The Canada Law Journal.

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WE call the attention of our readers to the letter of Mr. Seymour D. Thompson, one of the editors of the *American Law Review*, which appears elsewhere in this issue. That eminent legal writer evidently appreciates the painstaking and thorough character of the work done by the learned Master-in-Ordinary. We have had occasion before now to urge through these columns on the proper authorities the importance of the duties discharged by this officer and by the learned Master-in-Chambers as well: duties of a judicial nature, requiring for their proper discharge legal ability and learning of a high order. We regret that the talents and legal attainments which these two judicial officers undoubtedly possess do not bring them the substantial appreciation by the government in the way of salary to which they are both properly entitled. We have always been surprised that Canadian decisions receive so little attention from the courts either in the United States or in Great Britain. We have no doubt, however, that the time is at hand when Canadian reports will be cited frequently in the courts of both these branches of the great English family.

MAINTENANCE.

From a very early period in the history of English law it has been considered an offence for persons officiously to intermeddle and concern themselves in promoting litigation, in which they themselves have no direct or immediate beneficial interest.

This offence is known to the law by the name of "Maintenance"; but of this offence there are several species. Maintenance proper consists in a person unlawfully taking in hand, or upholding quarrels and suits wherein he is not concerned, to the hindrance of common right: Bac. Abr. Tit. *Maintenance:* and see per Buller, J., in *Master* v. *Miller*, 4 T.R. 340. When, in addition to intermeddling unlawfully in maintaining the suit of another, the offender bargains, as a consideration for his doing so, for a part of the land, or other proceeds of the litigation the offence is called "champerty," which is said to be the unlawful maintaining of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it: Bac. Abr. Tit. *champerty* and champertors were defined by 33 Ed. I., *ordinat. consp.* as follows: "Champertors be they that move pleas and suits, or cause to be moved either by their own procurement

or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains." And in *Sprye* v. *Porter*, 7 El. & Bl. 58, it is said to institute champerty there must be a suit pending for the recovery of the property, the subject of the agreement, or a stipulation for the amount of one. When the offender carries out his officious and unlawful interference, by seeking corruptly to influence the Court or jury, or by dissuading a witness from giving evidence, this species of maintenance is termed "Embracery," Russ. on Cr., vol. 1, c. 21. If he further make a common practice of maintaining suits unlawfully the offence is called "Barratry," and the offender "a common barrator." *Ib.*, c. 22.

The offence of maintenance is one which by both the common law and statute law is punishable criminally by fine and imprisonment, and by summary committal if committed in the face of the court; but of recent years resort to criminal proceedings for the redress of such wrongs has been rarely had. Not only is the offender criminally liable, but he is also responsible in damages to the party injured. The offence of maintenance is not *malum prohibitum* merely, but it is *malum in se*, per Lord Eldon, *Wallis* v. *Duke of Portland*, 3 Ves. 502.

The offence is a common law offence, but various statutes have imposed specific penalties for the commission of particular kinds of maintenance. The origin of the statutory enactments upon this subject may no doubt be found in the attempted abuse of legal proceedings, by oppressive combinations to carry them into effect, by those who, previously to the establishment of law and order in the reign of Edward I., accustomed to associate for robbery and violence; see 2 Hume's History of England, 320; and by a statute passed in the 33rd year of Edward I., which is the earliest statute on the subject, persons engaging in the unlawful maintenance or promotion of suits were declared to be conspirators.

The state of society has very much changed since the days of Edward I., Richard II., or even those of Henry VIII., in whose reigns the chief statutory enactments relating to this offence were passed. The interference of the rich and powerful in legal proceedings is now less likely than of old to produce any failure of justice, and both by the course of legislation and of judicial decision, the rigour of the common law and of the more ancient statute law on this subject, has of late years been greatly modified. For instance, the 32 Hen. VIII., c. 9, invalidated the sale of pretended titles where the settler had been out of possession for more than a year before the sale; but its provisions are very considerably modified by R.S.O., c. 100, s. 9, which authorizes the sale of contingent executory and future interests, and of possibilities coupled with an interest in land, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, and of rights of entry present or future, and whether vested or contingent, into, or upon land.

There is another still more ancient statute, 1 Ric. II., c. 9, which invalidates as against the plaintiff in an action, all sales of the land in dispute made by a defendant *pendente lite*, but whether it is affected by R.S.O., c. 100, has not, we believe, been expressly determined. This statute of Richard II. was expressly

repealed in England in 1863 by the Statute Law Amendment Act, but it appears to be still in force in Ontario.

England and her colonies have acquired justly a pre-eminent distinction as law-abiding communities; and if we take the trouble to search into the matter we shall find that the secret of this universal respect for law and the judicial tribunals, which prevails throughout the British dominions, is due in a great measure to the salutary checks and safeguards which were placed about the administration of the law in bygone days, and which had the effect of inspiring all classes of the people with confidence that the law would be fairly and justly administered so far as that ever could be secured by human means. It was, no doubt, to this anxiety to ensure respect for the law of the land and the tribunals by which it was administered, and also as a necessary corrollary of the well-known maxim of the civil law, "*interest rei-publicæ sit finis litium*," that the laws relating to maintenance came into being. In the early days of our history it was, and no doubt justly, considered detrimental to the impartial administration of justice, that any person not of kin to the litigants in a court of justice should appear even in court with them publicly to espouse their cause, to plead for them or even to ask others to be of counsel for them. And one can readily understand that a powerful and influential man might, by an ostentatious intervention in support of the cause of another, be the means of over-awing or exercising thereby an undue influence over judge and jury in a semi-barbarous age, so as to induce them to depart from the strict line of duty—and even if judge and jury were impervious to such assaults upon their integrity, it would nevertheless be difficult to convince a losing suitor that they had been so. Many acts, however, which in the early period of our history were deemed maintenance, would probably in the altered circumstances of our civilization, no longer be held to be so. Recent cases both in our own and in the English courts have clearly established that maintenance as an offence still exists, and though the punishment of it by criminal proceedings may have fallen into disuetude, it nevertheless still constitutes a good cause of action for damages to the person injured.

It may be useful, therefore to inquire what, according to the modern authorities, constitutes the offence, and how redress is given when it has been committed.

In Bacon's abridgment we find it is laid down that whoever is of kin, or godfather, to either of the parties, or related to them by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, or pray another to be of counsel to him, and a barrister-at-law may plead the cause of his client; but none of these may lawfully aid the party with money in the cause, unless he stand in the relation of father, or son, or heir apparent, or husband to the party, see Bac. Abr. Tit. *Maintenance* (B); 1 Hawk. P.C., c. 27, s. 26. A landlord it would seem may aid with money his tenant in defence of the tenant's title to the land demised, but not as regards other lands not holden of himself, 1 Hawk. P.C. c. 27, s. 29.

A master may also aid his servant by counsel and advice, and even with money to keep him out of prison; but it would seem he cannot safely lay out

money for the servant in an action relating to land, unless he have some of his wages in his hands, and the servant consents to their application in that manner, Bro. Tit. *Maintenance* 44, 52; Hawk. P.C., c. 27, ss. 31-33, and see *Elborough* v. *Ayres*, 10 Eq. 367. A servant cannot lawfully lay out his own money to assist his master in a suit, 1 Hawk. P.C., c. 27, s. 34. But in a very recent case it has been held that any one may assist a poor man with money as a matter of charity to enable him to maintain or defend a suit, *Harris* v. *Briscoe*, 17 Q.B.D. 504; 55 L.T.N.S. 14. A solicitor when specially retained may lawfully defend, or prosecute an action, and lay out his own money in a suit: 2 Inst. 564, Bac. Abr. Tit. *Maintenance* (B) 5; 1 Hawk. P.C., c. 27, ss. 28-30. Where a similar demand is made against several persons they may, without being guilty of maintenance, combine together for the purpose of resisting the demand, *Findon* v. *Parker*, 11 M. & W. 675; and see *Gowan* v. *Vowell*, 1 Me. 292; *Plating Co.* v. *Farquharson*, 17 Chy.D. 49.

The fact of relationship between the parties, although it may justify the aiding with money or with assistance in carrying on or defending a suit, will not justify that species of maintenance called Champerty. Where two cousins entered into an agreement whereby it was arranged that one of them should bring a suit to contest a will purporting to make a former will, on the understanding that the other of them would share with the plaintiff in the proposed action half the estate recovered thereby, it was held that the agreement was void in champerty, notwithstanding the relationship of the parties: *Hutley* v. *Hutley*, L.R., 8 Q.B. 112.

The fact of a person having a direct interest in the subject matter of litigation justifies him in assisting a party in prosecuting or defending an action: but it is doubtful whether an indirect interest is sufficient. In *Langtry* v. *Dymoulin*, 7 O.R. 644, the Divisional Court of the Chancery Division was divided in opinion as to whether, in an action against a rector affecting the endowment of his church, the vestry and churchwardens of the church were entitled to carry on the litigation in the rector's name on an agreement to indemnify him against the costs. Subsequently the vestry and churchwardens applied to be made formal defendants in the action, which was refused by the Court of Appeal: 11 App. R. 544, but the application was afterwards granted by the Supreme Court. It would therefore appear that the weight of authority is in favor of the view that the vestry and wardens had not the right lawfully to carry on the defence in the rector's name; otherwise it would not have been necessary for them to apply to be made defendants. But even where there is an unlawful agreement for maintenance, the plaintiff's action cannot be stayed on that ground; thus an agreement by an association of persons with whom a petitioner was connected, to pay the costs of an election petition was held not to warrant the Court in staying the proceedings: *North Simcoe Election—Edwards* v. *Cook*, 1 H.E.C. 617. But though a suitor cannot be debarred from his right to prosecute his suit on the ground of the existence of an agreement for maintenance, yet it would seem clear that the agreement could not be enforced by the suitor against those who had agreed to maintain him; see *Wallis* v. *Duke of Portland*, 3 Ves. 494. In

Hilton v. *Woods*, 4 Eq. 432, the plaintiff was not aware that he was the owner of certain coal mines until his solicitor informed him of it. An agreement was then made between the plaintiff and the solicitor that in consideration of the solicitor guaranteeing the plaintiff against costs the solicitor should have a portion of the property. The defendant claimed that the bill should be dismissed, but Malins, V. C., said in giving judgment, "I have carefully examined all the authorities which were referred to in support of the argument (as to dismissing the bill), and they clearly establish that wherever the right of the plaintiff in respect of which he sues is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any which goes the length of deciding that when a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. . . . If Mr. Wright had been the plaintiff suing by virtue of a title derived under that contract it would have been my duty to dismiss the bill. . . . In this case the plaintiff comes forward to assert his title to property which was vested in him long before he entered into an improper bargain with Mr. Wright, and I cannot, therefore, hold him disqualified to sustain the suit." And he refused to dismiss the bill, but he also refused the plaintiff his costs, though granting a decree in his favour. But it would seem that if in such a case the action failed, the defendant would have had a good cause of action against the solicitor for maintenance, *Harris* v. *Briscoe*, supra. Thus when a member of parliament induced, under a promise of indemnity against costs, a man of straw to prosecute an action against another member of parliament for penalties for sitting and voting without having duly taken the required oaths, which action failed, it was held that was unlawful maintenance, and the member of parliament who had instigated the proceedings was held liable for all costs incurred by the defendant in the action: *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1.

