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DIARY FOR NOVEMBER.

1. *Sun*.....*22nd Sunday after Trinity.* All Saints' Day.
3. Tues.....Draper, C.J., died, 1877.
4. Wed.....First Intermediate Examination.
5. Thur.....Sir John Colborne, Lieut.-Gov. U. C., 1838.
6. Fri.....Second Intermediate Examination.
8. *Sun*.....*23rd Sunday after Trinity.*
9. Mon.....Prince of Wales born, 1841.
10. Tues.....Court of Appeal Sittings. Solicitors' Exam.
11. Wed.....Barristers' Examination.

TORONTO, NOVEMBER 1, 1885.

A NEW batch of Queen's Counsel for Ontario has been announced, though not yet gazetted. This has created no interest in professional circles, and has been received almost without comment. This may be rather hard on the very few of the appointees who are properly entitled to the distinction, but is the necessary consequence of the broadcast distribution of what was once an honour, but now appears to be the result of the "fortuitous concurrence" of some circumstances quite unconnected with professional position, seniority in the ranks, or otherwise.

THE case of *Turnbull* v. *Forman*, 15 Q. B. D. 234, noted *ante*, p. 329, has been followed, it will be observed, by O'Connor, J., in *Scott* v. *Wye*, also noted *ante*, p. 339. *Cameron* v. *Rutherford*, 10 P. R. 620, is therefore overruled, and the law must be taken to be settled, at all events for the present, that contracts made by a married woman prior to 25th March, 1884, only bind the separate property which she had at the date when the contract was made, and which she continues to have when judgment is recovered against her, according to the rule laid down in *Pike* v. *Fitzgibbon*.

THE law relating to married women's rights of property is full of surprises. We had confidently hoped and believed that the efforts of the Legislature had at last conferred upon married women as full control over their property as it was possible for the Legislature to give them. Our hopes and expectations are, however, apparently doomed to disappointment. It appears, according to the view of Pearson, J., in *Re Shakspear, Deakin* v. *Lakin*, 53 L. T. N. S. 145, that a married woman has now less power over property in which she has an absolute interest, contingent on her surviving her husband, than she has over property in possession, which is by statute declared to be her separate property. Under a marriage settlement executed in 1843 between Mr. and Mrs. Shakspear, a life policy was transferred by the husband to the trustees upon trust to receive and invest the money and pay the income to Mrs. Shakspear and her assigns during her natural life, in case she should survive her husband, and for her sole and separate use and benefit during her life in case she should marry again; and after her death in trust for the children of the marriage as tenants in common. Two children were born of the marriage, both of whom died intestate and unmarried. Mr. and Mrs. Shakspear on 7th Oct., 1884, executed an assignment of all their interest in the policy to Mr. Edward Deakin. The surviving trustee having refused to transfer the policy under this deed, the question was submitted to Pearson, J., whether Mrs. Shakspear was able to execute a valid assignment of her interest in the policy, and he held that she was not. He says: "At the present moment the life interest

of the wife is a contingent reversionary interest—she has no interest whatever in *præsenti*. If she survives her husband she will be entitled in possession, but not for her separate use. She will be absolutely entitled as widow. The separate use only arises if she marries again. Under those circumstances I am asked to say that by virtue of the Married Women's Property Act an assignment by the wife passes her interest in the policy." After reading section 1 of the Act, he goes on to say: "It is said that the wife's interest in this case is 'separate property,' which she may thereafter acquire within the meaning of that section. I am of opinion that, according to the proper construction of that section, the contract must be entered into with respect to separate estate which the married woman has at the time of the contract. If she has entered into a contract and broken it, any separate property which she acquires afterwards is made liable for the breach of the contract which, under the Act, she was able to enter into by reason of her having separate estate. That is a very different thing from saying that her assignment passes a merely contingent reversionary interest to which she will become entitled if she survive her husband, and to which she may, if she marries again, be entitled for her separate use." So clear was the learned judge in this view that counsel who appeared for the trustees was not called on, and yet we cannot help thinking the learned judge has taken a very narrow view of the scope of the Act, and his conclusion has led to certainly an anomalous result. The learned judge seems to us to assume, without sufficient grounds, that the property which a married woman is entitled to dispose of under the statute must be property in possession. But anything that can be turned into money is surely rightly considered to be property, even though it be but a bare contingent reversionary right. We cannot help thinking, therefore, that the learned judge has not only given an unnecessarily restricted meaning to the Act, but has added one more case to the list of those which have imposed an interpretation of the Act contrary to its real spirit and intention.

