74 of the Registry Act, fraudulent and void as against the plaintiff; and, having arrived at that conclusion, one would have thought that that which is admitted to be fraudulent and void as against the plaintiff, and which was utterly inconsistent with the absolute title claimed by him, would have been ordered to be removed from the register.

The court, however, was unable to arrive at that conclusion; but, *mirabile dictu!* made a declaration that the deed of the plaintiff was entitled to priority over the agreement of 1882, upon the plaintiff paying to the Niagara Grape Co. what was due to them under that agreement; and whether the plaintiff chose to accept relief on these terms or not, gave the Niagara Grape Co. that relief as against the plaintiff in any event.

The rationale of the Registry Act appears to be this: All instruments affecting the title are required to be registered, in order that third persons dealing with the land may have notice of their existence. If a person takes a conveyance from the registered owner and neglects to register it, he enables the grantor to pass himself off as still the owner, and he becomes, by his neglect, a passive party to the fraud, if the latter assumes to make a subsequent conveyance of the property. The Registry Act, therefore, declares that as between an unregistered purchaser and a subsequent purchaser who first registers his conveyance, the latter shall prevail, and that as against him the prior unregistered instrument shall be adjudged fraudulent and void. Now it certainly is the queerest way of administering this very beneficial Act to say "true it is that this prior instrument is fraudulent and void as against you; yet it shall remain on the register and be a cloud on your title, unless you give to the person entitled thereunder all the benefit and advantage he would have had if he had duly registered his conveyance." And yet that in substance is what the court did in this case.

The court was led into, what appears to us, this erroneous conclusion by the fallacious reasoning of Armour, J., who delivered the judgment of the court. He says at p. 716: "If the plaintiff is entitled

to relief; then if A. makes a mortgage to B. on the first of the month, and another to C. on the tenth of the same month, and C. registers his mortgage, and subsequently B. registers his, and C. has no actual notice of B.'s mortgage, C. will be entitled to maintain a bill to vacate the registry of B.'s mortgage, because it is by the Registry Act to be adjudged fraudulent and void as against him, and being of a prior date to his mortgage it causes him embarrassment in disposing of his mortgage."

This, however, is a simple *non sequitur*, and the fallacy arises from the common law notion that the same judgment must follow in every case coming within sec. 74, irrespective of the circumstances. To an equity lawyer this method of reasoning must appear absurd, because he is aware that the particular circumstances of each case must be considered in administering equity, and the judgment must be bent to suit the circumstances.

The aim of equity, properly understood, is to do substantial justice between litigants, and while giving one party his rights, not needlessly to oppress his adversary nor infringe upon his rights.

In the case which Mr. Justice Armour puts, we think the obvious answer is, that the equity of the case would be amply answered by a simple declaration that the subsequent mortgage of C., by virtue of its prior registration, was entitled to priority over that of B.—that would enable C. to dispose of his mortgage, or otherwise deal with the mortgaged property as amply as if he had been first in date as well as by registration. To decree under such circumstances a removal of B.'s mortgage from the register would be an injury to B. beyond what the necessity of doing justice to C. would call for. But where, as in the case before the court, the subsequent conveyance is an absolute conveyance of the whole estate, and the existence of any outstanding lien or interest in any third person is altogether inconsistent with the subsequent grantee's possession of that absolute estate, then equity requires, in order that full justice may be done to the subsequent grantee, that the prior deed, which is subsequently registered, should be removed from the register.

We should hope that the case may be carried to appeal, as in our judgment it amounts to a virtual repeal of sec. 74 of the Registry Act.

LAW SOCIETY.

TRINITY TERM, 1886.

THE following is the *résumé* of the proceedings of Convocation on the 29th June, and of Trinity Term, 1886.

TUESDAY, 29TH JUNE.

Convocation met.

Present—The Treasurer, and Messrs. Falconbridge, Foy, Fraser, Irving, McCarthy, Mackelcan, Maclennan, Martin, Morris, Moss, Murray, Osler, Purdom, Robinson, Smith.

The minutes of last meeting were read and approved.

Mr. Murray presented a joint report from the Committee on Finance and Legal Education on the subject of fees to examiners on primary examination, recommending that when one examiner conducts the whole examination the same rate of remuneration be allowed as when two act, and that this apply to the last primary examination.

The report was read and received.

Ordered for immediate consideration and adopted.

Mr. Murray introduced a rule to give effect to the report.

Ordered, that the rule be read a first time.

Ordered for a second reading on the second day of next Term.

Mr. Moss presented the report of the Legal Education Committee on the admission as Students-at-Law of graduates, pursuant to the rule of 29th May, 1885, showing the admission of the following candidates, viz.:

William Gregor Bain, Thomas Walter Ross MacRae, Donald Murdoch Robertson, Gordon James Smith, Francis Pedley, Charles Swabey, Samuel Hugo Bradford, Hume Blake Cronyn, Horace Harvey, Alexander McLean Macdonell, Dugald James MacMurchy, Francis James Roche, Thomas Alfred Rowan and Roland William Smith.

The report was received, considered and adopted.

Ordered, that the above named students be entered on the books of the Society as Students-at-Law in the graduate class as of the first Monday of Easter Term, 1886.

Ordered, that the Legal Education Committee be requested to consider the draft of the consolidation of the statutes affecting the Law Society, with a view to suggesting the removal of any ambiguities in the law.

The report of the Committee on Legal Education on the petition of C. J. Patterson was received, considered and adopted.

The report of the Finance Committee on the subject of the fees payable by Articled Clerks and Students-at-Law was received and ordered for immediate consideration.

Ordered, that it be referred to the Committee on Legal Education to report their views to Convocation.

Mr. Owens was called to the Bar.

The letter of Mr. Read, the solicitor in the matter of L. U. C. Titus, was read.

The petition of L. U. C. Titus was read and received.

Ordered, that the petition be referred to the Discipline Committee.

The letter of Mr. Ryan, Secretary of the Hamilton Law Association, enclosing a resolution on the subject of the law library, was read and received.

The petition of Antoine Gilly was referred to the Finance Committee with power to act.

A letter from Mr. Joseph, with draft of revision of chapters 138, 139, 140, of Ontario Statutes, was received.

Ordered, that it be referred to the Committee on Legal Education with power to act.

The report of the Law School was brought up for consideration.

The rule for the continuance of the Law School was read a second time.

Mr. Moss moved, seconded by Mr. Irving, the third reading of the same rule.

Mr. Martin moved, in amendment, that the rule be amended by adding "that the students attending lectures be required to pay an annual fee of five dollars for attendance."

The amendment was lost.

The rule was read a third time and passed.

Mr. Murray, seconded by Mr. Moss, moved the second reading of the rule to amend the rules for the encouragement of legal studies.

The rule was read a second and third time and passed.

The second reading of the rule to amend rule 155 was postponed until the second day of next Term.

Mr. Martin gave notice that on the second day of next Term he would introduce a rule for the amendment of rule 142, section E.

Mr. Martin moved, seconded by Mr. Moss, that the Reporting Committee be requested to lay before Convocation, at its next meeting, an estimate of the probable cost of a current quarterly index of the reports published by the Law Society, such index to be published in a form similar to the current index published in connection with English Law Reports.

Convocation adjourned.

During Trinity Term the following gentlemen were called to the Bar, viz., September 6th: — John Murray Clark (honors and gold medal), William Smith Ormiston, Edward Cornelius Stanbury Huycke, William Murray Douglas, William Chambers, William Nassau Irwin, Lawrence Heyden Baldwin, Lyman Lee, Robert Charles Donald, George Hutchison Esten, Joseph Coulson Judd, Walter Samuel Morphy, John Wesley White, Thomas Urquhart, Thomas Johnson, William Hugh Wardrope, Francis Edmund O'Flynn, George Henry Kilmer, Francis Cockburn Powell. September 7th: — Thomas Joseph Blain, William Lees, Charles True Glass, Alexander David Hardy, John Campbell, Richard John

Dowdall, John Carson, Richard Vanstone, George Edward Evans, William Hope Dean, Charles Bagot Jackes. September 17th:—William Robert Smyth.