As it is unlawful, generally speaking, to assist another directly with money to carry on or defend litigation, in which one is not concerned, it is also unlawful to do so indirectly by buying or taking an assignment of a bare right to litigate. Although a mere right of entry may be sold and conveyed under the statute already referred to, yet ever since that statute it has been held that the purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud, partakes of the nature of champerty, and will not be enforced: *De Hoghton* v. *Money*, 1 Eq. 154; 2 Ch. 164; and see *Hovey* v. *Hobson*, 51 Me. 62; *Little* v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, 19 Gr. 512; *Muchall* v. *Banks*, 10 Gr. 25; *Prosser* v. *Edwards*, 1 Y. & C. (Ex.) 481. But when a party, having obtained an assignment of a judgment against a mortgagor, thereupon brought an action against the mortgagee, who had sold under the power of sale, to compel him to account for the surplus moneys left in his hands after such sale, it was held that the plaintiff was entitled to sue, and that the assignment was not in contravention of the law respecting champerty and maintenance: *Harper* v. *Culbert*, 5 O.R. 152. But where a creditor of a

company presented a petition for winding up and then assigned his debt and the right to prosecute the petition to another, it was held to be invalid; and an order made for winding up, at the instance of the assignee, was reversed: *In re Paris Skating Rink Co.*, 5 Chy.D. 959. But the purchase of shares in a company for the purpose of instituting a suit to restrain the company from carrying out any agreement alleged to be illegal, was held not to be maintenance: *Hare* v. *London & N.W.Ry. Co.*, Johns. 722; and an assignment by a legatee of his legacy was upheld, though made for less than it was worth to a person who bought it for the purpose of enforcing payment by suit: *Tyson* v. *Jackson*, 30 Beav. 384. But though an infringement of a right of litigating is in some cases void, yet the law allows the assignment of *choses in action*, not only in the case of negotiable instruments which are assignable by the law of merchant, but also other *choses in action*, which by the common law were not assignable, R.S.O., c. 122, ss. 6-12; and the assignee is entitled to sue for the recovery of the *chose in action* assigned in his own name. But this Act does not make valid a voluntary assignment made merely for the purpose of enabling the assignee to sue, on the understanding that he was to share in the proceeds secured, *Re Cannon, Oates* v. *Cannon*, 13 O.R. 70; but the assignor on a re-assignment being made to him may, notwithstanding the previous champertous assignment, recover the *chose in action, Re Cannon, Oates* v. *Cannon*, 13 O.R. 705, and it has been held that the conveyance of property either voluntarily or for value, which the grantor has previously conveyed by a deed, voidable in equity, is not void on the ground of champerty; and that the right of instituting a suit to set aside the previous voidable deed passes to the grantee: *Dickinson* v. *Burrell*, 1 Eq. 337. In that case the grantor after making the voidable deed, executed a voluntary settlement of the property in trust for himself for life, with remainder to such children as he should appoint and in default of appointment for all his children, and it was held that the children were entitled to maintain a suit to set aside the voidable deed.

So also assignments by trustees in bankruptcy of *choses in action* of the bankrupt though in litigation to a purchaser for value or to a creditor, and though made for enabling the assignee to carry on the litigation for his own benefit, or for the benefit of himself and others, are not void on the ground of maintenance: *Seear* v. *Lawson*, 15 Chy.D. 426; *Guy* v. *Churchill*, 40 Chy.D. 481. A party prosecuting his claim to a fund in Court, and to which he was ultimately found entitled, mortgaged it *pendente lite* to enable him to carry on his claim, and the mortgage was held to be valid and not to savour of champerty or maintenance: *Cockell* v. *Taylor*, 15 Beav. 103.

Where unlawful maintenance has been practised the party injured has, as we have said, a right of action against the unlawful maintainer for the injury he has sustained, and where the injured party has succeeded in the action unlawfully maintained, he will be entitled to recover against the unlawful maintainer all the costs that he has been put to: *Bradlaugh* v. *Newdegate*, 11 Q.B.D. 1; and see *Harris* v. *Briscoe*, supra; but as we have already seen, the fact that the action is being unlawfully maintained by some third party, does not of itself constitute a defence to the action; see *Elborough* v. *Ayres*, 10 Eq. 267; nor yet does the fact

of the existence of a champertous agreement between the plaintiff and his solicitor: *Hilton* v. *Woods*, 4 Eq. 432. Where, however, it appears that the plaintiff's right is derived under a champertous agreement, it will, as we have already seen, be held invalid, and the Courts will refuse to give effect to the right of the plaintiff so derived as against the defendant in the action: *Muchall* v. *Banks*, 10 Gr. 25; *Little* v. *Hawkins*, 19 Gr. 267; *Wigle* v. *Setterington*, Ib. 512; *Hilton* v. *Woods*, 4 Eq. 432; *Re Cannon, Oates* v. *Cannon*, 13 O.R. 70; and will also refuse to enforce any such champertous agreement as between the parties to the agreement: *Kerr* v. *Brunton*, 24 U.C.Q.B. 390; *Carr* v. *Tannahill*, 30 U.C.Q.B. 217; *Hutley* v. *Hutley*, L.R., 8 Q.B. 112. A solicitor who procured money from his client for the purpose of corruptly influencing a jury before whom the client was to be tried for a criminal offence, which, as we have seen, constitutes that species of maintenance called embracery, was struck off the rolls: *Re Titus*, 5 O.R., 87.

Owing to the secret nature of agreements for maintenance, it is generally somewhat difficult for the party injured to get at the facts on which his right of action depends, because even if he recovers judgment for costs in the action unlawfully maintained, it is not open to him to bring the execution debtor up for examination: *Majors* v. *Kendrick*, 9 P.R. 363; *Fiskin* v. *Troutman*, C.P.D., 20th June, '89 (not reported), *sed vide Re Irwin*, 12 P.R. 297; but where it is suspected that unlawful maintenance has been practised, it would seem an action could be brought against the suspected maintainer, in which the plaintiff in the original action might either be made a co-defendant for the purpose of discovery, see *Wallis* v. *Duke of Portland*, 3 Ves. 492, or he might, perhaps, without being made a defendant, upon an interlocutory application, be ordered to attend to be examined for discovery: *McMaster* v. *Mason*, 12 P.R. 278; *Smith* v. *Clarke*, 12 P.R. 217; *Turner* v. *Kyle*, 18 C.L.J. 403; *Hendrie* v. *Neelon*, 2 C.L.T. 599; *Megaw* v. *McDiarmid*, 10 L.R. Ir. 376: Rule 566. It is not, however, without doubt that the latter course can be adopted, as it has been held in England that the attendance of a third party for examination or to produce documents can only be ordered for the purpose of a particular motion or proceeding: *Central News Co.* v. *Eastern Telegraph Co.*, 76 L.T.Jor. 242; and see *Rosenheim* v. *Silliman*, 11 P.R. 7.

Where the action unlawfully maintained has succeeded, it does not appear that the defendant in the action could recover substantial damages against the unlawful maintainer, as it would be a case of *damnum absque injuria*.

Correspondence.

THE CENTRAL BANK CASE.

To the Editor of THE CANADA LAW JOURNAL:

Dear Sir,—I wish to express the satisfaction I have found in the examination of the decision of Mr. Hodgins, Q.C., Master-in-Ordinary, in the case of the *Central Bank of Canada*, published in your issue for May 1st. I have often found that the opinion written by the judge of first instance, so to speak, was better studied and intrinsically more valuable than that afterwards written in the Court of Appeal. I cannot avoid thinking that more attention to Canadian decisions by our own judges and lawyers would result in an improvement of our own jurisprudence.

Very respectfully yours,
SEYMOUR THOMPSON.

St. Louis, Mo., June 29, 1889.

COURT DRESS.

To the Editor of THE CANADA LAW JOURNAL:

Dear Sir,—In the County of Huron the judges have laid down a rule that barristers who appear in court before them shall wear the court dress. Can an attorney appear before them with white tie and gown? This is done by an attorney in our county at the sittings of the court in his town. Can the Law Society prevent his doing this?

INQUIRER.

Proceedings of Law Societies.

LAW SOCIETY OF UPPER CANADA.

EASTER TERM, 1889.

The following gentlemen were called to the Bar during the above term, viz.:

May 20th.—John Franklin Palmer, David Fiske Macmillan, Samuel Hugo Bradford, Isaac Benson Lucas, James Alexander Macdonald, John Alexander Chisholm, Ernest Merrick Lake, Arthur George Browning, Edward Peel McNeill, Hume Blake Cronyn, Charles Duff Scott, Herbert Read Welton, Thomas Alfred Rowan, Alexander McLean Macdonell, Charles Swabey, Alfred David Creasor, James Frederick Edgar, Edward Herbert Ambrose, Andrew Leslie Baird, Sydney Chilton Mewburn, William John Lockwood McKay, Thomas Edward Parke, Hugh Mackenzie Cleland, Horace Harvey.

May 25th.—Frank Reid.

The following gentlemen were granted Certificates of Fitness as Solicitors, viz. :

May 20th.—W. Greene, R. J. McLaughlin, J. A. Macdonald, E. F. McNeill, A. Henderson, C. Swabey, H. Harvey, R. O. McCulloch, J. F. Edgar, W. C. Fitzgerald, W. H. Irving J. A. McLean, G. J. Smith, S. R. Wright, W. L. Beale, G Martin

May 21st.—J. T. Kirkland, H R. Welton.

May 25th.—R. R. Hall, A. L. Baird, G. A. Loney, G. H. Douglas.

May 31st.—E. M. Lake, A. G. Browning, A. M. Macdonell.

June 8th.—J. I. Poole, I. B. Lucas, S. H. Bradford, F. J. Roche.

June 25th.—H. B. Cronyn.

The following gentlemen passed the Second Intermediate Examination, viz. :

N. W. Rowell, with honors, 1st scholarship ; T. D. Law, with honors, 2nd scholarship ; E. Bayley, with honors, 3rd scholarship ; W. H. Murray, C. W. Kerr, W. J. Fleury, and J. Reeve, with honors ; and Messrs. H. Chatelain, W. A. Logie, A. G. Smith, D. Fenton, A. Abbott, A. A. Adams, J. D. Lamont, M. K. Cowan, C. J. Notter, W. Mackay, D. Holmes, M. J. Routhier, J. R. L. Starr, W. York, A. J. Keeler, N. Mackenzie, J. W. Evans, D. R. McLean, R. A. Montgomery, C. Elliott, J. W. Mealey, J. W. McColl, C. E. Oles, F. W. Maclean, D. Grant, J. W. Morrice, A. C. Paterson, W. A. Smith, H. W. Steward, A. H. Wallbridge.

The following gentlemen passed the First Intermediate Examination, viz. :

W. Stewart, with honors, 1st scholarship ; G. D. Minty, with honors, 2nd scholarship ; H. Langford, with honors, 3rd scholarship ; J. E. Jones, W. A. Leys, E. F. Blake, E. N. Livingston, with honors ; and Messrs. W. S. Middlebro, J. Hales, A. W. Ballantyne, J. A. Taylor, G. F. Downes, J. B. McLeod, H. B. McGiverin, J. S. Denison, C. F. Maxwell, A. U. Bain, J. Steele, W. F. Hull, R. T. Harding, F. A. Hough, H. J. D. Cooke, Z. Gallagher, S. King, J. F. Carmichael, R. B. Henderson, T. A. Gibson, E. G. Fitzgeraid, B. E. Swayzie, W. A. Boys, J. N. Anderson, W. J. Clarke, J. E. Cooke, F. Elliott, G. Waldron, F. C. Jones, E. Mortimer, W. E. Burritt, R. B. Revell, U. A. Bachner, M. O. Sheets, W. M. McKay, J. W. Winnett.

The following gentlemen were entered on the books of the Society as Students-at-Law, viz. :

Graduates.—Charles Howard Barker, Bronte Melbourne Aikens, Peter Secord Lampman, James Craig Cameron, John McKay, Edward Scott Griffin, Ralph Manson Lett, John Henry Madden.

Matriculants.—Thomas Wesley Evans, Arthur Holman.