NOTICE OF ACTION.

THE successful maintenance of many actions depends on the plaintiff being able to prove that before action he has served the defendant with a notice of his intention to bring the action. One of the principal statutes requiring this notice to be served is the Act to protect Justices of the Peace and other officers from vexatious actions (R.S.O. c. 73). This Act applies to all actions brought against any justice of the peace, or any other officer, or person fulfilling any public duty, for anything done in the execution of his office. The Act extends not only to public officers over which the Provincial Legislature has jurisdiction, but also to all public officers and persons discharging public duties, whether such duties arise out of the common law, or are imposed by Act of either the Imperial or Dominion Parliament.

By the tenth section of this Act, a calendar month's notice in writing of the intended action has to be delivered to the person against whom the action is intended to be brought, or left for him at his usual place of abode, by the party intending to bring the action, or by his attorney or agent, in which notice the cause of action and the Court in which the same is intended to be brought must be clearly and explicitly stated, and upon the back thereof is to be endorsed the name and place of abode of the party intending to sue, and also the name and place of abode, or of business, of his attorney or agent, if the notice be served by an attorney or agent.

There are, however, other statutes expressly requiring notice of action to be served in the particular cases therein referred to. For instance, the Division Court Act, R. S. O. c. 47, s. 231, which applies to actions brought for anything done in pursuance of that Act; the Special Constables Act, R. S. O. c. 83, s. 22; the Municipal Act, 46 Vict. c. 18, s. 340; the Customs Act, 46 Vict. c. 12, s. 226 (D.); the Militia Act, 46 Vict. c. 11, s. 89, ss. 2 (D.); the Crimes Act, 32 & 33 Vict. c. 29, s. 131 (D.); Land for Naval Defence Act, C. S. C. c. 37, s. 42; the General Inspection Act, 37 Vict. c. 45 (D.).

Where notice of action is required, it must strictly comply with the statute which requires it to be given. Where, however, there is a special act relating to the matter, it would seem that the notice of action, if it comply with the latter, will be sufficient, though it may not contain all that is required by the general act, R.S.O. c. 73, to which we have above referred. Thus in *Stephens* v. *Stapleton*, 40 U. C. Q. B. 353, and *McMartin* v. *Hurlburt*, 2 App.R. 146, it was held that a notice to a Division Court bailiff which complied with the provisions of the Division Court Act was sufficient, though it omitted some of the particulars required by R. S. O. c. 73, in other words, that the provisions of the two Acts were not cumulative.

When the action is intended to be brought in the High Court of Justice it is sufficient so to state, without going on to specify the particular Division, *Haines* v. *Johnston*, 3 O. R. 100. With regard to the cause of action, it has been repeatedly held that the notice must specify the time and place, when and where, the injury complained of was committed: *Friel* v. *Ferguson*, 15 C. P. 584; *Parkyn* v. *Staples*. 19 C. P. 240; *Sprung* v. *Ande*, 23 C. P. 152; *Moore* v. *Gidley*, 32 U. C. Q. B. 233. It is not, however, necessary that the exact time and place should be stated, reasonable certainty is all that is required; thus where the notice stated the act complained of to have been committed "on or about the 28th of May last," and the place was described as "at or near the west half of lot 31, in the 2nd con. of Mulmur," and the wrong complained of was proved to have been committed on the 23rd and 28th days of May, and on lot 32, in the 2nd concession, the notice was held to be sufficient: *Langford* v. *Kirkpatrick*, 2 App. R. 513. The nature of the wrong complained of must be explicitly set forth. A letter which merely stated that damages had been sustained, for which the defendants would be held responsible, was held an insufficient notice: *Union Steamship Co.* v. *Melbourne Harbour Commissioners*, 50 L.T. N. S. 337.