The following gentlemen were granted Certificates of Fitness, viz., September 6th:—J. M. Clark, G. H. Esten, W. S. Ormiston, W. Chambers, A. McLean, R. G. Code, W. J. McWhinney, C. T. Glass, R. C. Donald, F. E. O'Flynn, L. H. Baldwin, R. D. Gunn, H. H. Dewart, J. White. September 7th:—J. C. Judd, L. Lee, W. M. Sinclair, H. H. Macrae, H. S. Osler, A. D. Hardy, A. Macrimmon, J. Geale, W. M. Douglas, H. M. Mowat, J. B. Dalzell. September 17th:—E. C. S. Huycke.

The following gentlemen passed the First Intermediate Examination, viz.:—H. J. Cosgrove (honors and first scholarship), J. A. V. Preston (honors and second scholarship), W. Mundell (honors and third scholarship), and Messrs. J. G. Kerr, H. E. Irwin, H. B. Witton, J. A. Chisholm, W. S. McBrayne, A. E. K. Grier, J. F. Woodworth, Ira Standish, E. H. Johnston, R. W. Thompson, J. Kyles, W. W. Dingman, H. Holman, D. A. Dunlop, H. Millar, T. A. Rowan, J. McKean, J. A. McLean (as Student-at-Law only).

The following gentlemen passed the Second Intermediate Examination, viz.:—R. J. McLaughlin (honors and first scholarship), J. M. Young (honors and second scholarship), and Messrs. M. Wright, R. J. Leslie, W. J. Millican, W. B. Lawson, A. McNish, J. M. McWhinney, F. M. Field, A. J. Boyd, J. M. Balderson, E. H. Ridley, J. H. Kew, T. C. Robinette, G. J. Cochrane, R. A. Grant, J. A. Davidson, T. M. Bowman, W. H. Campbell, Jr., H. O. E. Pratt, J. A. McLean, R. C. Levisconte, T. R. Ferguson, G. L. Lennox.

The following candidates were allowed their examinations as Students only, viz.:—W. A. F. Campbell, C. R. Boulton, J. Ross, T. Hornsby, W. E. Thompson, G. H. Douglas.

The following gentlemen were admitted into the Society as Students-at-Law:—

Graduates.

George Ross, John Simpson, George William Bruce, John Almon Ritchie, James Armour, John Miller, Frederick McBain Young, Malcolm Roblin Allison, Robert Baldwin, Charles Eddington Burkholder, Alexander David Crooks, Andrew Elliott, Robert Griffin McDonald, Thomas Joseph Mulvey, James Milton Palmer, James Ross, John Wesley Rosswell, Richard Shiell, Alfred Edmund Lussier, Charles Murphy, George Newton Beaumont.

Matriculants.

William Johnston, Samuel Edmund Lindsay, Nelson D. Mills.

Junior Class.

R. C. Gillett, A. J. Anderson, G. P. Deacon, L. A. Smith, A. R. Tufts, W. Wright, K. H. Cameron, H. B. Travers, J. A. Webster, T. J. McFarlen, W. E. Coryell, J. H. Glass, A. Northey, A. A. Roberts, C. B. Rae, G. S. Kerr, W. E. L. Hunter, J. A. Buttrey, F. T. D. Hector, R. A. Hunt, D. O'Brien, F. C. Cousins, T. A. Duff, W. G. Bee, S. T. Evans, W. Mott, S. A. Beament.

Articled Clerk.

J. A. Mather.

MONDAY, 6TH SEPTEMBER.

Convocation met.

Present—The Treasurer and Messrs. S. H. Blake, Foy, Fraser, Irving, Lash, Maclennan, Moss and Murray.

The letter of Mr. Delamere, resigning his office of Examiner of the Law Society and Chairman and Lecturer of the Law School, was received and read.

Ordered, that the usual advertisement be inserted for applicants for the office of Examiner in place of Mr. Delamere, resigned.

Ordered, that the Secretary notify the Benchers that a successor to Mr. Delamere will be appointed at the meeting of the Bench on Friday, September 17th.

The letter of Mr. D. R. Davis was received and read.

Ordered, that the papers of Mr. Davis be laid before Convocation to-morrow for such action as was taken in the like case of R. D. Gunn.

The petition of Mr. Mundell was received and read.

Ordered to be referred to the Legal Education Committee for report to-morrow.

The report of the Select Committee on on the subject of Honors and Scholarships, in connection with the First Intermediate examination, was received and read

Ordered for immediate consideration and adopted.

Ordered, that Messrs. Cosgrove and Preston be allowed the First Intermediate Examination with honors, and that Mr. Cosgrove do receive a scholarship of one hundred dollars, and Mr. Preston a scholarship of sixty dollars, and that the case of Mr. Mundell, as to honors and third scholarship, be reserved till after the report on his petition.

The report of the Committee on Honors and Scholarships, in connection with the Second Intermediate Examination, was received and read.

Ordered for immediate consideration and adopted.

Ordered, that Messrs. McLaughlin and Young be allowed their Second Intermediate Examination, with honors, and that Mr. McLaughlin do receive a scholarship of one hundred dollars, and Mr. Young a scholarship of sixty dollars.

Ordered, that the Finance Committee be authorized to act from time to time, in their discretion, on any application of the County Court Judges for the use of Convocation Room for their conferences.

Mr. Murray moved, that Mr. Moss, Chairman of the Legal Education Committee, be appointed representative of the Law Society at the Senate of the University of Toronto.—Carried unanimously.

TUESDAY, 7TH SEPTEMBER.

Convocation met.

Present—The Treasurer, and Messrs. Beaty, S. H. Blake, Cameron, Fraser, Hoskin, Lash, McCarthy, Mackelcan, Moss and Murray.

The minutes of last meeting were read and approved.

The letter of H. R. Hardy was read, ordered to be referred to the Finance Committee to consider and report their opinion to Convocation.

Pursuant to the order of yesterday the papers of D. R. Davis were laid on the table and inspected by Convocation, and the values of the answers as allowed to him on the examination having been added up, and it having been found that the totals were correctly reported to Convocation, it was ordered that the Secretary do inform Mr. Davis that there had been no omission or oversight in the examination of his papers.

Ordered that the order for the second reading of Mr. Britton's proposed rule as to the Supreme Court Reports be postponed to Friday, 17th instant.

Mr. Murray's proposed rule for the amendment of rule respecting the remuneration of the examiner conducting the Primary Examinations was read a second and third time, and passed.

Mr. Irving presented the report of the Library Committee, as to the catalogue and thefts from the library.

The report was ordered for immediate consideration, and adopted.

SATURDAY, 11TH SEPTEMBER.

Convocation met.

Present—The Treasurer, and Messrs. Falconbridge, Foy, Hoskin, Maclennan, Martin, Moss, Murray, McMichael.

The minutes of last meeting were read and approved.

Mr. Moss, from the Committee on Legal Education, reported in the case of Mr. Mundell.

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

Ordered that Mr. Mundell be allowed his First Intermediate Examination with honors, and that he be awarded the third scholarship.

Mr. Murray presented the report of the Finance Committee, in the matter of H. R. Hardy's letter, recommending that the sum of $100 be allowed to him toward getting out his chart, on the condition that one dozen copies of said chart be supplied to the Law Society by him free of charge.

Ordered for immediate consideration, and adopted, and the grant to Mr. Hardy ordered accordingly.

Mr. Maclennan presented the report of the Reporting Committee.