Juniors.—James Turner Scott, William Nassau Ferguson, Frederick Langmuir, Thomas Richard Beale, Henry Edward Price, William Archibald Hutchison, William Douglas, Trevor Hugo Grout, James Archibald Hunter, Ellis Hughes Cleaver, Albert Mearns, John Thomas Loftus, Alfred Edwin Bull, Frederick Hamilton Coulter, David Irving Sicklesteel, William Alexander Lewis, George Shepherd Bowie, William Tyndall Gray, James Kenneth McLennan,

Ward Stamworth, William Morley Punshon Whitehead, Samuel Simpson Sharp, Allan McLennan, Matthew Henry East, Daniel Smith, John Joseph McCready, William Pattison Telford, Augustus Noverre Middleton, Frederick George Anderson, William F. W. Lent, Oliver Hugel Mabee, Charles Edward Williams, John Ernest Primeau, Thomas Ernest Godson, George Johnston Ashworth, Alexander Garrett, and John Agnew Stevenson.

Articled Clerk.—John Percival White.

The following gentlemen were entered on the books on the last Tuesday in June, as Students-at-Law in the graduate class, under the provisions of the Rule in that behalf, viz.:

George Coltman Biggar, William Cross, John Henry Moss, John Henry Rodd, Edwin Goodman Rykert, John Harold Senkler, John David Macdonald Spence, William Benjamin Taylor, Michael Joseph O'Connor.

The following is a *résumé* of the proceedings of Convocation during Easter Term:

MONDAY, May 20, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Britton, Cameron, Ferguson, Hoskin, Irving, Kerr, Kingsmill, Lash, Murray, and Shepley.

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

The minutes of last meeting were read and approved.

Mr. Shepley, on behalf of the Special Committee to frame draft rules on the subject of the Law School, presented their report, which was received, read, and the appointment of a time for the consideration of the report was deferred until to-morrow.

The petition of Messrs. Morrison and others relating to the case of L. U. C. Titus was read.

Ordered that the petitioners be informed that Convocation can take no action in the matter.

Mr. Shepley gave notice

1. That he will to-morrow move that section 12, rule 29, be amended by inserting between the words "libraries" and "to be supplied" the words "and one copy for each solicitor who has taken out his certificate."

2. That he will move to-morrow that the Order of Proceedings be amended by inserting after the order "communications" an order under the name of "inquiries."

Mr. Murray presented the report of the Finance Committee relating to the laying of the walks in accordance with the proposals of the Consumers' Gas Company, at $2 per superficial yard, with Bryce's patent asphalt pavement.

Ordered that it be referred back to the Committee to report upon the position of the matter between the Law Society and the Gas Company, and further to report on the best method of securing a permanent and suitable pavement.

TUESDAY, May 21, 1889.

Convocation met.

Present: Messrs. Beaty, Bruce, Cameron, Foy, Hardy, Hoskin, Hudspeth, Irving, Kerr, Kingsmill, Martin, Meredith, Murray, and Shepley.

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

The Secretary read the report of the Examiners on the First and Second Intermediate Examinations, and also his report on the standing of the candidates.

Ordered that so much of the report as refers to the question of honors and scholarships be referred to a Special Committee, composed of Messrs. Bruce, Foy, and Kingsmill, for examination and report.

Ordered that Thursday, 30th May, be appointed for the consideration of the report of the Special Committee on the subject of the Law School, and that a call of the Bench be made for that day.

Mr. Martin presented the annual report of the County Libraries Aid Committee, which was received, read, considered and adopted.

Ordered that Mr. Winchester, the Inspector of the County Libraries, be paid the sum of fifty dollars for his work for the first year, in addition to the sum of one hundred dollars already paid to him.

Ordered that in accordance with the recommendation contained in the report of the County Libraries Aid Committee, Mr. Winchester be re-appointed Inspector for the ensuing year, and that he be paid one hundred and fifty dollars for his services during such year.

The Secretary read a letter of Mr. F. H. Keefer.

Ordered that the letter and papers connected therewith be referred to the Discipline Committee for report.

Mr. Martin gave notice

That on the 31st May, inst., he would introduce a rule to amend section 24 of rule relating to County Libraries so as to permit the payment of two-thirds of the salary of the librarian and one-half of the charge for telephone service of County Associations, the members of which do not exceed one hundred in number. Provided that in no event shall more than two hundred dollars be paid to any library association for librarian's salary and telephone service.

Mr. Bruce from the Special Committee entitled to deal with the report of the examiners on the first and second intermediate honor examinations, presented their report:

That W. Stewart, G. D. Minty, H. Langford, J. E. Jones, W. A. Leys, E. F. Blake, and E. N. Livingston are entitled to be passed with honors in the first intermediate examination, and that W. Stewart is entitled to the first scholarship of one hundred dollars, G. D. Minty to the second scholarship of sixty dollars, and H. Langford to the third scholarship of forty dollars.

That N. W. Rowell, T. D. Law, E. Bayley, W. H. Murray, C. W. Kerr, W. J. Fleury, and J. Reeve are entitled to be passed with honors in the second intermediate examination, and that N. W. Rowell is entitled to the first scholarship of one hundred dollars, T. D. Law to the second scholarship of sixty dollars, and E. Bayley to the third scholarship of forty dollars.

A. BRUCE, *Chairman.*

The report was adopted and ordered accordingly.

Mr. Shepley, seconded by Mr. Murray, moved that section 12, rule 29, be amended by inserting between the words "libraries" and "to be supplied" the words "and one copy to each solicitor who has taken out his certificate."

Ordered that the subject be referred to a Special Committee, consisting of the Chairmen of the Finance and Reporting Committees and Mr. Shepley, to report on the subject generally.

Mr. Osler's notice of motion was ordered to stand until Friday, 31st inst.

SATURDAY, May 25, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Cameron, Hoskin, Irving, Mackelcan, Martin, Morris, Moss, Murray, Osler, Robinson, and Smith.

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

The minutes of last meeting were read and approved.

Mr. Hoskin, seconded by Mr. Moss, moved that Mr. Edward Blake, Q.C., be re-elected Treasurer of the Law Society of Upper Canada.—*Carried.*

Mr. Hoskin mentioned the letter of Mr. Read to Mr. Irving on the subject of his recent work, "The Lives of the Judges."

Ordered that the subject be deferred until next Friday, when the Secretary will lay all the information before the Convocation.

Mr. Hoskin brought up a communication from Miss Cameron of the telephone and telegraph office, and moved, seconded by Mr. Osler, that she should be paid the sum of $540 annually, such increase to commence from the First day of April, 1889.—*Carried.*

Mr. Osler presented the report of the Reporting Committee, which was received, read and adopted.

Ordered that the standing committees for the ensuing year be composed of the same members as the standing committees for the past year consisted of at the beginning of this term, except that the name of Sir Adam Wilson be added to the Reporting Committee.

Mr. Moss from the Legal Education Committee presented the report on the Primary Examination.

The report was read, adopted, and ordered accordingly.

The Secretary read the letter of Messrs. Macdonald and Dignam, enclosing a copy of the *London Free Press* of 21st March, 1889.

The Secretary having acknowledged the letter, no further action was ordered.

THURSDAY, May 30, 1889.

Special meeting of Convocation *re* Law School Rules.

Present: Sir Alexander Campbell, Sir Adam Wilson, and Messrs. Beaty, Bell, Britton, Bruce, Cameron, Foy, Hardy, Hoskin, Irving, Kingsmill, Lash, Mackelcan, Martin, Meredith, Murray, Purdom, Robinson, Shepley, and Smith.

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

The Secretary read the order of Convocation of the 21st inst., that this day be appointed for the consideration of the report of the Special Committee on the

subject of the Law School, and that a call of the Bench be made for this day, the notices of meeting to state the subject to be considered, and no other business to be taken up.

Mr. Martin presented the report of the committee, which was received and read.

Ordered that it be considered clause by clause.

The report was then read, considered, and amended.

The report as amended was adopted.

Mr. Martin introduced a rule, founded on the report, to give effect to it in the same language as that contained in the report.

The repealing clause was added as to the rules inconsistent with those recommended by the report.

The rules were then read a first and second time, as contained in pages 37 to 61 of the new consolidated rules.

Mr. Lash, seconded by Mr. Mackelcan, moved the suspension of the rule as to third readings, and moved that the rules be read a third time.—*Carried unanimously.*

The rules were read a third time and passed.

Mr. Meredith, seconded by Dr. Smith, moved to amend rule 3, section 3, by striking out the words, "other than that of student in attendance," and substituting therefor the words, "inconsistent, or interfering with his duties as such student," and by striking out the words, "other than that of," in the 8th line, and substituting therefor the words, "inconsistent, or interfering with his duties of."

Mr. Shepley moved, seconded by Mr. Mackelcan, to amend rule 3, section 3, as follows:

No person attending in the Chambers of a barrister in pursuance of section 3 of these rules shall, during his time of attendance, hold any office or emolument, or engage or be employed in any occupation whatever other than that of student in attendance, and no person bound by articles of clerkship to any solicitor shall, during the term of service mentioned in such office, hold any office of emolument, or engage or be employed in any occupation whatever other than that of clerk to such solicitor or his partner or partners, if any, and his Toronto agent, with the consent of such solicitors, in the business, practice, or employment of a solicitor.

Mr. Shepley's amendment was carried on the following division:

Yeas—Bruce, Martin, Shepley, Lash, Foy, Mackelcan.

Nays—Meredith, Purdom, Smith.

The rules as amended on the third reading were carried.

Ordered that the rules come into operation immediately for purposes of organization, but as far as students are concerned not till Trinity Term, with an examination for admission of students in Michaelmas Term.

It was further ordered that the minutes of this meeting be submitted for approval to Convocation at the regular meeting of Convocation on 8th June next, instead of at the meeting of 31st May.

FRIDAY, May 31, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Cameron, Ferguson, Hoskin, Irving, Kerr, Kingsmill, Meredith, Murray, and Shepley.

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

The minutes of meeting held on Saturday, May 25th, were read and approved.

Ordered that a committee be appointed to report whether it will be necessary to erect a special building for the accommodation of the Law School, and also to report upon the propriety of erecting therewith consultation chambers, for such members of the Society as may desire to rent the same.

Convocation appointed as the committee Messrs. Moss, Osler, Robinson, Meredith, Shepley, Kingsmill, Hoskin, and Martin.

Mr. Shepley presented the report of the Committee on Supreme Court Reports, which was adopted, and is as follows:

The Special Committee appointed (21st May) by Convocation to enquire and report to Convocation on the desirability of furnishing the Supreme Court Reports to the profession, beg to report that after enquiry the Committee is of opinion that it is not practicable to furnish these reports. The Committee, however, is of opinion and would recommend that some inexpensive and convenient means be devised by which the practitioner may find within the limits of our own reports what the final result has been of cases in our own courts carried to the Supreme Court or Privy Council, and the Committee recommend that it would be an instruction to the Reporting Committee to devise such means and carry the same into effect at the earliest possible date.

May 31st, 1889. (Sgd.) G. F. SHEPLEY.

Mr. Murray, from the Finance Committee, presented a report on the pavement to be laid in the grounds. The report was read, considered and referred back to the committee to re-consider whether a five years' guarantee can be obtained from the Gas Company, and also to ascertain the cost of paving with flags and of a wooden pathway, and to obtain such other information as may be deemed desirable by the committee to lay before Convocation.

Ordered, that the "Order of Proceedings" be amended by inserting after the word "communications" an order under the name of "enquiries."

Mr. Shepley gave notice for Saturday, 8th June, that he would introduce a rule amending such rules of the Society as it is desirable should be amended by reason of and in accordance with the rules passed yesterday, the proposed amendments being shown by the report of the Special Committee for drafting rules relating to the Law School, which was adopted yesterday, and that the rules be suspended so that such rule as may be adopted shall be passed through all its stages.

Mr. Osler gave notice that he would move to alter the rule in so far as fixing the amount of the salary of the Principal of the Law School is concerned, and also that the terms of the occupations open to the Principal be reconsidered.