In actions against public officers entitled to notice under R. S. O. c. 73, for anything done by them within their jurisdiction, the notice of action must state that the act complained of was done maliciously and without reasonable or probable cause: *Taylor* v. *Nesfield*, 3 El. & Bl. 725; *Howell* v. *Armour*, 7 O. R. 363. But when the act complained of was beyond or in excess of the defendant's jurisdiction, it is not necessary to allege want of probable cause, see R. S. O. c. 73, ss. 2, 20. With regard to the name and address of the plaintiff, and of his attorney, if any, reasonable certainty is also required. R. S. O. c. 73, requires the name and address to be endorsed on the notice, but when the name and place of residence of the attorney were not endorsed on the notice but added inside at the foot of it, it was held to be sufficient: *Bross* v. *Huber*, 15 U. C. Q. B. 625. But the subscription by the attorney at the foot of the notice, "A. B., attorney for the said C. D., Simcoe, Talbot District," was held insufficient, as not stating the place of residence of the attorney: *Bates* v. *Walsh*, 6 U. C. Q. B. 498. But a notice describing the plaintiff's abode as

"of the township of Garafraxa, in the county of Wellington, labourer," was held to be sufficiently precise: *Neill* v. *McMillan*, 25 U. C. Q. B. 485, and see *McDonald* v. *Stuckey*, 31 U. C. Q. B. 577. Defects in the form of the notice cannot be amended after action brought: *McCrum* v. *Foley*, 6 P. R. 164; *Grant* v. *Beaudry*, 19 C. L. J. 51. Where the notice is given by a solicitor it is not necessary that he should serve it in person, his clerk may make the service: *Morgan* v. *Leach*, 10 M. & W. 558. The service should be effected as directed by the Act of Parliament requiring it to be given. Under R. S. O. c. 73, it may be made by delivery to the defendant personally, or it may be left for him at his usual place of abode. And even under the Division Court Act, which does not expressly state that the notice may be left at the defendant's place of abode, it has been held that leaving the notice with a defendant's wife for him at his residence is sufficient service: *Haines* v. *Johnston*, 3 O. R. 100. It is no objection that the statement of claim is delivered by a different solicitor from the one who gave the notice and issued the writ: *McKenzie* v. *Mewburn*, 6 O. S. 486.

Notwithstanding the generality of the words of R. S. O. c. 73, as to the persons entitled to notice, the judicial interpretation of the statute has established some important exceptions and limitations to the general rule, both as to the persons entitled to notice, and the circumstances under which they are so entitled. Of course the mere fact that a person holds a public office does not entitle him to notice of every action that may be brought against him. He is only entitled to notice when the action is brought to recover damages in consequence of something done in the execution, or assumed execution, of his office, or public duty.

The mere fact that a public officer has acted maliciously, and without reasonable and probable cause, does not disentitle him to notice, because the statute (R. S. O. c. 73, s. 1) assumes that a public officer may so act, and it is of actions brought on that ground, among others, that the act provides that he is to have notice, see *per* Parke, B., *Kirby* v. *Simpson*, 10 Ex. 358. The question therefore on which the right of a public officer to notice of action turns, is not "whether or not the act complained of was done *mala fide*," but whether or not it was done by the defendant in his public capacity. If it were, he is entitled to notice even though he acted maliciously and without reasonable or probable cause. Sometimes it happens, however, to be a matter of controversy whether the act complained of was done in the execution, or assumed execution, of a public duty; and it is then a question for the jury whether or not the defendant *bona fide* believed, at the time of the doing of the act complained of, that he was acting in the discharge of his public duty: *Selmes* v. *Judge*, L. R. 6 Q. B. 724; *Cottrell* v. *Hueston*, 7 C. P. 277; but see *Ibbotson* v. *Henry*, 8 O. R. 625 *infra*. Where a person, not being a public officer, is entitled to notice of action under any statute, for anything done in pursuance thereof, he is only entitled to such notice in cases where he honestly believed in the existence of a state of facts, which, if it had existed, would have justified him in doing the act complained of: *Cann* v. *Clipperton*, 10 A. & E. 512; *Hermann* v. *Seneschal*, 13 C. B. N. S. 392; *Roberts* v. *Orchard*, 2 H. & C. 769; *Heath* v. *Brewer*, 15 C. B. N. S. 803; *Downing* v. *Capel*, L. R. 2 C. P. 461. It is not necessary that it should have been a reasonable belief: *Ib.*, *Chamberlain* v. *King*, 6 L. R. C. P. 478, although there must at least be some facts to warrant it: *Ib.*, and see *Leete* v. *Harte*, L. R. 3 C. P. 322. In the latter case, a *semble* is added to the head note, to the effect that even an honest belief would be insufficient unless