Ordered for immediate consideration, and adopted.

Ordered that the Secretary do forthwith communicate the second paragraph of the report, as adopted, to Mr. Grant, and that the Reporting Committee do report to Convocation at its sitting on Friday next on the action taken under the second paragraph.

Mr. Martin gave notice, for the second day of next term, of the following motion: To amend Rule 142, section E, and to further amend the rule by permitting the

increase of grants to County Libraries in outer counties, and to permit advances to be made in special cases repayable out of future annual grants.

REPORT OF THE COUNTY LIBRARIES AID COMMITTEE.

Adopted by Convocation on 5th June, 1886.

OSGOODE HALL, 5TH JUNE, 1886.

To the Benchers of the Law Society of Upper Canada:

The County Libraries Aid Committee beg to report as follows:

1. The annexed statement shows the amounts paid to the County Libraries therein named in respect of initiatory and annual grant respectively, during the year ending 31st December, 1885, and also all payments made on annual grants up to 17th May, 1886. Nothing has been paid on initiatory during the current year.

No reports have been received for the year 1885 from the Ontario or Essex Associations. Reports were received from Bruce, Welland and Peterboro' which were incomplete in certain particulars, but these defects will, it is expected, be supplied shortly. The libraries had been established and received aid from the Law Society up to 31st December, 1885. In every case in which the annual grants have been paid, as shown by the statement referred to, the returns were sent in within the period required by the rules, and all requirements complied with.

2. Steps are being taken to form Library Associations at Guelph and Stratford, but no formal applications for aid have yet been received.

3. The value of county libraries is being more highly appreciated year by year, and applications for aid to new associations will no doubt continue to be made from time to time.

4. On the 18th May, 1886, an application for aid was received from the County of York Law Association, which was incorporated on the 31st December, 1885. The Association has furnished the proper proofs of its incorporation, and also copies of its by-laws, declaration, and a statement of its funds. This application has now to be dealt with by Convocation, but as the position of the Association is in some important points very different from that of a library association formed in an outer county, the committee have thought it desirable to report fully on the facts requiring consideration.

5. County libraries were established in 1879 upon the report of a special committee, a copy of the report will be found in the *Law Journal* for 1879, pages 179 and 181.

It appears from the report that the idea was to establish libraries in the county towns of outer counties for the convenience of the courts and profession who from necessity could not derive the same advantage from the Osgoode Hall Library as the Toronto Bar. Toronto and York, as having full use of the Osgoode Hall Library, were excluded from the calculation of those likely to avail themselves of the scheme; and Ottawa, as having the use of the Parliamentary Library, was for that reason also excluded.

It will be seen therefore, that the terms of clause six of Rule 142, regulating the aid to be granted to libraries in outer counties, ought not to be applied to this association without very considerable modifications.

6. No action towards the formation of a county library for York and Toronto was taken till quite recently, but the advantage of having a library suitable for reference at *Nisi Prius* in the Court House at Toronto having been felt, Mr. Osler, pursuant to notice, moved in Convocation on 17th November, 1885: "That it is expedient to form a branch library at the Court House in the City of Toronto, to consist of a complete set of the statutes, a complete set of the Upper Canada and Ontario Reports, and the English Reports, beginning with the Law Reports series, with a selection of text books in common use at *Nisi Prius*, and that the City Council be requested to provide accommodation in the new Court House for such library."

Upon which it was

Ordered, that the matter be referred to the County Libraries Aid Committee for consideration and report, and that Mr. Osler be added to the said committee in respect of the matter of this notice.

A discussion took place on the consideration of Mr. Osler's motion, during which it was pointed out that there were objections to the establishment of a branch library at the expense of the Society for a purely local purpose; and that the City Council could not be compelled to furnish the accommodation asked for, but if a County Library Association were formed, the right to suitable accommodation in the Court House existed under the Amended Municipal Act of 48 Vict. c. 5, ss. 11 and 12; and the question as to the amount of aid would be considered when the Association made its application. This view apparently commended itself to those interested, as the matter was never brought before the special committee, and steps were immediately taken to incorporate the County of York Library Association.

7. Your Committee believe that a library containing such books as are in common use at *Nisi Prius* (including Chancery Sittings) is all that is required for the County of York as a county library, and although the establishment of a county library in York seems not to have been originally contemplated, yet your Committee think a sufficient reason has been established to warrant them in recommending that an initiatory grant should be made, based on this principle, because for all other than *Nisi Prius* purposes the profession have ready access to the general library at Osgoode Hall. And the close proximity of the site of the new court to Osgoode Hall renders the one place as convenient as the other for the profession, and for this reason many of the works required in other county libraries would not be needed.

8. It appears from the statement furnished by the York Association that $1,623 has been contributed in cash, and $260 in books. Your Committee think that in addition to this sum a grant from the Law Society of $1,500 would be quite sufficient to purchase a suitable library of the class above indicated, and recommend that in lieu of the grant ordinarily made under section 6 of Rule 142, a special grant of $1,500 be made as the full initiatory grant to this Association.

As to the annual grant to be made it appears that there are now 196 members who pay an annual subscription of $2.00, and half of this amount is payable by practitioners resident elsewhere in the county.

The subscription paid by the members of Law Associations in outer counties is, in most cases, $5.00 per annum. Some pay $10.00, but the great number of practitioners resident in Toronto makes the burden much lighter in this case.

The annual expenses of the Society for librarian's salary, insurance, and contingencies, would probably not exceed $550.00.

An annual grant, equal to $2.00 for each member of the Association paying his annual subscription of $2.00, and of $2.00 for member paying his annual subscription of $1.00, would provide a sum quite sufficient to keep up the library in a very satisfactory manner.

9. In accordance with the above recommendation, if approved of by Convocation, Rule 142 might have to be reconsidered to meet the special case of the grant to this Association.

EDWARD MARTIN,
Chairman.

Statement of Money paid the County Libraries' Associations from 1st January, 1885, to 17th May, 1886.

NAME.	Date.	Initiatory.	Annual.	Total.
		$ c.	$ c.	$ c.
Hamilton..	1885	576 00	297 50	.....
	1886	.....	379 92	1253 42
Middlesex.	1885	480 00	180 00	.....
	1886	.....	187 50	847 50
Peterboro'...	1885	184 00	85 00	269 00
Frontenac.	1885	.....	36 00	.....
	1886	.....	42 50	78 50
Bruce.....	1885	.....	29 10	29 10
Brant.....	1885	.....	82 00	.....
	1886	.....	71 00	153 00
Welland.....	1885	200 00	.....	200 00
Lindsay...	1885	340 00	.....	.....
	1886	.....	85 00	425 00
Essex.....		147 00	.....	147 00
		$1927 00	$1475 52	$3402 52

REPORTS.

ASSESSMENT CASES.

IN THE MATTER OF THE APPEAL OF REVEREND S. M.

Exemptions—Superannuated minister.

M., a superannuated minister of the Methodist Church of Canada, claimed that as a clergyman or minister of religion in actual connection with the Methodist Church doing duty as such, and having no other business or calling, the property on which he resided was exempt from taxation under sec. 12, cap. 42, 48 Vict. Ont.

Held, that such property was not exempt.

[Prescott—McDonald, Co.J.]

The Reverend S. M. appealed to the Court of Revision of the town of Prescott, against being assessed for certain real estate in said town—the ground of the appeal being as stated in the head note above. Against the decision of such court he appealed to the County Judge of the County Court of the United Counties of Leeds and Grenville, on the ground that such decision was against law and evidence.