Mr. Meredith moved, seconded by Mr. Kerr, That it be referred to the Legal Education Committee to consider and report as to the appointment of the staff of the Law School, with power to advertise for applicants for the positions therein, such committee to report to Convocation at its next meeting, and that a call of the Bench be made for the 19th June to make the appointments.

Mr. Osler moved, seconded by Mr. Hoskin, That if one hundred copies of Mr. Read's "Lives of the Judges" can be obtained by paying two dollars a copy to Mr. Read, and fifty cents a copy to the publishers, they be purchased, and that two copies be given to each of the County Law Libraries, and that the balance be reserved for distribution as prizes in connection with the Law School.

Sir Adam Wilson gave notice of motion for the reconsideration of new rule 21 as number 3 sub-section of section 3, as amended on 30th May, so as to make it conform to the Ontario Act—R.S.O., 1887, c. 146, s. 6, ss. *a*.

SATURDAY, June 8, 1889.

Convocation met.

Present: Sir Adam Wilson, and Messrs. Cameron, Foy, Irving, Kingsmill, Lash, Mackelcan, Martin, Meredith, Morris, Moss, Murray, Osler, Robinson, Shepley, and Smith.

Mr. L. W. Smith was appointed chairman, in the absence of the Treasurer.

The minutes of meetings held on the 30th and 31st of May were read and approved.

Dr. Lash, from the Legal Education Committee, presented the following report:

That pursuant to the resolution of Convocation, they have considered as to the appointment of the staff of the Law School, and as to advertising for applications for positions therein.

1. The Committee are of opinion that it would be advisable to advertise for applications for the office of Principal, and they submit herewith the form of advertisement for that purpose.

2. The Committee think that until a detailed scheme for the working of the Law School has been framed, it would be advisable to defer the appointment of lecturers, and as examiners will not be required before May next, the Committee think that it is unnecessary to advertise for applicants at present.

3. The Committee further recommend that the first duty of the Principal be to prepare and submit to the Legal Education Committee a scheme not inconsistent with the rules of the Law Society providing for the proper working of the Law School, and the carrying out of the rules relating thereto.

4. The Committee further recommend that the provision of the rule requiring the Principal to devote his whole time to the duties of his office be modified to the effect that he shall engage in no professional work other than that of a consulting and chamber counsel, and that he be required to reside in or near Toronto.

June 6th, 1889. Z. A. LASH, *Chairman.*

The report was received, read and considered, clause by clause. Clauses 1, 2 and 3 were carried: clause 4 stands.

The report of the lecturers on the Law School for 1888-89 was received. No action taken.

Mr. Murray presented the report of the Finance Committee on pavements.

Ordered that the offer of the Consumers' Gas Company to lay the pavement recommended in the second report of the Finance Committee, if the Gas Company will give a five year guarantee, be accepted.

A letter from the Treasurer acknowledging his re-election was read.

A letter from the Treasurer in the matter of the Crooks Monument memorial enclosing one from Mr. Howland, was read, and the Secretary was directed to reply that the Society, having no armorial bearing, Convocation is unable to comply with the request.

A letter from Mr. Tully, of 29th May, to the chairman of the Finance Committee was read.

Ordered that the Secretary see Mr. Tully on the subject of the danger of the ceiling falling in the library, and obtain repairs.

A letter from J. A. Davidson, Secretary Perth Law Association, of 3rd June, read and referred to County Libraries Aid Committee.

Mr. Martin, seconded by Mr. Osler, moved

That section 23 of the rules relating to County Libraries be amended by striking out the words, "and Convocation may authorize," and all following words, and substituting therefor the following:

"And Convocation may authorize the payment of such proportion not more than two-thirds of the charges for telephone service of any County Association, the members of which do not exceed one hundred in number, provided that the amount to be paid in respect to such service to any County Association shall not in any case exceed in the whole two hundred dollars per annum. Provided that an allowance not to exceed two hundred dollars per annum may be made to any County Association, although the number of its members exceed one hundred. Provided further that no allowance shall be made to any Association unless the same be reported on satisfactorily by the Inspector."—*Carried on a division.*

Mr. Meredith, for Sir Adam Wilson, moved for the reconsideration of new rule 21, as number 3, sub-sec. of sec. 3, as amended on 30th May, so as to make same conform to the Ontario Act, R.S.O., 1887. c. 147, s. 6, ss. *a*.

The motion was lost.

Mr. Osler, seconded by Mr. Martin, moved,

To alter the rule in regard to the salary of the Principal—to increase the salary to four thousand dollars.—*Carried.*

Ordered that the provisions of the rule requiring the Principal of the Law School to devote his whole time to the duties of his office, be modified to the effect that he shall engage in no professional work other than that of consulting counsel, nor shall he be a member of any firm of practising barristers or solicitors, and that he be required to live in or near Toronto.

Clause 4 in the report of the Legal Education Committee was amended as above and with this substitution, the report as amended was adopted.

Mr. Shepley, seconded by Mr. Osler, moved for leave to introduce the following rule:

Any person who having entered the Society as a student-at-law, has proceeded regularly to the degree of barrister-at-law, and who thereafter serves under articles for the full term, during which he would, if an articled clerk, only have required to serve, shall, upon completing these articles and petitioning under these rules for a certificate of fitness, be entitled to have allowed him the intermediate examinations passed by him when proceeding to the degree of barrister-at-law. (Before rule 190.)

The rule was introduced, leave being granted.

Ordered that the rule be now read a first and second time.

Mr. Shepley moved that the rule be now read a third time.

Ordered that the rule be now read a third time and passed.

Mr. Osler from the Special Committee on increased building accommodation for the Law School and for consultation chambers, reported as follows:

That it is probable that a new building will be required, but that further action on the matter ought to be deferred until after the Principal has reported upon the accommodation required.

June 8th, 1889. B. B. OSLER, *Chairman.*

Ordered that the rules as consolidated, including the rule just passed, be read a first and second time.

Mr. Shepley, seconded by Mr. Lash, moved that the rules as consolidated be read a third time and passed.—*Carried unanimously.*

Ordered that the rules as consolidated be read a third time and passed.

WEDNESDAY, June 19, 1889.

Convocation met in pursuance of a special call of the Bench, ordered 31st of May last.

Present: Messrs. Beaty, Bell, Bruce, Britton, Cameron, Ferguson, Foy, Guthrie, Hardy, Hoskin, Irving, Kerr, Lash, McCarthy, Martin, Meredith, Morris, Moss, Murray, Osler, Robinson, and Shepley.

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

The minutes of the last meeting were read and approved.

The Secretary read the resolution of Convocation, appointing this day to consider the appointment of the Principal of the Law School.

It was then resolved, That the position of Principalship of the Law School be offered to Mr. Justice Strong, and that the resolution of Convocation, with memorandum of terms, be communicated to Mr. Justice Strong, and that it be intimated to him that as Convocation will meet on Tuesday 25th inst., it is necessary to have a reply before that date.

It was further resolved, That the further consideration of the appointment of Principal be adjourned to that day.

Mr. Shepley gave notice that he would, at the half-yearly meeting on Tuesday, move that so much of the rules passed on the 8th June, inst., as relate to examinations be suspended until the end of next Trinity Term, and that Primary Examination be held prior to next Michaelmas Term as heretofore, and that he will move the suspension of the 21st rule for that purpose.

Ordered that the Visitors of the Society be invited to attend the half-yearly meeting of Convocation on Tuesday next at 12.30 p.m., for the purpose of giving their approval to the rules passed on 8th June, inst., and that in the meantime the Secretary forward a copy of the rules to each of the Visitors.

Mr. Cameron gave notice that on next Tuesday the question of the salaries of the lecturers be reconsidered.

TUESDAY, June 25, 1889.

Convocation met.

Present: Messrs. Beatty, Ferguson, Foy, Irving, Kingsmill, Lash, Mackelcan, Martin, Meredith, Morris, Moss, Murray, and Shepley.

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

Sir Thomas Galt, Mr. Justice Ferguson, Mr. Justice Robertson, and Mr. Justice Maclennan, as Visitors of the Society, attended Convocation in order to confer with the Benchers on the subject of the new rules, to which they gave their assent.

The minutes of last meeting of Convocation were read and approved.

The Secretary read the report of the Legal Education Committee on the admission of graduates as of Easter Term, 1889.

The report was adopted.

Ordered that the graduates therein named be entered on the books of the Society as students-at-law of the graduate class as of the first day at Easter Term, 1889.

Mr. Justice Strong having declined the position of Principal of the Law School, which had been offered him,

Mr. Martin moved, seconded by Mr. Mackelcan, That Convocation proceed to appoint a Principal for the Law School on Wednesday, 3rd July, 1889; that a call of the Bench be made for that day, and that in the notice to Benchers it be mentioned that Mr. Justice Strong had declined the position.—*Carried.*

Ordered, that so much of the rules passed on the 8th June instant as relate to examinations be suspended until the end of next Trinity term, and that primary examinations be held prior to next Michaelmas term as heretofore.

WEDNESDAY, July 3, 1889.

Convocation met.

Present: Messrs. Bell, Britton, Bruce, Cameron, Ferguson, Hardy, Irving, Lash, Mackelcan, Martin, Meredith, Morris, Moss, Murray, Pardom, 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 the order of Convocation of the 25th June last directing that a call of the Bench be made for the 3rd July in order to appoint a Principal for the Law School, the Hon. Mr. Justice Strong having declined the appointment.

Convocation then proceeded to consider the appointment of the Principal of the Law School.

Mr. W. A. Reeve, Q.C., was elected Principal of the Law School.

Ordered, that the Finance Committee be authorized to pay the travelling expenses of the Principal to be incurred in visiting such places in New York and Massachusetts, or such other places as may be deemed desirable, for the purpose of acquiring information on the Law School systems adopted at those places.

Convocation being of opinion that it is most desirable that Convocation should have the benefit of the opinion of Messrs. Martin and Moss upon the working of the Law Schools which the Principal is requested to visit, it is ordered that they be requested to accompany the Principal, if it suits their convenience.

It is further directed that their expenses be defrayed by the Law Society.

Ordered, that the salary of the Principal begin on the 1st July instant, and that he be required to conduct such duties relating to the examination of candidates as may be necessary until other arrangements are made in respect of examiners, and that the duty to be discharged by him as such examiner shall not entitle him to other salary than that allowed to him as Principal.

Ordered, that Convocation do meet for Trinity term on Monday, the 2nd day of September, and for the two weeks then ensuing, notwithstanding Rule 6, and that the Secretary do issue notices to that effect to members of Convocation.

Convocation adjourned.

DIARY FOR AUGUST.

1. Thu.....Slavery abolished in British West India Islands, 1838.
3. Sat.....Last day for notices for Primary Exam.
4. Sun.....*Seventh Sunday after Trinity.*
6. Tue.....Thomas Scott, 4th C.J. of Q.B., D.60.
11. Sun.....*Eighth Sunday after Trinity.* Battle of Lake Champlain, 1814.
13. Tue.....Primary Exam. Sir Peregrin Maitland, Lieut.-Governor, 1799.
14. Wed.....Battle of Fort Erie, 1814.
15. Thu.....Admission of graduates and matriculants.
17. Sat.....Last day for filing papers and fees for Final Examination.
18. Sun.....*Ninth Sunday after Trinity.*
20. Tue.....First Intermediate Examination.
22. Thu.....Second Intermediate Examination.
24. Sat.....St. Bartholomew.
25. Sun.....*Tenth Sunday after Trinity.*
26. Mon.....Trinity Term begins.
27. Tue.....Solicitors' Examination.
28. Wed.....Barristers' Examination.

Reports.

ONTARIO.

MUNICIPAL LAW.

[Reported for the CANADA LAW JOURNAL.]

Re KINGSTON, SMITH'S FALLS AND OTTAWA RAILWAY AND THE TOWNSHIP OF BASTARD AND BURGESS SOUTH.