the defendant had reasonable grounds for such belief; but this was disapproved of by the judges in *Chamberlain* v. *King*, *supra*. But it has been said that the absence of reasonable grounds for belief is evidence of the non-existence of a *bona fide* belief on the part of the defendant that he was acting in discharge of his duty; *Booth* v. *Clive*, 10 C. B. 827, and see *Cox* v. *Reid*, 13 Q. B. 558; but it seems clear since *Chamberlain* v. *King*, *supra*, that the reasonableness of the grounds for the defendant's belief is not a question for the jury. It is not necessary that the defendant should have been cognizant of the Act giving him protection: *Read* v. *Coker*, 13 C. B. 850; *Danvers* v. *Morgan*, 1 Jur. N. S. 501. Where a public officer is sued for damages occasioned by his negligent omission to do something which it was his duty to do, it has been held that he is not entitled to notice of action, as the act complained of is not "an act done," but something not done. Thus a registrar of deeds who improperly omitted an instrument from an abstract was held not to be entitled to notice of an action brought to recover damages resulting to the plaintiff by reason of the omission: *Harrison* v. *Brega*, 20 U. C. Q. B. 324, and see *Ross* v. *McLay*, 40 U. C. Q. B. 83; *Harrold* v. *Simcoe*, 16 C. P. 43; and see *Dale* v. *Cool*, 6 C. P. 544, *infra*. But in *Wilson* v. *Halifax*, L. R. 3 Ex. 114; 37 L. J. Ex. 44; 17 L. T. N. S. 660, it was held that the negligent omission to do something which ought to be done in order to the complete performance of a duty imposed on a public body by an Act of Parliament amounts to "an act done or intended to be done in pursuance of the act," within the meaning of a clause requiring notice of action to be given to the public body. So also a mayor of a city, who was sued for refusing to sign an order to enable the plaintiff to obtain a license, was held entitled to notice: *Moran* v. *Palmer*, 13 C. P. 528. In *Moran* v. *Palmer*, however, the rule laid down in *Harrison* v. *Brega* is approved, viz., that where what is complained of is a negligent omission to do what the defendant was called upon to do in discharge of the duty of his office, then no notice of action is necessary; but when the party refuses to do an act, and in that way carries out the law according to his erroneous idea of his duty, then he is entitled to notice. Having regard to the state of the authorities, however, it would probably be safer in cases such as *Harrison* v. *Brega*, to give the notice.

For a long time the former Common Law Courts of this Province were divided in opinion as to whether a corporation discharging a public duty was a "person" entitled to notice of action. The numerous cases in which conflicting decisions were given on this point are noted in Har. & Jos'. Dig. 33. The Court of Error and Appeal ultimately, in *Hodgins* v. *Huron*, 3 E. & A. 169, sustained the view of the Queen's Bench that they were not entitled to notice of action under the general act relating to actions against public officers; but the Municipal Act (46 Vict. c. 18, s. 340) now expressly provides that municipal corporations are to be entitled to notice of actions brought in respect of any act done under any by-law, order, or resolution, illegal in whole or in part, and the decision in *Hodgins* v. *Huron* is therefore to that extent superseded.

When a person is acting under the Division Court Act for his own private benefit, he has been held not entitled to notice. Thus where a person was sued for having maliciously sued out an attachment from a Division Court, he was held not entitled to notice of action under the Division Court Act: *Pall* v. *Kenney*, 11 U. C. Q. B. 350. So also a plaintiff in a Division Court action who had indemnified the bailiff, was held not entitled to any

notice of an action brought for the wrongful seizure and sale of goods under the execution: *Dollery* v. *Whaley*, 12 C.P. 105; but the bailiff himself was held entitled to notice of an action, brought under such circumstances, notwithstanding he had been indemnified, and even though acting under a warrant not under seal: *Anderson* v. *Grace*, 17 U. C. Q. B. 96; *Sanderson* v. *Coleman*, 4 U. C. Q. B. 119; *Lough* v. *Coleman*, 29 U. C. Q. B. 367; *McCance* v. *Bateman*, 12 C. P. 469. In *McWhirter* v. *Corbett*, 4 C. P. 203, however, it was held that a sheriff sued for wrongful acts done under a *fi. fa.* issued in a private suit is not entitled to notice of action, and this was approved in *Moran* v. *Palmer*, 13 C. P. at p. 532; and, following *McWhirter* v. *Corbett*, it was held that an official assignee sued for trespass in taking and selling goods was not entitled to notice: *Archibald* v. *Haldan*, 30 U. C. Q. B. 30; but the learned judge who delivered the judgment of the Court, stated that but for the prior decision he would have come to a different conclusion. A Division Court bailiff, sued for wrongfully neglecting to pay over money levied by him in the course of his duty, is not entitled to notice of action, see *Dale* v *Cool*, 6 C. P. 544; *McLeish* v. *Howard*, 3 App. R. 503.