The section or sub-section of the Act upon which he relied, was the new sub-sec. 23 of section 6 of the Assessment Act, as enacted by sec. 12 of cap. 42 of the Ontario Statutes, 48 Vict. It reads as follows:

(23) The stipend or salary of any clergyman or minister of religion, while in actual connection with any church, and doing duty as such clergyman or minister, to the extent of one thousand dollars and the parsonage when occupied as such or unoccupied, and if there be no parsonage the dwelling house occupied by him with the land thereto attached, to the extent of two acres, and not exceeding two thousand dollars in value. This sub-section shall not apply to a minister or clergyman whose ordinary business or calling at the time of the assessment is not clerical, though he may do occasional clerical work or duty.

The appellant, having been sworn, testified to his being a minister of the Methodist Church and superannuated. That superannuated ministers are stationed in a certain sense. They must be somewhere, in connection with some district, so that they can be called upon if needed. That he be called upon to act for another minister, and if in health must comply. That he is on the plan with local preachers for work. A minister is superannuated, and his superannuation allowance fixed and paid, by the conference. Old age

or physical inability is a cause for superannuation. Appellant, not employed in any business or occupation other than clerical, occupies a house in Prescott. There is a parsonage of the Methodist Church in Prescott, occupied by the Rev. George McRitchie, the regularly stationed minister of the Methodist Church in Prescott.

Dowsley, for appellant, cited a judgment of Judge McDougall, of county of York, in connection with the assessment of the city of Toronto, reported in the current volume of the CANADA LAW JOURNAL, page 158.

M. E. O'Brien, contra, cited *Jarvis* v. *Corporation of Kingston*, 26 C. P. 526.

MCDONALD, Co.J.—With all respect for the learned judge of the County Court of the county of York, I am unable to concur in the conclusion at which he arrived. In my judgment, the exemption is of the parsonage when occupied as such, or unoccupied, and if there be no parsonage, the dwelling house used in lieu of such, and as such occupied by the minister in regular duty and appointed to the particular church (not church in the sense of a religious community, but in the sense of an edifice), to which such parsonage, or the dwelling house used in lieu thereof, is attached. I dismiss the appeal and confirm the decision of the Court of Revision, and the assessment of the assessors.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

COMMON PLEAS DIVISION.

DIVISIONAL COURT.

O'Connor, J.] [September 11.

MCDOUGALL v. HALL.

Deed—Omission to tender for execution before action brought—Evidence that execution would have been refused—Dispensing with tender.

The general scope of the O. J. Act, and especially sub-sec. 8*a* of sec. 16, requires that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters be avoided, so that whenever a subject of controversy arises in an action, the Court should, if possible, determine it so as to prevent further and needless litigation.

In this case, where in strictness there should have been a tender of a conveyance for execution before action brought, but no such tender was made, and the defendant, in his statement of defence, though setting up the absence of such tender, at the same time indicated that if it had been made, he would have refused to comply therewith, and the tender would therefore have been futile.

Held, under the circumstances, judgment must be entered for the plaintiff.

MCLACHLIN v. GRAND TRUNK RY. CO.

Railways—Overhead bridge—Accident—Liability.

Action to recover damages sustained by plaintiff by reason of a bridge being less than seven feet above the top of the freight car on which plaintiff was employed while in the service of the defendants. At the time of the accident the defendants were operating the Midland Railway under an agreement made 22nd September, 1883, whereby it was agreed that the defendants should "take over all the lines of the Midland Railway, buildings, rolling stock, stores and materials of all kinds; and shall, during the continuance of this agreement, well and efficiently, work the said lines, and keep and maintain them with all the works of the Midland in as good repair as they are when so taken over." The agreement was to be in force for twenty-eight years. The Midland Railway Co., though incorporated under 44 Vict. ch. 67 (O.), was brought under the control of the Dominion Legislature by 46 Vict. ch. 24 (D.), passed in 1883, before the agreement was executed. By the Act of 1881, amending the Consolidated Railway Act, 44 Vict. ch. 24, sec. 3 (D.), "Every bridge or other erection or structure under which any railway passes existing at the time of the passing of this Act, of which the lower beams are not of sufficient height from the surface of the rails to admit of an open and clear headway of at least seven feet, shall be reconstructed or altered within twelve months from the passing of the Act, so as to admit of such open and clear headway of at least seven feet. Such bridges shall be reconstructed or altered

at the cost of the company, municipality, or other owner thereof as the case may be," etc.

Held, GALT, J., dissenting, that the defendants were not liable for the injury sustained by plaintiff.

Barron (of Lindsay), for the plaintiff.

Osler, Q.C., for the defendants.

McQUAY v. EASTWOOD.

Surgeon — Malpractice — Evidence — Finding of jury—Circumstances.

In an action against the defendant, a surgeon, for malpractice, the jury, by one finding, found that the defendant was guilty of negligence in his treatment in not giving instructions to the nurse; and by another, in not seeing that his instructions were properly carried out.

Held, that these findings were clearly inconsistent; but their inconsistency would not entitle defendant to judgment in his favour dismissing the action; but, at most, to a new trial, if there was evidence that ought to be submitted to the jury on either branch of the findings; but *held*, that on the evidence the findings could not be supported, and judgment was entered for the defendant, dismissing the action.

Robertson, Q.C., for the plaintiff.

McEWAN v. DILLON.

Landlord and tenant — Breach of covenant — Damages, measure of.

Action by the plaintiff, the lessee, against the defendant, the lessor, for breach of the covenant contained in a lease to dig certain ditches, erect certain fences, and furnish materials for the repair of the house. At the trial the learned judge, in fixing the amount of the plaintiff's damages, held that the measure was the difference between the rentable value of the demised premises with the defendant's covenant performed and the improvements made, and their rateable value without such improvements.

On motion to the Divisional Court, the measure thus adopted was affirmed, CAMERON, C.J., dissenting.

The learned judge at the trial having also directed that if certain improvements were made the damages were to be reduced thereby, and on its being shown to the Divisional Court that these improvements had been made, the damages were accordingly reduced.

Musgrove, for the plaintiff.

Alan Cassels, for the defendant.

McLENNAN v. WINSTON ET AL.

Contract—Breach—Evidence.

The plaintiff set up a contract alleged to have been made between the plaintiff and defendants, whereby the plaintiff was to cut and lay down 25,000 railway ties, at twenty-four cents per tie, on the defendants' limit, and were to be delivered thereon: that after the making of the contract the plaintiff procured an outfit to enable him to carry out the said contract, and the plaintiff was put to loss of time in procuring same: that the defendant refused to carry out said contract, whereby the plaintiff sustained damage: that it was further agreed that the plaintiff should ship the outfit to Port Arthur to the care of R., and on arrival of same the plaintiff should report and receive instructions as to the means and way of forwarding the outfit to the defendant's limit, etc.; and that though plaintiff shipped the outfit, etc., the defendants refused and neglected to give the instructions, whereby the plaintiff was damnified.

Held, assuming that the contract, as alleged, was proved, the evidence showed that the breach was on the part of the plaintiff and not of the defendant, and therefore the action failed.

Schoff, for the plaintiff.

W. R. Meredith, Q.C., for the defendants.

LANDRY v. CORPORATION OF OTTAWA.

By-law—Application to quash—Single judge—Divisional Court.

An application to quash a by-law may and ought to be made to a single judge, and not to the Divisional Court, unless some good reason is shown why the latter should entertain it.

McCarthy, Q.C., and *Clement*, for the applicant.

Maclennan, Q.C., contra.

TODD v. DUN WIMAN ET AL.

Libel—Mercantile agencies—Privilege.