Scrutiny of votes—Powers of County Court judge—Municipal Act, secs. 320, 323, 326—Decision as to specific ballots.

On an application under secs. 320 and 323 and following sections of the Municipal Act, in respect of the by-law for granting aid by way of bonus to the Kingston, Smith's Falls and Ottawa Railway Company from the Township of Bastard and Burgess South, it was

Held, that the powers of a County Court Judge under the provisions of section 320, sub-section 2, and sections 323, 324, 325, and 326 of the Municipal Act are limited to an inspection of the ballot papers, and to ascertaining who are and who are not entitled to vote, and, as a result of such inspection and ascertainment, to determining whether the by-law has or has not been carried. For decision as to specific ballots see judgment.

[MACDONALD, CO.J., BROCKVILLE.

On the 15th April, 1889, Mr. E. J. Reynolds of counsel for Thomas H. Percival, a duly qualified voter, filed with the judge of the County Court of the united counties of Leeds and Grenville the petitions and affidavits, and the said Percival entered into the recognizance required by section 323 of the Municipal Act, and application was thereupon made to the said judge for a scrutiny of the ballot papers and a determination of the questions in connection with a vote of the electors of the township of Bastard and Burgess South in the County of Leeds upon a by-law for granting aid by way of bonus to the Kingston, Smith's Falls, and Ottawa Railway Company.

On the 29th April, 1889, at Delta, in the said township, the said judge entered into the scrutiny and determining the dispute under sections 320 and 323 and following sections of the Municipal Act.

Owing to an error made by the deputy returning officer for polling sub-division No. 5, there were 88 votes counted for the by-law and 8 against The numbers should have been reversed. Certain ballots were objected to upon both sides, and it appeared that in one polling sub-division the deputy returning officer, instead of putting his initials on the back of the ballots, merely put the initial of his surname. Allowing these in the meantime the vote was ascertained to have been 250 for the by-law and 235 against it.

An inspection or scrutiny of the voters' list was then entered upon to ascertain how many persons were qualified to vote. It was conceded on both sides that 589 persons were so qualified, and the petitioner claimed there were 30 more. The right of these 30 was questioned by the Railway Company.

The proceedings were adjourned, and on 10th May, 1889, argument was had at Brockville.

E. J. Reynolds for the petitioner.—Some of the ballots objected to may be valid; but those upon which the deputy returning officer merely put the initial of his surname cannot be counted, see sec. 143, sub-sec. 6, secs. 144, 146, 152, and 163, sub-sec. 8 (d) and sub-sec. 4. Also *Jenkins* v. *Breckin*, 7 Sup. Court 258; *Mills* v. *Hawkins*, 8 Sup. Court 696, and *East Hastings Case*, *Hodgin's Election Cases*, 764. As to the powers of the judge upon the scrutiny see *Re Canada Temperance Act*, *G. Ontario Reports 161*, 12 Appeal 677, and *Chapman* v. *Rand*, 11 Sup. Court 312.

A person may be compelled to say how he voted, or at any rate a person who voted, and who, upon enquiry, is found not to have been entitled. Sec. 171 of the Municipal Act provides that a voter cannot be compelled to state for what *person* or *individual* he voted, and does not apply to a vote given on a by-law; at any rate it only applies to a lawful voter and not to an intruder who votes without right. Even if it

applies to a vote upon a by-law it does not prevent a person from stating of his own accord for whom he voted. See secs. 218 and 219 of this Act, and *Langdon* v. *Arthur*, 45 U.C.B.R. 47, see page 52.

Section 306 does not bring in section 171 or any other section not incidental to the taking of the votes.

In one polling sub-division only 6 votes were polled against the by-law; any bad votes on the poll book over six in number must have been polled for the by-law and should be struck out.

J. L. Whiting for the Railway Company.—Probably the ballot with the straight mark and no cross ought to be rejected. All the others ought probably to be allowed. The ballots upon which the deputy returning officer merely put the initial of his surname ought under the decided cases to be allowed. He could identify the ballot as the one he gave to the voter, and the object of putting on the initials is such identification. Even if there was an irregularity it is cured by section 175. As to powers of the County Judge the Legislature discriminated as to powers conferred, sec. 320, sub-sec. 3, sec. 335. Sections 323 to 326 are all under the head of "scrutiny" and controlled by that term, *Wood* v. *Hurl*, 28 Grant 146. The meaning of secs. 323, 324, and 325, and the jurisdiction of the judge has been decided by *Chapman* v. *Rand*, 11 Sup. Court, 312. See Canada Temperance Act, secs. 61, 62 and 63. No hardship arises in this case as might under the Canada Temperance Act, as the Legislature has made provision for application to quash by-laws. Although apparently sec. 326 gives further power to the judge, in reality it does not, and that section must be controlled by the three previous sections. The meaning is that any incidental powers as to allowing costs or such like powers as the judge would have upon a trial of the validity of the election of a member of a municipal council he has in such a case as this. Sec. 171 does apply.

McDonald, C.J.—Upon a consideration of the 2nd sub-section of sec. 320 and of secs. 323, 324, 325 and 326 of the Municipal Act, and of the authorities cited to me, I am of opinion that my powers are limited to an inspection of the ballot papers, to ascertaining who are and who are not entitled to vote for the by-law, and, as a result of such inspection and ascertainment, to determining whether the by-law has or has not been carried. In my judgment, the provisions of sec. 326 as to the powers and authority of the judge must be read in connection with the foregoing sections under the head of "scrutiny," and the limitation of them thereto or thereby is not at all a strained construction. In fact, the very insertion—I might say, repetition—of the words "upon the scrutiny" after the word "arising" appears to me to evidence an intention upon the part of the Legislature to impose the limitation which I find exists. I therefore merely consider the matters above mentioned as being those as to which I have jurisdiction, and as to them I adjudge as follows:

Polling Sub-division No. 2:

Two ballots objected to, one for and one against the by-law. The cross upon each of these ballots is marked in a rough manner. I have not any doubt as to the honesty of the mark, and do not believe that the peculiar manner of making the cross was intended to lead to identification of the voter. I allow them.

Polling Sub-division No. 3:

One ballot against the by-law objected to. There is a distinct cross in the compartment, and near it and within the same compartment, a cross hardly distinguishable, which possibly may have been made by the voter as a cross or mark, or which may be a mere mark in the paper as it came from the mill, or a mark upon it afterward accidentally made. But even if the two crosses were made by the voter, the vote was not thereby invalidated. See *Bothwell Election Case*, Supreme Court, vol. 8, and *Woodworth* v. *Sessions*, 10 L.R.C.P. 733 or 773.

Polling Sub-division No. 4:

All the ballot papers objected to on the ground that the deputy-returning-officer did not put his initials upon them. He did put "P," the initial of his surname. I hold the ballots good.

Two votes for the by-law objected to, one on the ground that the voter made two crosses, the other on the ground that the mark made is not a cross. My decision in the case of the ballot objected to in Polling Sub-division No. 3 applies to the former, and the vote is allowed. As to the latter, I hold that the mark cannot be considered to be a cross, but must be held to be a straight line, and under the authority of the Bothwell case above cited, I disallow and strike off the vote.

Polling Sub-division No. 5:

No ballots objected to.

The total number of votes cast for and against the by-law, as allowed by me, is then as follows :

	For.	Agst.
Polling Sub-division No. 1	135	6
" " " 2	20	48
" " " 3	4	72
" " " 4	82	21
" " " 5	8	88
Totals	249	235

making a majority of 14 in favor of the passing of the by-law.

Upon a scrutiny of the voters' list, there were allowed to be 589 persons entered thereon who had an undoubted right to vote upon the question of the passing of the by-law, and there were 30 so entered whose right to vote was questioned. Allowing that the 30 had a right to vote (which it is the interest of Mr. Percival to maintain), and adding them to the 589, we have 619 persons entitled to vote. The assent of two-fifths of all ratepayers who were entitled to vote, as well as of a majority of the ratepayers voting on the by-law, is required by the statute. Two-fifths of 619 would, as I make it, require 248 votes to secure the passing of the by-law. As 249 votes were given in its favor, the required proportion has been secured, and I do therefore determine that the majority of the votes given is for the by-law, and that the assent of two-fifths of all ratepayers who were entitled to vote has been given to the passing thereof, and that therefore the said by-law has been carried.

It was subsequently decided that each party should bear his own costs.

Early Notes of Canadian Cases.

SUPREME COURT OF CANADA.

GALARNEAU *et al. v.* GUILBAULT.

Title to bridge—Appeal R.S.C., c. 135, s. 29, (b)—38 Vict., c. 97—Statutory privilege to maintain toll bridge—Infringement—Damages.

By 38 Vict., c. 97, the appellants authorized to build and maintain a toll bridge on the river L'Assomption, at a place called Portage, were bound "if the said bridge should, by accident or otherwise, be destroyed, because unsafe or impassable, the said plaintiffs should be bound to rebuild the said bridge within the fifteen months next following the giving way of the said bridge, under penalty of forfeiture of the advantages to them by this Act granted; and during any time that the said bridge should be unsafe or impassable, they should be bound to maintain a ferry across the said river, for which they might receive the tolls."

The bridge was accidentally carried away by ice, but rebuilt and opened for traffic within fifteen months. During the reconstruction, although appellants maintained a ferry across the river, the respondent built a temporary bridge within the limits of the appellants' franchise and allowed it to be used by parties crossing the river.

In an action brought by the appellants' claiming $1,000 damages, and praying that respondent be condemned to demolish the temporary bridge, on an appeal to the Supreme Court it was

Held, 1st, That as matter in dispute related to the title of an immoveable, by which rights in future might be bound, the case was appealable. R.S.C., c. 135, s. 29 (b).

2nd, Reversing the judgment, of the court below, that the erection of the respondent's bridge and the use made of it as disclosed by the evidence in the case, was an illegal interference with appellants' statutory privilege, but as the bridge had since been demolished the court would merely award nominal damages, viz.: $50 and costs.

RITCHIE, C.J., and PATTERSON, J., dissenting.

Appeal allowed with costs.

M. E. Charpentier, solicitor for appellant.

McCourville & Renaud, solicitors for respondent.

EVANS *v.* SKELTON *et al.*

Lease—Accident by fire—Arts. 1053, 1627, 1629, C.C.

By a notarial lease the respondents (lessees) covenanted to deliver to the appellant (lessor) certain premises in the city of Montreal at the expiration of their lease "in as good order, state, etc., as the same were at the commencement thereof, reasonable tear and wear, and accidents by fire excepted."

The premises were used as a shirt and collar factory, and were insured, the lessees paying the extra premium, and having been destroyed

by fire during the continuance of the lease, the amount of the insurance money was received by the appellant.

Subsequently the appellant (alleging that the fire had been caused by the negligence of the respondents) brought an action against them for $9,084, being the amount of the cost of reconstructing and restoring the premises to good order and condition, less the amount received from the insurance. At the trial it was proved that respondents allowed the ashes of hard coal used in the premises to be put into a wooden barrel on one of the flats, but that slushy refuse, tea leaves, etc., were always poured into the barrel. The origin of the fire could not be ascertained.

Held, affirming the judgment of the Court of Queen's Bench for Lower Canada (Appeal side), SIR W. J. RITCHIE, C.J., and TASCHEREAU, JJ., dissenting, that the respondents were not responsible for the loss under Art. 1629, c.c., as the fire in the present case was an accident by fire within the terms of exception contained in the lease.

Appeal dismissed with costs

Macmaster, Q.C., for appellant.

Lacoste, Q.C., for respondents.

SHAW *v.* CADWELL *et al.*

Partnership—Liability—Art. 1867, c.c.

Where one member of a partnership borrows money upon his own credit, by giving his own promissory note for the sum so borrowed, and he afterwards uses the proceeds of the note in the partnership business of his own free will without being under any obligation to, or contract with, the lender so to do, the partnership is not liable for said loan. Art. 1867, c.c. *Maguire* v. *Scott*, 7 L.C. Rep. 451, distinguished.