A special constable sued for wrongful arrest is entitled to notice, R. S. O. c. 83, s. 22, *Sage* v. *Duffy*, 11 U. C. Q. B. 30, but not a private person who wrongfully gives another into custody, *Brooker* v. *Field*, 9 C. & P. 651—unless he be authorized to do so under the Crimes Act, 32 & 33 Vict. c. 29 (D.). A revenue officer sued for seizing goods in the course of his duty, or who conceives he has authority so to act, is entitled to notice, see the Customs Act, 46 Vict. c. 12, s. 226 (D.); *Wadsworth* v. *Morphy*, 1 U. C. Q. B. 190; and so is a person, not at the time of the seizure authorized to act as a revenue officer, but whose act is subsequently adopted by the collector: *Wadsworth* v. *Morphy*, 2 U. C. Q. B. 120.

School trustees are also entitled to notice when sued for acts done in their corporate capacity, even though they may purport to act individually, if in fact they were acting in discharge of their duty as trustees: *Spry* v. *Mumby*, 11 C. P. 285. So also are collectors of school taxes, *Ib.*, and arbitrators between school trustees and a teacher: *Kennedy* v. *Burness*, 15 U. C. Q. B. 487; *Hughes* v. *Pake*, 25 U. C. Q. B. 95. Poundkeepers are entitled to notice: *Davis* v. *Williams*, 13 C. P. 365. But a constable sued for wrongfully impounding sheep and cattle is held not to be entitled to notice: *Ibbotson* v. *Henry*, 8 O. R. 625. The correctness of this decision, however, we think, is open to doubt. One of the learned judges based his conclusion on the ground that the constable did not honestly believe that such a state of facts existed as would, if it had existed, have justified the taking and impounding of the cattle; and the other learned judge proceeded on the ground that it was no part of the duty of the defendant as a constable to take up and impound cattle. The real question, however, by which the right to notice should have been determined we take to be this: "Did the defendant in doing as he did act as a constable?" He may have altogether mistaken or exceeded his duty; but that we think, on the authority of *Chamberlain* v. *King*, L. R. 6 C. P. 478, is immaterial. Although, as we have seen, a registrar of deeds who is sued for damages resulting from his negligently omitting a document from an abstract, has been held not entitled to notice, yet a registrar sued for overcharges is entitled to notice: *Ross* v. *McLay*, 40 U. C. Q. B. 87.

It is not necessary to give notice of every action brought against a public officer. Notice is only necessary when the action is to recover damages for the wrongful act complained of. In actions

of replevin notice is not necessary, although damages are recoverable therein for the goods which cannot be found to be replevied: *Folger* v. *Minton*, 10 U. C. Q. B. 423; *Manson* v. *Gurnett*, 2 P. R. 389; *Kennedy* v. *Hall*, 7 C. P. 218; *Applegarth* v. *Graham*, 7 C. P. 171; *Lewis* v. *Teale*, 32 U. C. Q. B. 108; and see *Ibbotson* v. *Henry*, 8 O. R. 625. Notice is not necessary when the action is for an injunction: *Flower* v. *Leyton*, 5 Ch. D. 347. Nor when it is brought against a registrar of deeds to compel the removal from the register of an instrument improperly registered: *Industrial Loan Co.* v. *Lindsey*, 4 O. R. 473, 3 O. R. 66.