The defendants, Dun Wiman & Co., the proprietors of a mercantile agency, wrote to the defendant C., requesting him to advise them confidentially of the standing and responsibility for credit of the plaintiff, stating that he claimed to have been burglarized and to have lost $1200 to $1600; asking if this were so, for full particulars, and was there not something wrong? The defendant replied that he had made inquiries and found that the general opinion was that the plaintiff was not robbed at all, and what had been done he had done himself; at all events if he were robbed it was of not more than $200 or $300; that circumstances were against him, still he could not say. The defendants, Dun Wiman & Co., subsequently issued a printed circular or notification sheet, in which after the plaintiff's name were the words "if interested, inquire at office." This was published and circulated amongst the defendant's customers in Canada and the United States, some 800, whether they had any interest in the affairs of the plaintiff or not, not more than three or four having any interest. The notification sheet also contained the following: "The words, 'if interested inquire at the office,' inserted opposite names on this sheet, do not imply that the information we have is unfavourable. On the contrary it may not unfrequently happen that our last report is of a favourable character; but subscribers are referred to our office, because, in justice to them, the parties *reported*, and to ourselves, the information can only be properly conveyed to those entitled to receive it by the full report as we have it on our record." The words complained of, namely: "If interested, inquire at the office" were proved to have the effect of injuring the plaintiff. At the trial no attempt was made by C. to prove that the statements made in his letters were true, or that he made inquiry and found the general opinion to be as stated. In an action of libel the jury found for the plaintiff.

Held, that the words charged were clearly libellous, and there was no privilege; for, as regards Dun Wiman & Co., the court was governed by *Lemay* v. *Chamberlain*, 10 O. R. 638, and the explanatory statement did not affect the matter; and as to C., his failure to prove the truth of the statement, or his belief therein, deprived him of any privilege.

Ritchie, Q.C., and *McGillivray* (of Uxbridge), for the plaintiff.

Osler, Q. C., and *Lash*, Q. C., for the defendants.

MCCASKELL v. MCCASKELL.

Rent charge, rent service or rent seck—Appointment.

On 1st December, 1870, A. M. by deed conveyed certain lands to his grandsons, W. M. and D. M., as tenants in common; and on the same day an agreement was made between W. M. and D. M. and A. M., whereby W. M. and D. M. agreed to pay the following sums of money and fulfil the written agreement, namely, that W. M. and D. M. should thenceforward support their mother, M. M., the plaintiff, and furnish her with reasonable, suitable and comfortable board, lodging, and clothing, and medical attendance when required at all times when necessary during the remainder of her natural life; and should treat her at all times with proper respect and regard, and maintain her in proper manner; and, if in the event of any disagreement arising between the said W. M. and D. M. and their mother, so that she would be obliged to leave the said premises, then, they should only be obliged to pay her $55 a year in lieu of board, lodging and clothing and attendance; and that the said payment should be recovered by suit at law if not paid her when due; and that it was thereby agreed and understood that the said covenants payments and annuities should thenceforth be chargeable against the said lands so conveyed as aforesaid. The plaintiff was no party to the agreement. On 4th October, 1872, the defendant W. M., for a nominal consideration of $1,000, conveyed his undivided half interest to the plaintiff; but of which she had no knowledge. Subsequently on 1st March, 1877, the plaintiff reconveyed the same to W. M.

Held, that the agreement did not create a rent charge, as no power of distress was conferred if a rent service or rent seck there would be a right of distress; but if neither but a covenant charged on land performance of it would be decreed; that upon the conveyance by W. M. to the plaintiff, the whole charge was not extinguished but an apportion-

ment took place; and the plaintiff was entitled to enforce performance as against D. M.'s undivided interest.

Reeve, Q.C., and *McGillivray*, of Uxbridge, for the plaintiff.

Marsh, for the defendant.

CHANCERY DIVISION.

Ferguson, J.] [June 29.

WATSON v. WESTLAKE.

Trade mark—Infringement—Word in common use not eligible as trade mark.

In January, 1885, plaintiff registered as a trade mark, under the Act of 1879, the words, "Imperial Cough Drops," and now sued the defendant for infringement thereof by selling confectionery under the name "Imperial Cough Candy."

Held, that inasmuch as the evidence showed that the word "Imperial" as a designation or mark for cough drops or candy was really public property, and a common brand or designation for candy long before the plaintiff's registration, the plaintiff had not the right to endeavour to attribute to that which he might manufacture a name which had been for years before a well-known and current name by which that article was defined, and the action must be dismissed.

Ridout, for the plaintiff.

Frazer, for the defendant.

Ferguson, J.] [August 31.

AMBROSE v. FRASER.

Married Woman—Liability as assign under covenant running with the land.

On November 23rd, 1872, defendant F. executed a lease of certain lands to the plaintiff and another, covenanting that the plaintiff should be allowed to erect a malt-house on the premises, and that at the expiration or other sooner determination of the demise, F., "his heirs and assigns," would pay the plaintiff the value of the malt-house which in case of disagreement was to be determined by arbitration. The plaintiff erected a malt-house. Afterwards, in 1878, his co-lessee transferred his interest in the lease to the plaintiff; and during the continuance of the term F. conveyed the land in such manner as that it became vested in him and his co-defendant W. as trustees for his (F.'s) wife, in whom the beneficiary interest was vested at the commencement of this action. It appeared that the marriage of F. and his wife took place in 1849, without any marriage contract or settlement, but that she had separate property at the time of the execution of the lease and had had such ever since, and now had it. After this the lands were sold under a mortgage of date prior to the lease, which absorbed the whole of the purchase money. The present action was now brought against F., Mrs. F. and W. to recover the amount awarded by the arbitrators who had been appointed to fix the value of the malt-house. It further appeared and was urged by way of counter-claim, that a certain sum of $275 was due from the plaintiff in respect to rent unpaid and certain non-repairs.

Held, (1) that Mrs. F. was not liable in respect of her separate estate under the covenant although the covenant was one which ran with the land, and the reversion had in equity been assigned by the covenantor to her during the term and before breach of the covenant. To hold that she was would be to say that the separate property of a married woman married before May 4th, 1859, without any marriage contract or settlement, is bound by a contract made by her husband. For it was not pretended that she made any contract herself or that any credit was given or anything whatever done in respect to, or on the faith of, her separate property or estate. (2) That the $275 could not properly be set off against the plaintiff's demand, the matters of the two not being in the same right; but the said sum being owing to the defendants as trustees, whereas the plaintiffs claim was against the defendant F. individually and payable out of F.'s own estate.

Moss, Q.C., and *Barwick*, for plaintiff.

Osler, Q.C., and *Gunther*, for defendant.

PRACTICE.

Q. B. Div.] [Jan. 6, 1885.

WILSON v. ROBERTS.

Libel—Costs—Nominal damages—Rule 428 O. J. A.

Where in an action of libel a verdict for $1 damages was found, and the judge at the trial gave no certificate for costs,

Held, that the plaintiff was entitled to tax full costs.

The statute 21 Jac. I., ch. 16, having been as to costs in actions of libel, etc., overridden by Rule 428 O. J. A., *held* to apply to actions of libel as well as slander, and *Garnett* v. *Bradley*, L. R. 3 App. Cas. 944, followed.

H. J. Scott, Q.C., for defendant.

Aylesworth, for plaintiff.

Galt, J.] [June 15.

COLQUHOUN ET AL. v. MCRAE.

Sheriff—Seizure—Sale—Fees—Poundage.

A sheriff, under a writ commanding him to levy $630 and accruing interest out of the goods of the defendant, seized some wheat, but did not remove it or put any person into possession, taking a bond for its safe keeping and delivery to him when demanded. No day for sale was fixed, nor were notices of sale posted or prepared, when the sheriff received a letter from the plaintiff's solicitor, directing him to withdraw the seizure upon payment by defendant of his fees and charges.

The sheriff accordingly notified the defendant of his withdrawal, and obtained payment of $52, the amount he claimed for fees and poundage, under protest. No money, except this, passed through the sheriff's hands, and he made no levy.