Appeal dismissed with costs.

Robertson, Q.C., and *Falconer* for appellant.

Geoffrion, Q.C., and *Carter* for respondent.

[April 30.

GREEN *v.* CLARK.

Appropriation of payments—Evidence—Satisfaction of judgment.

G. and the firm of C. & P. were respectively judgment creditors of one J.; and G. accepted in satisfaction of his claim notes of J. indorsed by C. & P. for 60%, and J.'s unindorsed notes for 20% more, and G.'s judgment was assigned to C. & P. as security. C. & P. then undertook to supply J. with goods for which, as they claim, he was to pay cash. After a time C. & P. refused to give J. further goods, and recovered judgment against him on a demand note for a portion of their claim. Other judgment creditors of J. attempted to realize on his stock, and an interpleader order was issued in which C. & P. claimed to rank on the judgment of G. which had been assigned to them. The other creditors claimed that this judgment was satisfied, if not by the settlement with G. for 80%, at all events by J.'s subsequent payments. C. & P., on the other hand, claimed that these payments were all on account of the new supplies of goods for which J. was to pay cash. In his evidence on the trial of the interpleader issue J. swore that the agreement to pay cash was only for one year and after that all payments were to be on the old account. The payments were sufficient, if so applied, to satisfy G.'s judgment.

Held, affirming the judgment of the court below, GWYNNE and PATTERSON, JJ., dissenting, that the evidence was not sufficient to rebut the presumption that the payments were on account of the earlier debt.

Appeal dismissed.

Lash, Q.C., for appellants.

G. Davis and *G. Wills* for respondents.

EXCHEQUER COURT OF CANADA.

THE QUEEN *v.* CHARLAND.

Award of arbitrators increased by the Exchequer Court—Hearing of additional witnesses—Appreciation of the evidence—Appeal to Supreme Court—Weight of evidence.

In a matter of expropriation of land for the Intercolonial Railway, the award of the arbitrators was increased by the judge of the Exchequer Court from $4,155 to $10,842.25, after additional witnesses had been examined by the judge. On an appeal to the Supreme Court it was

Held, affirming the judgment of the Exchequer Court, that as the judgment appealed from was supported by evidence and there was no matter of principle on which such judgment was fairly open to blame, nor any oversight of material consideration, the judgment should be affirmed. GWYNNE, J., dissenting.

Appeal dismissed with costs.

Hogg for appellant.

Belleau for respondent.

QUEEN *v.* VEZINA.

Expropriation of land—Damages—Injuriously affecting land taken—R.S.C., c. 39, sec. 3, subsec. E—Farm crossings—R.S.C., c. 38, s. 16.

A certain quantity of land belonging to V. was expropriated for the purposes of the Intercolonial Railway; $\frac{118}{100}$ arpents for the track, and $\frac{177}{100}$ arpents for a borrowing pit whence gravel for ballast is taken. V. made a claim before the Exchequer Court for the land taken and for injury by the severance of his farm, and damages. The judge in the Exchequer allowed $100 per arpent for all the land taken.

On appeal to the Supreme Court,

Held, affirming the judgment of the Exchequer, that the land taken for the gravel, as ballast, there being no other market for the gravel, had been properly estimated at $100 per arpent as farm land.

In addition to the value of the land taken, the learned judge of the Exchequer Court allowed for depreciation of the remainder one-third of its value, excluding the damages resulting to a portion of the land from the operation of the railway. On appeal it was

Held, reversing the judgment of the Exchequer Court, GWYNNE, J., dissenting, (1) that the words "compensation to be paid for any damages sustained by reason of anything done under and by authority of R.S.C., c. 39, sec. 3, subsec. E., or any other Act respecting public works or government railways," include damages resulting to the land from the operation as well as from the building of the railway.

(2) That the right to have a farm crossing over government railways is not a statutory right, and that in awarding the damages the learned judge should have granted full compensation for the future as well as for the past for the want of a farm crossing. R.S.C., c. 38, sec. 16.

GWYNNE, JJ., dissenting.

Appeal allowed with costs.

Belleau for appellant.

Angers for respondent.

[April 30.

KEARNEY *v.* THE QUEEN.

Expropriation of land—Severance—Damages.

On the hearing of a claim referred to the Exchequer Court by the Minister of Railways, for compensation to the claimant for land taken by the Crown for railway purposes, the learned judge awarded a certain sum for the value of the land so taken, and a further amount as damages for the severance from land not taken in lieu of a crossing. There was evidence that the claimant made money by selling ballast and seaweed for manure and collecting driftwood for fuel on the remaining land.

Held, GWYNNE, J., dissenting, that as the sum allowed for the severance did not include future damage, and the evidence showed that the consequences of the severance would remain even if a crossing was made, the amount of compensation should be increased

Appeal allowed.

J. T. Wallace for appellant.

W. D. Hogg for the respondent.

GUAY *v.* THE QUEEN.

Appeal from the Exchequer Court—Expropriation for government railway purposes—Severance of land—Farm crossings—Compensation.

Where the land expropriated for Government railway purposes, severs a farm, although the owner is not entitled to a farm crossing apart from contract, he is entitled to full compensation covering the future as well as the past for the depreciation of his land by the want of such a crossing; and as it does not appear by the judgment appealed from that full compensation has been awarded, the damages assessed by the judge of the Exchequer Court should be increased by $100.

GWYNNE, J., dissenting.

Appeal allowed with costs.

Belleau for appellant.

Angers for respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

[June 29.

WEAVER *v.* SAWYER & CO.

Appeal—County Court—Action tried with jury—R.S.O., c. 47, secs. 41, 42.

When a case in the County Court has been tried by a jury, the only appeal given by R.S.O., c. 47, s. 41, direct to the Court of Appeal from

the judgment at the trial, is when such judgment is directed to be entered upon special findings of the jury, and it is complained of as being wrong in law upon such findings. Any other appeal raising an objection to the conduct of the proceedings at the trial as to a motion for a non-suit, or the reception or rejection of evidence, or the charge to the jury, must be brought from the decision of the judge upon a subsequent motion for a new trial.

The general language of sec. 42 does not apply when the case is one coming within sec. 41.

Aylesworth for the appellants.

C. J. Holman for the respondent.

[June 29.

BOND *v.* CONMEE.

Malicious arrest—Justices of the Peace—Conviction for having liquors for sale near public works—Destruction of liquors—Necessity for quashing conviction before bringing action—Unsealed conviction returned on certiorari—Power to put in sealed conviction after such return—Notice of action—Statement of cause of action—Service of notice—Necessity for order for destruction of liquors—Necessity for quashing such order before bringing action—Venue—R.S.O. (1877), c. 32, secs. 2, 6, and 7, (R.S.O., 1887, c. 35, secs. 2, 6, and 7—R.S.O. (1877), c. 73. (R.S.O., 1888, c. 73).

The defendant C. and others were contractors employed in constructing a portion of the line of the Canadian Pacific Railway on the north shore of Lake Superior, 50 miles north of the mouth of the Michipicoten River, where there is a post of the Hudson Bay Company and a small collection of houses and stores known by the name of the Village of Michipicoten River. At this place the defendant C. and his co-contractors had their head quarters, and had constructed a supply road to the line of the railway where their operations were being carried on. The plaintiff brought to this village in a small sailing vessel a quantity of intoxicating liquors, intending to sell them at this place. The defendant C. and his co-defendant B., who were Justices of the Peace having jurisdiction in the District of Algoma, caused the liquors to be seized and destroyed, and the plaintiff to be arrested, fined, and imprisoned.

Held, that this was a village with n the meaning of R.S.O., c. 35, s. 1, and therefore that the prohibition contained in the Act did not apply, and that the Justices had no jurisdiction.

The plaintiff, after remaining in gaol for some six weeks, was discharged upon a writ of *habeas corpus*, the conviction having been brought up on certiorari, and one signed by the Justices, but not sealed, having been returned by them. The conviction was not quashed.

Held, that after the return to the writ of certiorari a new conviction could not be prepared, and that as the conviction as returned was not sealed it was a nullity, and that it was not necessary to quash it before bringing an action.

The notice of action stated that one month after the service of the notice an action would be brought for malicious arrest, etc., and for the malicious, etc., destruction of goods, and for damages for loss of time and injury to business, and for the recovery of costs and expenses, etc., "same having been committed by you against me in the month of May last at said Village of Michipicoten River, and at the Town of Port Arthur."

The notice was served on the defendant B. personally, and was served on the agent of the defendant C. at the head office of the defendant C. at Michipicoten River, and a copy was also left for the defendant C. at his place of residence at Port Arthur, and another copy was served on his solicitors. The defendant C. admitted that he had seen a copy of the notice, but it was not shown at what time or place he had seen it.

Held, that the notice and service were sufficient.

The venue in the action was laid at the City of Toronto, and subsequently by consent an order was made striking out the jury notice and directing the trial to take place at Port Arthur.

Held, that in view of this order the objection that the venue was improperly laid could not be sustained.

The order for the destruction of the liquors was not produced, but the person who destroyed the liquors stated, without objection, that he had received a written order to destroy the liquors signed by both Justices, and that he had returned the order to them. This order had not been quashed.

Held, that the defendants were entitled to say that the existence of the order was proved, but that the order for the destruction and the adjudication of destruction were two different things, and that in order to obtain protection the formal adjudication of destruction should have been proved, and that it was not necessary to quash a mere order for destruction.

The order spoken of in R.S.O. (1877), c. 73, s. 4, is an order in the nature of an original adjudication by the magistrate upon some matter brought before him by charge, complaint, conviction or otherwise, and not an order for the purpose of carrying out or enforcing such adjudication.

Judgment of the Common Pleas Division (reported 16 O.R., 716) affirmed.

Osler, Q.C., and *A. W. Ayloun-Finlay* for the appellants.

G. T. Blackstock for the respondent.

[June 29.

BETTS *v.* SMITH *et al.*

Contract—Tender—Incorporation of previous advertisement—Evidence.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 15 O.R., 413, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 20th of May, 1889.

The court allowed the appeal with costs, holding that the advertisements and requirements formed part of the contract, and that the plaintiff was not limited to his rights under the tender and acceptance, and a new trial was ordered.

Lount, Q.C., and *F. R. Powell* for the appellant.

Pigeow and *S. G. McGill* for the respondent.

[June 29.

THE LONDON MUTUAL FIRE INSURANCE CO. *v.* JACOB AND GORDON.

Solicitors—Lien—Funds recovered in action.

Actions were brought by one G. against two insurance companies to recover losses occasioned by a fire. The actions were tried together, but one was dismissed with costs, and in the other the plaintiff recovered judgment. The defendants acted as G.'s solicitors in each action.

Held, reversing the judgment of ARMOUR, C.J., that the solicitors had no lien for the costs of unsuccessful action upon the fund recovered in the other, that fund not having been recovered or preserved by means of the costs incurred in the action which was lost, and the two actions not being so intimately connected as to be regarded one.

Macmillan for the appellants.

Jacob, one of the respondents, in person.

[June 29.

MOORE *v.* JACKSON.

Contract—Married Woman—R.S.O., c. 132.

To entitle a plaintiff to recover judgment on a contract entered into by a married woman, it is necessary for him to show that at the time the contract was entered into by her she owned separate estate, in respect of which she is enabled by statute to contract.

The defendant, a married woman, endorsed certain notes held by the plaintiff, and wrote him the following letter:

"I hold 400 acres of land near W., which is worth $33,000, and is all in my own name and right. By your renewing the note for $1,500 and the one for $600 I pledge myself solemnly to do nothing to affect my interest in the said lands either by deed or mortgage, unless said notes are paid to you in full."