We have now to consider how the objection of want of notice of action must be raised. The true rule appears to be, that where the defendant is entitled to plead, and does plead "not guilty by statute," it is not necessary to plead specially the want of notice (see Rule 145). But in all other cases the want of notice must be specially pleaded. In *Dale* v. *Cool*, 4 C. P. 460, and *Pearson* v. *Ruttan*, 15 C. P. 79, it was expressly held that the defence is available under the plea of "not guilty by statute," and see *Hermann* v. *Seneschal*, and *Roberts* v. *Orchard*, *supra*. It is not, however, available under a simple plea of "not guilty," *Timon* v. *Stubbs*, 1 U. C. Q. B. 347; *Verratt* v. *McAulay*, 5 O. R. 313; *McKay* v. *Cummings*, 6 O. R. 400. In *Fowke* v. *Robertson*, 6 O. S. 572, however, the objection appears to have been allowed though not pleaded specially, and it does not appear from the report that a plea of "not guilty by statute" was on the record; and, in *Davis* v. *Moore*, 4 U.C.Q.B. 209, Macaulay, J., referring to Tyrwhitt's Plgs., seemed to think that the objection might be taken under a plea of "not guilty," though not pleaded "per statute." This, however, was a mere dictum. In *McLeish* v. *Howard*, 3 App. R. 503, there was a plea of "not guilty by statute" on the record, as appears from the printed appeal book, but the Court of Appeal, without apparently much consideration of the subject, seems to have thought that the defence of want of notice was not available thereunder; but this expression of opinion was a mere dictum, and not necessary for the decision of that case.

The objection of want of notice must be taken at the trial: it will not be allowed to be taken for the first time on a motion to set aside the verdict: *Armstrong* v. *Bowes*, 12 C. P. 539; *Moran* v. *Palmer*, 13 C. P. 528. But when a new trial has been ordered, the objection of want of notice, though not taken at the first trial, may be raised on the new trial: *Bross* v. *Huber*, 18 U. C. Q. B. 282; *Nevill* v. *Ross*, 22 C. P. 487. In Taylor on Evidence (8th ed.) 54, it is said that the question whether a defendant is entitled to notice of action is a question for the judge, and the learned author refers to *Arnold* v. *Hamel*, 9 Ex. 404, and *Kirby* v. *Simpson*, 23 L. J. M. C. 165; but a reference to *Arnold* v. *Hamel* will show that that case turned upon the peculiar wording of the statute under which the notice was required, and which virtually precluded any evidence being submitted to the jury unless notice was first proved, and *Kirby* v. *Simpson* is no stronger authority. Neither case, we think, establishes a rule of universal application. It would perhaps be more correct to say that where the question of the right to notice is a mere question of law it is for the judge alone, but where the question turns on a disputed question of fact, then that question of fact must be submitted to the jury, and upon the fact so found the judge must determine the law. For example, where the statement of claim shows on its face that the action is brought against the defendant for something done by him in the execution of a public office held by him, or where this fact appears by the plaintiff's own evidence, then the question

whether the defendant is entitled to notice on the facts alleged or proved by the plaintiff, would clearly be for the judge alone. But where it does not appear by the plaintiff's pleading or evidence that the defendant is sued for anything done under circumstances entitling him to notice, but the question depends on a disputed question of fact as to whether or not the defendant in doing the act complained of was in fact acting in his public capacity, or in the *bona fide* belief that he was anthorized to do as he did by any statute entitling him to notice; then that question of fact must be submitted to the jury subject to the limitation laid down in *Chamberlain* v. *King*, *supra*, viz., that in determining the question of a defendant's belief, they are not to be influenced by the consideration whether he had reasonable grounds for it or not.

RECENT ENGLISH DECISIONS.

The Law Reports for October comprise 15 Q. B. D. pp. 401-440, and 29 Chy. D. pp. 893-1,017.

SIX MONTHS' NOTICE—HALF-YEAR'S NOTICE.

Taking up the Queen's Bench Division cases first, the first case to be noted is that of *Barlow* v. *Teal*, 15 Q. B. D. 403, in which a Divisional Court, composed of Coleridge, C.J., and Field, J., held that an agreement to terminate a tenancy from year to year upon a six month's notice being given, is not equivalent to an agreement for a half-year's notice. Most people ignorant of law would no doubt conclude that six months and half a year are convertible terms; but, owing to the inequalities in the lengths of the calendar months, this is clearly not the case—six calendar months frequently comprise only 181 days, and in some cases they include as many as 184 days.

SOLICITOR AND CLIENT—TAXATION—UNUSUAL PROCEEDINGS.

In the case of *In re Broad* v. *Broad*, 15 Q. B. D. 420, the Court of Appeal affirm the decision of the Divisional Court, 15 Q. B. D. 252, noted *ante*.

SECURITY FOR COSTS—DEFENDANT OUT OF JURISDICTION—COUNTER-CLAIM.