Upon an application to the local judge at Pembroke to compel the sheriff to refund, and upon appeal to GALT, J.:

Held, that the sheriff was not entitled to poundage; but he was allowed $10 in lieu of poundage, and $8.68 for fees and expenses, and was directed to refund the balance of the $52.

Held, also, that the sheriff was not entitled to retain the amount ordered to be refunded for the purpose of applying it on another execution against the defendant.

Holman, for the sheriff.

Aylesworth, for the defendant.

C. P. Div. Ct.] [June 26.

MACGREGOR v. MCDONALD.

Discovery — Fraud — Subsequent dealings with estate—Examination—Production—Privilege—Solicitor.

In this action the plaintiff, in her statement of claim, charged her brother, the defendant D. M. McD., with inducing her father to make a will in her mother's favour, with the fraudulent design on the part of D. M. McD. of obtaining the whole estate for himself, and charged that her father was induced to make the will by fraudulent misrepresentations, and that after her father's death, D. M. McD. obtained from her mother a power of attorney to manage the estate, and invested large sums in the purchase of property in his own name and that of his wife, and prayed to have the will set aside. D. M. McD., in his examination for discovery before the trial, admitted receiving the power of attorney from his mother after his father's death, and dealing with the estate under it.

Held, that although what took place after the father's death was no proof of the fraudulent design, yet it might throw light upon it, and the plaintiff was entitled to interrogate D. M. McD. upon his examination before the trial, as to whether he had invested the moneys of the estate in his own or his wife's name; but that a general inquiry as to his dealings with each part and parcel of the estate, or as to what property came into his hands under the power of attorney, would be burdensome and oppressive, and should not be permitted. *Parker* v. *Wells*, 18 Ch. D. 477, considered and followed.

The defendant, D. M. McD., claimed privilege for certain documents in his possession, asserting that he held them merely as solicitor for his mother and co-defendant, F. McD.

Held, that D. M. McD. should not have been ordered to produce these documents, without F. McD. being called upon to show cause why they should not be produced.

W. Cassels, Q.C., and *C. J. Holman*, for D. M. McD,

MacGregor, for the plaintiff.

Cameron, C.J.] [September 2.

MCDONELL v. THE BUILDING AND LOAN ASSOCIATION.

Costs, scale of—Illegal distress—Injunction—Damages—Subrogation—County Court, equity side of.

The plaintiff claimed to have it declared that a certain distress made upon his goods by the defendants, under a clause in their mortgage, was illegal and void, that it should be set aside, that an *interim* injunction obtained by the plaintiff to restrain the sale of the goods distrained should be made perpetual, that the plaintiff should be paid $200 damages for the illegal distress, or in the event of the Court holding the distress legal, that the plaintiff should be declared entitled to the defendant's mortgage security to the extent of the value of the goods sold.

The judge at the trial found in favour of the plaintiff, made the injunction perpetual, and assessed the damages at $25, with full costs against the defendants.

The Common Pleas Divisional Court reversed this judgment, and dismissed the action with costs.

Held, that the action was not one that could properly have been brought under the equity jurisdiction of the County Court before the O. J. A. and the Law Reform Act, 1868, although the arrears of rent and the damages found by the judge at the trial were less than $200; and that the costs should therefore be taxed upon the High Court scale.

D. Armour, for plaintiff.

Alan Cassels, for defendants.

Rose, J.] [September 7.

THOMAS v. STOREY.

Examination of plaintiff before trial—Issue of forgery or personation—Ex parte order.

No order of any moment should be made *ex parte*, except in a case of emergency.

The principal issue was as to a certain instrument upon which the defendant relied, which the plaintiff claimed was obtained either by forgery of the plaintiff's name or by personation of the plaintiff.

Held, that no order should be made for the examination of the plaintiff before the trial which would save him from personal attendance and examination before the court and jury.

Holman, for the plaintiff.

Aylesworth, for the defendant.

Armour, J.] [September 11.

TOMLINSON ET AL. v. THE NORTHERN RY. OF CANADA ET AL.

Third party—Costs—Indemnity—Rules 107, 108 O. J. A.

The defendants were sued as carriers for the loss of certain horses which they had contracted to carry from T. to W., partly by their own line, and partly over the lines of other carriers. The loss occurred while the horses were being carried by the C. H. S. T. Co., with whom the defendants had stipulated that all loss in transit should be paid for by the parties in whose custody the loss occurred.

The defendants served notice on the C. H. S. T. Co., claiming indemnity from them as third parties, under Rules 107 and 108 O. J. A., to which the latter appeared, and an order was made, allowing them to intervene and assist the defendants in disputing the plaintiffs' claim against the defendants, and that they should be bound by the result.

The plaintiffs were nonsuited at the trial.

Held, that the plaintiffs were not the authors of the litigation with the third parties, and should not be ordered to pay the costs occasioned by adding them as parties.

W. H. P. Clement, for plaintiffs.

Boulton, Q.C., for defendants.

Till, Q.C., for third parties.

Proudfoot, J.] [September 21

MORROW ET AL. v. CONNOR ET AL.

Jury notice—Qui tam action—Municipal councillors—Trustees—Exclusive jurisdiction of Court of Chancery.

The action was by two ratepayers of A. on behalf of themselves and all other ratepayers against all the members of the municipal council of A., charging them with continuing with knowledge a defaulting treasurer in office and causing loss to the municipality, and charging fraudulent collusion with the treasurer.

Held, that in charging the defendants it was not necessary to use the word "trustees," if, in fact, it appeared that they were trustees, and the law attaches the character of trustees to municipal councillors. The action was one within the former exclusive jurisdiction of the Court of Chancery, and a jury notice was therefore improper.

Semble, the municipal corporation should have been made parties, and the action should have been on behalf of all ratepayers, except the defendants.

W. H. P. Clement, for the plaintiffs.

A. H. Marsh, for the defendants

Proudfoot, J.] [September 21.

RE O'HERON.

Insurance—Benevolent societies—47 Vict. ch. 20 (O.)—R. S. O. ch. 167.

The statute 47 Vict. ch. 20 (O.) does not apply to benevolent societies incorporated under R. S. O. ch. 167, and not authorized to do business as insurance companies.

John Hoskin, Q.C., for infants.

Hoyles, for executor.

Chan. Div. Court.] [September 22.

RE FLEMING.

Executor—Compensation—Commission—R. S. O. ch. 107, ss. 37 & 41.

The judgment of Ferguson, J., reported 11 P. R. 272, and *ante* p. 85, was revised on appeal.

Per BOYD, C., who delivered the judgment of the court.—The right to compensation in this case depends entirely upon the statute which declares that a trustee or executor shall be entitled to a fair and reasonable allowance for his care, pains and trouble, and his time expended in and about the trust estate. The statute has fixed no standard by which the rate of compensation is to be measured, and this imports that each case is to be dealt with on its merits, according to the sound discretion of the Judge, who is to regard the care, pains, etc., expended by the claimant. Nor have the courts laid down any inflexible rule in this regard.

While a percentage has been usually awarded as a convenient means of compensating a class of services which do not admit of accurate valuation, yet the adoption of any hard and fast commission (such as 5 per cent.) would defeat the intention of the statute. There was no duty cast upon the applicant by the so-called precatory clauses of the will, which required him to act against the interests of his co-executor. In other respects, the risk or responsibility which attached upon him as compared with his co-executor is not very appreciable, inasmuch as, subject to the charge in favour of the widow, the whole estate was practically at home in the hands of his co-executor on the death of the testator.

The Master's report was therefore restored without costs, as the appellant had failed in his cross appeal to diminish the sum given by the Master.

Thompson v. *Freeman*, 15 Gr. 384, referred to.

A. C. Galt, for the appeal.

S. H. Blake, Q.C., and *Goodwin Gibson*, contra.

Proudfoot, J.] [September 23.

MCBEAN v. MCBEAN.