The notes and the letter were proved at the trial and the examination of the defendant before the trial, in which she stated that at the time she signed the notes she owned property on her own account, was also put in. There was no evidence as to the date of the marriage of the defendant or as to the mode in which the property was held by her.

Held, reversing the decision of BOYD, C., that there was not sufficient evidence to entitle the plaintiff to recover.

E. D. Armour for the appellant.

Moss, Q.C., and *J. R. Roaf* for the respondent.

[June 29.

HUTCHINSON *v.* CANADIAN PACIFIC R'Y. CO.

Railways—Negligence—Passenger.

This was an appeal by the plaintiff from the judgment of the Chancery Division, reported ante p. 93, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 22nd and 23rd of May, 1889.

The plaintiff was travelling in charge of cattle, and while the train was being made up got into a caboose which was standing on the track, thinking, as the fact was, that this caboose was to be attached to the train. While standing in this caboose, washing his hands, the train backed down upon it, and he was thrown down and injured. It was not shown that any of the railway employees knew that he was in the caboose, or that the coupling had been effected with more violence than usually occurs in the coupling of freight cars. The jury disagreed, and subsequently on motion judgment was given for the defendants.

The court dismissed the appeal with costs, holding that the plaintiff had not put himself in the position of a passenger in charge of the defendants, and in the absence of proof of any specific neglect of duty could not recover.

Osler, Q.C., *M. Wilsh*, and *A. W. Aytoun-Finlay* for the appellant.

Aylesworth, and *A. MacMurchy* for the respondents.

CARROL *v.* PENBERTHY INJECTOR COMPANY.

Corporations — Libel — Publication — Admission of Manager — Liability of Corporation for libel published by manager.

The plaintiff was the patentee and manufacturer of an automatic steam injector, and the defendants were a company manufacturing automatic steam injectors, one J. being their manager. A printed circular signed "Penberthy Injector Company," contained certain statements as to the mode in which the plaintiff had obtained his patent, and this action was brought by him on the ground that these statements were libellous. At the trial it was proved that the circular had been found in various places, but the only proof of publication was an admission by J., made in conversation with the plaintiff, that the circular had been issued by the Penberthy Injector Company in reference to a circular issued by the plaintiff.

Held, that no authority can be inferred in a general manager or other officer of a bank or trading corporation of any kind to subject the corporation to actions for libel by his admissions to any person that he had published a libel on another person by their authority, and that there was, therefore no proof of publication.

If J. had been called as a witness and had proved that he had been so authorized, and that it formed part of his duty to do the act complained of, then the libel would be the act of the corporation.

Tench v. Great Western Railway Co., 33 U.C.R., 8, distinguished.

Decision of the Queen's Bench Division reversed.

George Lynch-Staunton and *James Chisholm* for the appellants.

Moss, Q.C., and *Carscallen* for the respondent.

[June 29.

Re GODSON AND THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporations — Investigation by County Judge — Prohibition — R.S.O., c. 184, s. 477.

Where the County Court Judge is making an investigation pursuant to the resolution of a Council under R.S.O., c. 184, s. 477, he is acting as *persona designata* and not in a judicial capacity, and is not subject to control by a writ of prohibition.

That writ is not to be applied to any proceedings of any person or body of persons whether they be popularly called a court or by any other name, on whom the law confers no power of pronouncing any judgment or order, imposing any legal duty or obligation on any individual.

Re Squier, 46 U.C.R., 474, considered.

The decision of ROBERTSON, J. (reported 16 O.R., 275), reversed.

Aylesworth and *Fullerton* for the County Court Judge.

C. R. W. Biggar for the City of Toronto.

Osler, Q.C., and *T. P. Galt* for the respondent Godson.

[June 29.

CRAWFORD *v.* UPPER.

Negligence — Injury caused by runaway horse — Liability of owner — Onus of proof.

The plaintiff while walking on the sidewalk was knocked down and injured by the runaway horse of the defendant. At the time of the accident the horse was harnessed to a sleigh, but no person or driver was in the sleigh, and all that was proved was that the horse was seen running away, that the sleigh upset, the occupants being thrown out, and that the horse then ran on the sidewalk and the accident occurred.

Held, that this was sufficient to make out a *prima facie* case of negligence, and that the onus of disproving that case and explaining the cause of the runaway lay upon the defendant.

Manzoni v. *Douglas*, 6, Q.B.D., 145, discussed.

Judgment of the Queen's Bench Division affirmed.

Whiting for the appellants.

Aylesworth for the respondent.

[June 29.

Re THE BOLT AND IRON COMPANY, LIVINGSTONE'S CASE.

Corporations—Managing director—Remuneration of officer of company—Breach of trust—Set off—Winding-up proceedings—Jurisdiction of Master—Assignment of claim after winding-up order—R.S.C., c. 129, s. 77, ss. 2, secs. 83, 86, 87, 93.

This was an appeal by Livingstone from the judgment of BOYD, C., reported 14 O.R., 211, and came on to be heard before this court (HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.), on the 16th of March, 1889.

The court dismissed the appeal with costs, unanimously agreeing with and fully adopting the judgment of the learned Chancellor.

Moss, Q.C., for the appellant.

Bain, Q.C., for the respondents.

[June 29.

CONNOR *v.* MIDDAGH.

HILL *v.* MIDDAGH AND THE CORPORATION OF STORMONT, DUNDAS AND GLENGARRY.

Municipal corporation—By-law to open road—Trespass—Necessity of quashing by-law before bringing action—R.S.O., c. 184, s. 338.

A municipal council passed a by-law to open a road in a certain defined course, and by a subsequent by-law appointed the defendant M. a commissioner to remove all obstructions from the highway so defined. M. cut down some trees of the plaintiffs and removed them and portions of fences. Actions of trespass were brought against M. and the council, but the by-laws had not been quashed.

Held, that the road defined in the by-law was the true road and could properly be opened as therein defined.

Held, also (BURTON, J. A., doubting, but not desiring to express a judicial opinion), that whether the road defined in the by-law was the true road or not, and whether, therefore, a trespass was committed or not, the by-laws, being under certain conditions and requirements within the general competence of the council, and not being quashed, afforded a complete defence to the actions.

Judgments of the Queen's Bench Division reversed.

Osler, Q.C., and *J. P. Whitney* for the appellants, the Corporation.

W. M. Douglas for the appellant Middagh.

Robinson, Q.C., and *Aylesworth* for the respondents, the plaintiff in each case.

HIGH COURT OF JUSTICE FOR ONTARIO.

Chancery Division.

BANK OF MONTREAL *v.* BOWER *et al.*

Will—Devise—"Wish and desire"—Precatory trust—Estate in fee.

A testator by his will made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "and it is my wish and desire after my decease that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her, among my said children in such manner as she shall deem just and equitable."

Held, that this did not create a precatory trust, and that the wife took the property absolutely.

In *re Adams* v. *The Kensington Vestry*, 27 Chy.D., 394, and In *re Diggles*, 39 Chy.D., at p. 257. referred to and followed.

McCarthy, Q.C., and *R. G. Code* for the plaintiffs.

Kidd for the defendants.

Practice.

ROSE, J.] [May 3.

FARQUHAR *v.* ROBERTSON.

Costs—Action of libel—Recommendation of jury as to costs—Affidavits of jurors—Depriving successful defendants of costs—"Good cause"—Costs of special jury.

When the special jury before which an action of libel was tried, returned to the court-room after considering their verdict, the foreman announced a verdict for the defendant. He then asked if the jury had anything to do with the question of costs. The trial Judge replied that he thought not, but if any recommendation was made it would be considered. The foreman then announced that in the opinion of the jury each party ought to pay his own costs.

Upon a motion by the plaintiff to the trial Judge for an order disposing of the costs in the way recommended by the jury,

Held, that the recommendation of the jury as to costs was not a part of their verdict, but was an announcement of a result at which they had no right in law to arrive; the verdict was complete before anything was said as to costs. If the verdict for the defendant would not have been given except with the recommendation as to costs, that would be matter for consideration upon a motion for a new trial, and not upon the present motion.

Upon the motion the plaintiffs filed affidavits of some of the jurors, stating that they would not have agreed in a verdict for the defendant if they had thought the result would be to throw upon the plaintiffs the whole costs of the action.

Held, that these affidavits were not receivable in evidence.

Regina v. *Feilowes*, 19 U.C.R. 48, followed. *Jamieson* v. *Harker*, 18 U.C.R. 590, distinguished.

It was also contended by the plaintiffs that the trial Judge should make an order depriving the successful defendant of costs upon the recommendation of the jury and the facts appearing in evidence.

Held, that the question of costs was within the power of the trial Judge, and he could only interfere with the event for "good cause" (Rule 1170). By acting on the recommendation of the jury he would in effect be abdicating his functions, and allowing the jury to determine what was "good cause."

"Good cause" means some misconduct leading to the litigation or in the course of the litigation which requires the court in justice to interfere; and there is a marked distinction between interfering with costs going to the plaintiff and costs going to the defendant; and upon the facts of this case there was no "good cause" for interfering. The trial Judge certified for the defendant's costs of a special jury summoned at his instance.

Robinson, Q.C., and *Lefroy* for plaintiffs.

S. H. Blake, Q.C., and *J. B. Clarke* for defendants.

Q.B. Div'l Ct.] [June 22.

NIAGARA GRAPE CO. *v.* NELLIS.

Consolidation of actions—Rule 652—Staying actions—Identity of issues.

The plaintiffs brought four actions each against a different person, alleging that the defendant in each case entered into a separate agreement with the plaintiffs to purchase and pay for certain grape vines, and to allow the plaintiffs certain future benefits to be derived from the possession and cultivation of the vines, and claiming payment, an account, and damages. The statements of defence were practically the same in all the actions, the defendants setting up among their defences that by the fraud of the plaintiffs certain promises and warranties on their part were omitted from the written agreement, and that the defendants were induced to enter into the agreement by fraud and misrepresentation on the part of the plaintiffs, and claiming rectification and damages. The sales to the several defendants were entirely separate and distinct transactions made at different times and under different circumstances, but the form of agreement made use of with each defendant was the same.

An order was made in Chambers under Rule 652 on the application of the defendants in all the actions staying proceedings in all but one, which was to be treated as a test action, the defendants agreeing to be bound by the result of it, but the plaintiffs being allowed to proceed to trial in the other actions after the trial of the test action, if they deemed proper.

Held, that actions will only be stayed where the questions in dispute are substantially the

same; and in this instance they were not the same, because the questions raised by the defendants upon their defences of fraud and misrepresentation would necessarily be different in each case, the negotiations for each agreement being distinct; and the order made in Chambers was set aside.

C. J. Holman for the plaintiffs.

W. M. Douglas for the defendants.

Q.B. Div'l C't.] [June 22.

IN *re* CITY OF TORONTO LEADER LANE ARBITRATION.

Arbitration and award—Municipal by-law and appointment of arbitrators—R.S.O., c. 53, s. 13—Submission—Necessity for making rule of court—R.S., c. 184, s. 404—Ex parte order—Rule 526—Disclosure of matters in dispute.

In the case of an arbitration under the Municipal Act, R.S.O., c. 184, a municipal by-law and appointments in writing by the parties of the arbitrators constitute such a submission to arbitration by consent as may be made a rule of court under s. 13.

R.S.O., c. 184, s. 404, provides that every award made thereunder shall be subject to the jurisdiction of the High Court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court.

Held, upon the language of this section, that the submission should be made a rule of court before the award is moved upon.

Held, also, that any party to the submission has *prima facie* a right to have it made a rule of court; and according to the practice existing when the consolidated rules came into force no person other than the applicant was entitled to be heard upon a motion for such an order; and therefore by rule 526 there is no necessity for serving notice of motion, and an order can be made *ex parte*.