Sykes v. *Sacerdoti*, 15 Q. B. D. 423, is a decision of the Court of Appeal affirming a decision of the Divisional Court (Grove and Denman, JJ.) on a question of practice. The plaintiff in the action obtained leave to sign judgment for part of his claim, and leave was given to the defendant to defend as to the residue. The defendant, who was resident out of the jurisdiction, filed a counter-claim. The plaintiff then applied for leave to discontinue the action as to the residue of his claim and to stay proceedings on the defendant's counter-claim until he should give security for costs. An order was made on these terms which was afterwards affirmed by the Divisional Court, and which the Court of Appeal now affirm. The Master of the Rolls says: "When a claim and counter-claim arise out of different matters, the counter-claim is really a cross action, though for convenience of procedure the two are joined together. . . . In such a case the ordinary rule applies, and the Court is entitled to require the defendant, who is really an actor as regards the counter-claim to give security, if he is out of jurisdiction, for the costs which will be occasioned to the plaintiff by his counter-claim."

AGREEMENT TO APPOINT VALUERS—ARBITRATION—MAKING SUBMISSION RULE OF COURT.

The next case of *Re Dawdy*, 15 Q. B. D. 426, is a decision of the Court of Appeal affirming the opinion of a Divisional Court, composed of Coleridge, C. J. and Mathew, J. By an agreement between landlord and tenant it was provided that the tenant should be paid, at the expiration of the tenancy, the usual and customary valuation as between outgoing and incoming tenant in the same manner as he paid on entering the premises. And it was thereby agreed that when any valuation of the covenants should be made, the persons making the valuation should take into consideration the state, condition and usage of the farm; if not left in a proper and creditable state, should state what sum of money should be paid to the landlord as compensation therefor, and should deduct such sum from the amount of the valuation. On the expiration of the tenancy, there being no incoming tenant, the landlord and tenant respectively ap-

pointed a valuer. The valuers, not being able to agree, appointed an umpire who held a sitting, heard witnesses, and made an award in writing. The tenant, with the view of obtaining an order to remit the matters in dispute to the umpire for reconsideration, applied for an order to make the submission to arbitration contained in the agreement, together with the appointment of arbitrators and umpire, a rule of Court under the C. L. P. Act. But it was held that the agreement did not contain any submission to arbitration, but that it only provided for the appointment of valuers, and that it could not therefore be made a rule of Court. The ground of the decision may be gathered from the following observations which we extract from the judgment of Lord Esher, M. R.:

"The word 'arbitration' in s. 17 of the Common Law Procedure Act has been construed as meaning an arbitration to be conducted according to judicial rules, when the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it, and to determine judicially between them. He must have a matter before him which he is to consider judicially. As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge."

In the present case the Court was of opinion that the agreement only provided for the appointment of valuers and not arbitrators, and therefore there was no power in the Court to make the agreement a rule of Court.

DISCOVERY—LIBEL—COMPARISON OF HANDWRITING.

The only remaining case in the Queen's Bench Division which requires notice is that of *Jones* v. *Richards*, 15 Q. B. D. 439, which appears to be a decision of the Court of Appeal. The action was one for a libel contained in an anonymous letter, and the question was whether the defendant was bound to answer an interrogatory as to whether or not he was the writer of another letter addressed to a third person, and it was held that he was bound to do so. Lord Coleridge, C. J., says:

"The answer could be got from the defendant in the witness box in chief. The plaintiff would clearly have a right to put another document in the defendant's hand and ask him if that was in his handwriting. If the answer were in the affirmative it might be cogent evidence that he also wrote the letter in question in the cause; and so it becomes relevant."

LAW SOCIETY.

TRINITY TERM, 49th VICT., 1885.

The following is the resumé of the proceedings of the Benchers on the 30th June, and during Trinity Term, published by authority.