Reference—Account—Withdrawing admissions.

In the cause of a reference to take partnership accounts admissions of certain items in the plaintiff's account were made by the solicitor for the defendant, G. McB After the death of the solicitor G. McB. applied to be allowed to withdraw the admissions, swearing that he had not authorized them, and that the admitted items were not properly charge-

able against him. No report had been made, and the other parties had not altered their position in any way by reason of the admissions.

Held, that so rigid a rule as that a party should never be allowed to withdraw admissions could not be laid down; and G. McB. was allowed to attack the items admitted, they to be regarded as *prima facie* correct, and the onus of displacing them to be upon G. McB.

S. H. Blake, Q.C., for G. McB.

Hoyles, for the plaintiff.

D. W. Saunders, for the defendant, D. McB.

Wilson, C.J.] [September 24.

RE WOLTZ V. BLAKELEY.

Prohibition — Division Court — Order for imprisonment—Division Court clerk.

Held, that in an order made by a Division Court judge upon judgment summons for payment of the judgment within a certain time, a clause directing that the judgment debtor should be imprisoned unless he paid the debt within the time limited was beyond the jurisdiction of the judge; and prohibition was ordered as to that part of the order.

Semble, the defendant should have called upon the clerk of the Division Court to show cause against the issuing of any order of imprisonment, as he was the person alone to act upon the order of imprisonment already made.

Reeve, Q.C., for the motion.

Aylesworth, contra.

Mr. Dalton, Q.C.] [September 28.

SHERWOOD ET AL. V. GOLDMAN.

Writ of summons—Indorsement of plaintiff's residence—Irregularity.

The words: "This writ was issued by E. F., of ———, solicitor for the said plaintiff, who resides at ———," in Form 1 O. J. A. mean that the plaintiff's own residence is to be endorsed on the writ of summons, and a writ without such indorsement is irregular.

Small, for defendant.

Baird, for plaintiffs.

Proudfoot, J.] [September 29.

THE BANK OF B. N. A. V. THE WESTERN ASSURANCE CO.

Discovery of fresh evidence—Opening publication —Powers of trial judge.

At the trial, June 25th, 1884, Proudfoot, J. (7 O. R. 166), found that the plaintiffs were not entitled to recover a sum of £1,500 sterling from the defendants.

Held, that PROUDFOOT, J., now sitting as a single judge in court, had power to entertain a motion to open up the judgment and to put in further evidence, and for a new trial, upon the discovery by the plaintiffs of fresh evidence as to the £1,500; or in the alternative for leave to bring a new action for the £1,500.

Synod v. *De Blaquiere*, 10 P. R. 11, followed.

S. H. Blake, Q.C., for the plaintiffs.

McCarthy, Q.C., and *A. R. Creelman*, for the defendants.

Mr. Dalton, Q.C.] [October 1.

GILMORE V. TOWNSHIP OF OXFORD ET AL.

Writ of summons—Indorsement—Claim—Rule 5 O. J. A.

The writ of summons was issued against three defendants—A, B and C.

The endorsement was that the plaintiff claimed to have declared void a deed from A to B, and a deed from B to A. C was not mentioned at all in the endorsement, nor did it appear in any way upon the writ what the plaintiff claimed against him.

Upon motion to set aside the copy and service upon C,

Held, that the endorsement was sufficient under Rule 5 O. J. A., and the motion was refused with costs.

H. J. Scott, Q.C., for the motion.

Caswell, contra.

Mr. Dalton, Q.C.] [October 4.

T· ..ING ET AL. v. GRAND TRUNK RY. CO.

Notice of trial—Plaintiffs severing—O. J. A.

Since the Ontario Judicature Act any one of the parties, plaintiffs or defendants, may give notice of trial, if the record be in a state to take it down.

Aylesworth, for the defendants.
Fowler, for the plaintiffs, R. and J. T.
MacGregor, for the plaintiff, T. T.

Ferguson, J.] [October 11.

MURRAY v. WARNER.

Discovery—Rule 285, O. J. A.—Examination of assignor by assignee.

The plaintiff, who was the father of A. S. M., an insolvent trader, sued the assignee and trustee for the benefit of creditors of A. S. M., claiming a declaration of right to rank on the estate for a large sum.

The assignee was instructed by the creditors to resist the claim, and had himself no personal knowledge of the transaction, between the plaintiff and his son, and could find no entry of it in the books or papers of A. S. M. Under these circumstances an order under rule 285 for the examination by the defendant of A. S. M. for discovery before the trial was affirmed.

J. R. Roaf, for the plaintiff.
Holman, for the defendant.

CORRESPONDENCE.

To the Editor of the LAW JOURNAL:

SIR,—It would ! great convenience to the legal profession if a.. authorized law list of barristers and solicitors entitled to practise in this Province were published, not only for the use of the profession, but for the use of the commercial laity. If one were published by the 1st January it would give ample ime to the profession to pay their fees, and thus prevent their name being omitted, and from this list it could be ascertained who were in good standing. I believe the cost of publication would be more than covered by the sales to the general public, and leave sufficient margin to give a copy with the proceedings of Convocation bound up with it gratuitously to each practitioner. I say, "Give :" on second thought, would not a copy be due to each member as some return for the heavy fees he is generally called on to contribute towards the Law Society? I trust this subject will be considered by the present Benchers of the Law Society, even if at the instance of one of the new blood.

Yours respectfully,
H. W. C. MEYER.

Wingham, Ont., 21st Sept., 1886.

FLOTSAM AND JETSAM.

BULLUM v. BOATUM.

(Read before the Cincinnati Literary Club.)

I was fortunate enough to be present the other evening when a member of the club generously rescued the once famous "Dred Scott" case from being entirely lost and covered up with the dust of contumely and neglect, by pulling out the old thing by the legs and then blowing it out, and whitewashing it so artistically that for a few minutes it looked as natural as one of the stuffed figures in a museum of curiosities. This has encouraged me to undertake a similar enterprise, viz.: to pull another old case out of the mud and try my skill as an amateur taxidermist. If I can only make the old fossil stand upon its hind legs for a few moment

you will recognise its fitness as a pendant to the "Dred Scott" suit.

When I was a boy there was a celebrated legal case, which was a source the wonder and the horror of the age. It was then known as the famous Bull and Boat case, or, to give its legal title, *Bullum* v. *Boatum*. The facts are these: In the quiet village of Laydown lived Wm. Jones and Thomas Smith. Jones was the owner of a fragile boat, and Smith was the proprietor of a raging bull. One evening Jones, who had been visiting the girl on the other side of the river, tied up his boat to the shore with a hay band, rope being scarce—that is to say, with a band made of hay. An hour afterward Smith's bull came to the river to drink. He, I mean the bull, was frisking his tail in the breeze, with a sort of "does-any-fellow-want-a-horn" sort of an air, and anxious, unlike Mr. Micawber, to turn something up. He suddenly smelt hay, and following his nose he discovered the boat and the hayband.

As a matter of course he tasted this new kind of rope, and he found the ends so succulent that he commenced to eat the coils around the post; and, in order to do this thing thoroughly, he stepped on board the boat. As he bit, nibbled, pulled and chawed, the rope broke, and the next moment the tide (which waits for no man, much less for a bull) carried the boat and the bull into the centre of the river. The bull no sooner felt that his "bark was on the waves" than he tried to kick the boat back again into its place; and, as he plunged away, fore and aft, his hind legs went through the bottom, the boat turned upside down, and, not being able to swim with his legs in the air, he was drowned. In the elegant language of the daily press, he—I mean the bull—"ascended the golden stairs" with a broken boat wrapped around his loins.