Such an order is merely a necessary form in order to give the court jurisdiction over the award; it binds no one and concedes nothing; the granting of it is compulsory on the court upon the production of the proper affidavits; and the court can enquire into and adjudicate upon all matters of substance when the award itself is sought to be attacked or enforced. Therefore, it was immaterial that upon an *ex parte* application for such an order it was not disclosed that there were certain matters in controversy between the parties as to enlargements of the time for making the award.

D. E. Thomson for city.

Bain, Q.C., for land-owners.

Q.B. Div'l C't.] [June 22.

BANK OF LONDON *v.* WALLACE.

Parties—Action to set aside fraudulent conveyance—Assignee for benefit of creditors—Adding a new plaintiff—Consent—Rule 324 (b.)—R.S.O., c. 124, s. 7, s.s. 2.

The action was brought to set aside a conveyance as fraudulent against creditors. The plaintiffs sued on behalf of themselves and all other creditors of the defendant R.W., and began this action in July, 1888. The statement of defence filed in December, 1888, alleged that in August, 1888, R.W. executed an assignment for the benefit of his creditors under 48 Vict., c. 26, whereby the exclusive right of action became vested in the assignee.

In February, 1889, the plaintiffs obtained an order under R.S.O., c. 124, s. 7, s.s. 2, giving them leave to take proceedings in the name of the assignee but for their own exclusive benefit to set aside the conveyance in question; and then applied for an order adding or substituting the assignee as plaintiff in this action. The consent of the assignee was not filed.

Held, that the assignee could not be added as a plaintiff without his consent in writing being filed, under Rule 324 (b.); but that the plaintiffs had the right to proceed under the order they had obtained by bringing a new action in the name of the assignee, to which his consent would not be necessary.

Aylesworth for plaintiffs.

C. J. Holman for defendants.

Q.B. Div'l C't.] [June 22.

IN *re* LEWIS *v.* OLD.

Prohibition — Division Court — Jury trial — Judge withdrawing case from jury.

In a Division Court suit a jury was demanded and called, but the presiding judge withdrew from their consideration everything but the amount of damages to be awarded, saying that there were no facts in the case disputed, the plaintiff's evidence being uncontradicted. The

jury assessed the damages, and judgment was entered for the plaintiff.

Held, that where the plaintiff furnishes evidence which the judge thinks sufficient to support his case, the case cannot be withdrawn from the jury; the mere fact that the defendant does not call evidence to controvert the plaintiff's evidence by no means concludes the matter, for the jury might refuse to credit the plaintiff, and properly find a verdict for the defendant. The judge in this case exceeded his jurisdiction by assuming the functions of the jury; and the right to have the case submitted to the jury being an absolute statutory right, the violation of it was ground for prohibition.

Shepley for plaintiff.

Aylesworth for defendant.

Q.B. Div'l C't.] [June 22

IN *re* SOLICITORS.

Solicitor and client—Taxation of costs—Offer by solicitor.

The solicitors rendered to a client ten bills of costs, amounting in all to $428.83. The client obtained an order for taxation, reserving his right to dispute his liability to pay the bills, and reserving also the costs of the order and taxation. The bills were taxed at $329.76, more than one-sixth being taxed off; but the solicitors contended that they were not liable for the costs of the taxation under R.S.O., c. 147, s. 35 because of an offer made by them before the order but after service of the notice of motion therefor, to take $250 in full of all the bills, and a subsequent offer to take $200 in full of all but one. These were not offers to reduce the bills to the sums named, but were offers to take such sums if the bills were paid without dispute as to the client's liability upon them. The offers were rejected and the taxation proceeded with the above result. When the question of the liability upon the bills was still undetermined the client applied for costs of the order and taxation.

Held, that the solicitors when their offers were rejected remained in a position to claim the full amount at which their bills might be taxed, and therefore such offers could not avail them; and they must pay the costs of the order and taxation.

Re Allison, 12 P.R. 6, approved and followed.

Shepley for the solicitors.

W. H. Blake for the client.

Chy. Div'l C't.] [June 28.

MCKAY *v.* MAGEE.

Costs—Scale of—Action to set aside conveyance as fraudulent—Judgment under $200—Other claims against judgment debtor—Creditors' Relief Act.

The decision of BOYD, C., 13 P.R. 106; ante p. 284 was affirmed on appeal by a Divisional Court.

J. B. Clarke for appeal.

Middleton contra.

C.P. Div'l C't.] [June 29.

TROUTMAN *v.* FISKEN.

Judgment Debtor—Examination of—Judgment for costs only—Rules 926, 934.

A person against whom a judgment has been recovered for costs only cannot be examined as a judgment debtor.

Rules 926 and 934 considered.

Meyers v. *Kendrick*, 9 P.R. 363, has not been affected by the introduction of Rule 934, and is still the law.

J. F. Gregory for judgment creditor.

H. E. Irwin for judgment debtor.

FERGUSON, J.] [June 29.

BENNETT *v.* WHYTE.

Costs—Scale of—Jurisdiction of County Court—Counter claim—Set off.

The plaintiff in his statement of claim alleged certain transactions between him and the defendant, in the whole comprehending over $1,000, and claimed a balance of $169.72, and interest from the 1st January, 1888. The defendant by his statement of defence denied that he was indebted to the plaintiff in any sum, and alleged that the plaintiff was indebted to him for goods supplied and on certain promissory notes in the sum of $1,325.74, for which he counter claimed.

Held, that the matter of the counter claim was really a set-off, and even if it was not improper to call it a counter claim, having regard to Rule 373, this could not change its real character.

Cutler v. *Morse*, 12 P.R. 594, referred to.

The action was tried without a jury, and the plaintiff recovered $120.75, "together with his costs of action to be taxed according to the proper scale applicable."

Held, that a County Court has jurisdiction to entertain and investigate accounts and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum prescribed by the Act; and in this case a County Court would have had jurisdiction.

The case, not having been tried by a jury, did not fall under Rule 1172: and the determination of the scale of costs was a matter in the discretion of the court. In the exercise of such discretion the principles of Rule 1172 were applied to the case, and the plaintiff was allowed costs on the County Court scale, and the defendant the excess of his costs incurred in the High Court, as between solicitor and client, over the amount which he would have incurred in the County Court, to be set off.

Chapple for the plaintiff.

D. Armour for the defendant.

Law Students' Department.

The following papers were set at the Law Society Examination before Easter Term, 1889:

CALL.

REAL PROPERTY AND WILLS.

1. When a blank is left for the name of a legatee, what is the effect? Explain fully.

2. What is the effect of a bequest to a person for life with remainder to his executors and administrators? Explain fully.

3. From what time are annuities payable which are directed by will to be paid? At what periods are they payable when there is no express direction?

4. When a trespasser is in possession of lands can the plaintiff in ejectment, claiming under a paper title, call upon him under any circumstances to show title?

5. A. agrees to purchase land, and at the time of signing the agreement (which says nothing as to title) he is told by the vendor that the title is defective and cannot be made perfect. What are his rights and liabilities respecting title? Explain fully.

6. When the contract for the sale of land is signed by both vendor and vendee, what are the rights (if any) of the respective wives of vendor and vendee as to dower?

7. When an agreement for sale of land is made by an authorized agent, how should it be signed? Why?

8. What is the rule as to awarding damages in actions for specific performance of an agreement?

9. Where a mortgagor has died intestate since the *Devolution of Estates Act*, how can you enforce the mortgage if no letters of administration are granted? Draw a clause providing against difficulty (if any) in exercising the power of sale in such a case.

10. What is the effect of a conveyance from a man to his wife without the intervention of a third person?

HARRIS'S CRIMINAL LAW.
BROOM'S COMMON LAW, BOOKS 3 AND 4.
BLACKSTONE, VOL. 1.

1. Give an example of *justifiable homicide*, and one of *excusable homicide*.

2. What is the *gist* of the crime of *conspiracy*? Answer in one word.

3. What verdicts are there, any one of which may be rendered on a trial for murder?

4. If a pickpocket should insert his hand in a person's empty pocket, with intent to steal the purse which he supposed to be in it, could he be convicted of any, and if so, of what crime? Reasons.

5. Distinguish *burglary* and *housebreaking*.

6. What difference is there between *larceny* and *robbery* in regard to the *removal* of the goods.

7. What is the main difference between the remedy available against a magistrate who acts without jurisdiction, and that available against a magistrate who acts erroneously within his jurisdiction?

8. Explain briefly the meaning of *damnum absque injuria*.

9. When may one person become liable for a tort committed by another on the ground of *ratification*?

10. What is the effect of a *saving clause* being totally *repugnant* to the body of the act in which it is contained?

CONTRACTS—EVIDENCE—STATUTES.

1. A., professing to have authority to do so, makes a lease of B.'s property to C. B. repudiates the transaction, stating that he never gave A. any such authority. What remedy has C.? Why?

2. How far will a condition be enforced which requires that parties before bringing an action shall first have the amount to be recovered ascertained by a third person?

3. What requisites are there for the admission in evidence of statements made by deceased persons in the usual course and routine of business?

4. A. and B. jointly make a promissory note to C. in 1880. In 1885, and again in 1887, A. pays interest on the note and dies, whereupon in 1888 C., relying on these receipts and interest, sues B., who sets up the Statute of Limitations. Who is right? Why?

5. A letter is written by A. to B. "without prejudice," containing an offer of settlement of matters in dispute. B. answers by letter accepting A.'s offer. Proceedings are taken notwithstanding this correspondence, and at the trial of the action A. contends his letter to B. cannot be read. How far is he right? Why?

6. What are the requisites for a promise which is to be the consideration for a reciprocal promise?

7. A. has a claim against B., which he assigns in writing to C. At the time of the assignment B. has as against A. a right to set-off an amount which would extinguish the debt. How far can he insist upon this set-off as against C.? Why?

8. What assignments for the benefit of creditors are protected in Ontario, and under what circumstances will a transfer of goods to a creditor be protected?

9. In what civil actions is corroborative evidence required?

10. What procedure can you adopt to prove an original registered instrument by a certified copy?

EQUITY.

1. A., a tenant of B.'s, agrees verbally with him for the purchase of the property he is tenant of. B. afterwards refuses to carry out the contract, setting up the Statute of Frauds. A. relies on his possession under the lease. Who will succeed? State the general law.

2. A., the executor of B., receives $1,000 on a supposed debt from C.; he distributes this money with other moneys of the testator to the creditors. C. subsequently discovers that he had previously paid the money to the testator, and brings an action against the executor to recover the same. State the rights of all parties. Give reasons.

3. A. B. and C. are co-sureties to D. for the sum of $5,000. Default is made under the bond. A. pays the whole amount. In the interval C. has become insolvent. What are A.'s rights as against B.? Reasons?

4. A., who has been an agent for the management of B.'s estate, is aware of the existence of a valuable marble quarry on one of the farms. He makes an offer for it at good agricultural value, which B. accepts. He, B., on learning of the quarry, seeks to have the sale set aside. Can he succeed?

5. What was the law as to the separate estate of married women being bound by their contracts? Has the same been in any way modified by Provincial legislation?

6. A testator gives his wife a power of appointment over a certain property. She makes the appointment by will in favor of one of the children of the marriage. The will has one witness. Will the execution be aided? Reasons for answer.

7. What, if any, distinction is observed by Courts of Equity in the way of construing executory trusts contained in marriage articles and wills respectively?

8. Into what investments are trustees permitted to place the funds of the estate? By what authority? A will directs the funds to be invested in first mortgages on real estate. Can the trustee invest in Canada Permanent stock?

9. Distinguish between the right to give evidence of a parol variation of written contract for the sale of lands in an action for specific performance

(1) Where plaintiff is "insisting" on performance with parol variation.

(2) Where defendant is "resisting" performance on ground of variation.

10. A., a chemist, has been in the habit of compounding a medicine in which there are certain secret ingredients, but not patented. He employs for this purpose a confidential clerk who, at the solicitation of B., imparts to him the secret. B. commences to manufacture and sell. Has A. any remedy? If so, what?