Boat and bull were afterward found lying dead in each other's arms—or legs. Then came the suit. Jones sued Smith for the value of the boat, and Smith sued Jones for the worth of the bull. This is the great case of *Bullum* v. *Boatum*. It was argued fifteen times before a full bench; that is to say, each occupant of the bench was full.

First came the argument for the bull:

"The bull," roared his counsel, "was strictly within his rights. He was exercising his legs in the evening. Hay was his natural food. The right to eat hay was given by Magna Charta. He was suddenly tempted by a delicious hayband, and he did not resist. It was not in the nature or constitution of a bull to resist temptation. He ate that hayband—and in order to eat the whole of it he got into the boat. It was perfectly plain that if the boat had not been there, my client could not and would not have stepped aboard; and then this noble specimen of energy and push could not have perished"—and so on, and so on, for five days in succession.

Then up rose the great admiralty lawyer on behalf of the boat:

"The bull was palpably in the wrong. Why? The bull went to the boat; the boat did not come to the bull. 'My client' was gently and peaceably floating on the tide of the watery events when this red-headed rake of a bull ate up the anchor and hawser, tore it from its fastenings, jumped in, had a ride for nothing, kicked the bottom out, and died in an attempt to swim with his horns and tail. If ever there was a case of piracy and burglary combined, this was the one, and the bull was the culprit. Look at the natural consequences. The body of that bull floated into the millrace, broke a wheel of the mill; the miller lost his life in trying to pull it out by the tail, and his wife ran away with the constable by way of consolation, and—and—"

Here the chief justice suddenly woke up and said: "I have had enough of this. Take your decree, Brother Bullum. It is the most infamous case of wilful and malicious negligence on the part of the boat that I have ever come across in my professional career. Think of it. A boat tied with a hayband to the shore. Can human turpitude and moral delinquency go further? The bull was within his constitutional rights. He has a natural, inalienable lien upon all hay. The vicious nature of hay is well known. There was a case in the 49,000th report of Ohio Riddles, where a load of hay fell upon a mule and killed him, or her, or it. Bulls, why bulls are sacred animals, known and mentioned in Holy Writ. Popes keep them to this very day in the Vatican. Nearly all bulls are endowed with horns as a sign of martial honours. The statue of Michael Angelo, by Moses, had horns like a bull. I saw them myself. The bull was no sailor, and the boat knew it; and, what is more infamous still, took advantage of his ignorance of navigation, and drowned him with his feet in the air. I feel like giving heavy, yes, punitary damages in this case, as a warning to boats to keep away from bulls."

There is a judgment that is a judgment. This is a case which every lawyer ought to know by heart; it is an inexhaustible mine of legal lore. I regret to add that the Judge died soon after the decision, and that he is still dead.

However, the principle of this case still lives, and those who are without principles can come here and fill up their heads from the once world-renowned case of *Bullum* v. *Boatum*.

We give this as we find it in several exchanges. At the same time we are under the impression that we saw this amusing skit many years ago.—ED.

Flotsam and Jetsam.

A Lesson in Temperance.—Just as Justice Coldbath gave the fat man in a short coat thirty days for keeping a calf, three pigs, and a swarm of chickens in his front yard, a citizen in good clothes came into court. That is, his clothes were good, what was left of them. They were torn in a dozen varieties of rent, and dabbled with mud and blood. His broken head was bandaged, his hat was crushed, his face disfigured. O, but old Justice Coldbath was mad. "Well, sir," he snarled, before the citizen could speak, "it's easy enough to see what's the matter with you!" The citizen drew a sigh that sounded like a November breeze, and shook his head despondingly. "Same old story," said the justice: "same old thing. You look like a respectable man now, don't you! You are respectable when you are fixed up, I dare say. Merchant, aren't you. Yes, I knew it. Church member, more'n likely? Yes, I thought so. Stand well in society, and never slipped up before? Yes, sir, I know you. I can pick out your case every time it comes before me. Whiskey, eh? Liquor's the trouble. That's what plays the mischief with your respectable drinker, sir. Brings him to the gutter just as sure as it does the tramp. Now, sir, I'm going to reform you. I'm going to deal justly and harshly and mercifully with you for your own sake. I'll sock it to you, so that you'll never come here again. It's whiskey, you say?" "Yes, sir," said the citizen, feebly; "whiskey is the trouble, sir. But for whiskey I wouldn't appear in this disgraceful, forlorn, painful position. But for whiskey, I would be a sound, happy man, in good, clean clothes, and no headache. But for whiskey——" "That'll do," said the justice, "I know the whole story, and am glad you realize your situation so keenly. Maybe your contrition will take twenty days and $10 off your sentence, and maybe it won't. Now, then, how much whiskey did you drink, and where did you get it?" "Me!" the citizen said, in a faint tone of infinite surprise, "I never touched a drop of intoxicating liquor in all my life. I am pastor of Asbury M. E. Church, and a drunken policeman assaulted me on the street half an hour ago and nearly clubbed me to pieces. I have just come to file information, and get a warrant for his arrest."

Pump Court gives the following:—

In a recent case arising out of a sporting partnership, tried before Sir James Bacon, the learned Vice-Chancellor referred to a case in which a highwayman resorted to law to enforce a claim against another knight of the road in respect of an alleged partnership in a "money or life" business. In the second volume of the English edition of "Pothier on Obligation" (page 3) a case is mentioned of "Everet *v.* Williams," which is stated to have been a suit instituted by one highwayman against another for an account of their plunder. The bill stated that the plaintiff was skilled in dealing in several commodities, such as plate, rings, watches, etc.; that the defendant applied to him to become a partner, and that they entered into partnership; and it was agreed that they should equally provide all sorts of necessaries, such as horses, saddles, bridles, and equally for all expenses on the roads, and at inns, taverns, alehouses, markets and fairs. "And your orator and the said Joseph Williams proceeded jointly in the said business with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch, and afterwards the said Joseph Williams told your orator that Finchley, in the county of Middlesex, was a good and convenient place to deal in, and that commodities were very plenty at Finchley aforesaid, and it would be almost all clear gain to them; that they went accordingly and dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things; that about a month afterwards the said Joseph Williams informed your orator that there was a gentleman at Blackheath who had a good horse, saddle, bridle, watch, sword, cane, and other things to dispose of, which, he believed, might be had for little or no money; that they accordingly went and met with the said gentleman, and after some small discourse they dealt for the said horse, etc.; that your orator and the said Joseph Williams continued their joint dealings together until Michaelmas, and dealt together in several places—viz., at Bagshot, Salisbury, Hampstead, and elsewhere, to the amount of £2,000 and upwards." The rest of the bill was in the ordinary form for a partnership account. On the 3rd of October, 1725, the bill was referred for scandal and impertinence; on the 29th of November, the report of the bill as scandalous and impertinent was confirmed, and an order was issued to attach the solicitors; on the 6th of December the solicitors were brought into court and fined £50 each, and it was ordered that Johathan Collins, Esq., the counsel who signed the bill, should pay the costs. It is interesting to know that the plaintiff was hanged at Tyburn in 1730, and the defendant at Maidstone in 1735. Wreathcock, one of the solicitors as aforesaid, was convicted of robbing Dr. Lancaster in 1735, but was reprieved and transported. Altogether, it was hardly more creditable to the ingenuity than to the honesty of our learned friend Mr. Collins, that he should have drafted a Statement of Claim, or Bill in Equity as it would be at that time, to settle the dispute between two thieves as to the sharing of the swag. The case deals a blow, too, to a very old proverb that there is "honour among thieves" Mr. Joseph Williams was evidently a gentleman unmindful of the etiquette of his profession, and did not deal fairly with his "pardner."

We think this rather hard on the learned and ingenious Mr. Collins. At least a number of his brethren of modern times should be similarly treated in connection with some of the "big steals" of these days which are quite as villainous as the "stand and deliver" operations of 'Ounslow 'eath