During Trinity Term the following gentlemen were called to the Bar, namely:—

Messrs. George Morehead, Angus Claude Macdonell, John Jackson Scott, Angus MacMurchy, Leonard Hugh Patten, Spencer Love, James Baird, Philip Henry Simpson, Charles Julius Mickle, Louis Martin Hayes, Stephen Ormond Richards, Edward Wm. Murray Flock, David Fasken, Sanford Dennis Biggar, George Hamilton Jarvis, John Alfred McAndrew, Archibald Gilchrist Campbell, Joseph Priestly Fisher, George Cory Thomson, Henry Thomas Shibley, Douglas Alexander, John Baldwin Hands, Stephen O'Brien, Ambrose Kenneth Goodman, Willoughby Staples Brewster, John Armstrong, John Shilton, John Strange, Henry Brock, Daniel Hugh Allan, Alexander George Murray, Francis Wolferstan Goodhue Thomas, John Frederick Grierson, Henry Walter Mickle, Francis Arthur Eddis, George Sandfield Macdonald, George Hiram Capron Brooke, Albert John Flint, Donald Macdonald Howard, John Andrew Forin.

The following gentlemen were granted Certificates of Fitness as Solicitors, namely:—

Messrs. A. Carruthers, W. S. Brewster, A. MacMurchy, A. E. O'Meara, J. Shilton, P. H. Simpson, S. Love, G. H. Jarvis, S. D. Biggar, J. Baird, J. A. McAndrew, C. J. Mickle, J. Armstrong, T. E. Parke, D. Alexander, J. D. S. C. Robertson, D. F. McArdle, F. E. Redick, W. H. Robinson, S. O'Brien, T. C. L. Armstrong, E. A. Langtry, R. J. Dowdall, H. Brock, D. H. Allan, J. F. Grierson, F. W. G. Thomas,

H. W. Mickle, G. H. C. Brooke, A. J. Flint, D. McD. Howard, J. A. Forin.

The following gentlemen passed their First Intermediate Examination, viz.:—

R. J. McLaughlin, with honors, and first scholarship; A. P. McDonell, with honors, and second scholarship; J. M. Young, with honors, and third scholarship; and Messrs. F. H. Kilbourne, F. P. Henry, C. Horgan, F. A. Anglin, H. R. Welton, A. Macnish, T. Browne, R. J. Leslie, J. A. Davidson, W. Lawson, E. H. Ridley, M. Wright, J. B. Davidson, S. W. Perry, T. Steele, A. F. May, W. H. Campbell, E. H. Jackes, J. M. McWhinney, A. Saunders, T. R. Ferguson, J. H. Kew, H. O. E. Pratt, G. L. Lennox, W. G. Munro, W. S. Turnbull.

The following gentlemen passed their Second Intermediate Examination, viz.:—

J. H. Reeves, with honors, and first scholarship; A. E. Swartout, with honors, and second scholarship; W. Chambers, with honors, and third scholarship; and Messrs. G. H. Kilmer, J. F. Lyall, A. W. Fraser, E. J. B. Duncan, R. C. Donald, T. A. McGillivary, D. G. Marshall, H. S. Osler, E. Considine, G. A. Loney, J. B. Dalzell, W. Whittaker, A. Fraser, R. H. Pringle, J. W. Bennett, J. L. Peters, J. R. Shaw, J. Elliott, A. J. Arnold, J. P. Eastwood, D. C. Hossack, L. Lee, J. A. Mills.

On 30th June, the following candidates were admitted as Students-at-Law as of the first day of Easter Term, viz.:—

Graduates.—Robert Maxwell Dennistoun, Heber James Hamilton, John Gumaer Holmes, Gordon Hunter Matthew Ford Muir, John Irving Poole, William W. Vickers. And on the first day of Trinity Term the following candidates were admitted.

Graduates. — Clifford Kemp, William Smith, Albert Ed. Kingsley Grier, Evan John MacIntyre, Alex. Doffs Cartwright, James H. Macnee, Horatio Venice Lyon, Stuart Alex. Henderson, Wm. Craig Chisholm, James Albert Collins, Herbert Edward Irwin, Edward Herbert Johnston, John Kyles, Robt. Osborne McCulloch, William Henry Walker, Thomas Walmsley, Henry Blois Witton, James Alex. Victor Preston, Alfred Burke Thompson.

Matriculants.—John Bell Holden, Walker Lewis E. Marsh, Frank William Maclean, Dudley Holmes, Augustus Jas. Jackson Thibaudeau.

Juniors.—D. A. McKillop, S. H. Brooke, E. G. P. Pickup, W. McKay, G. B. Carroll, W. J. Hanna, P. H. Bartlett, I. Greenizen, W. York, H. D. Macdonald, J. F. Keith, A. F. Wilson, J. Knowles, T. W. Scandrett, J. J. McPhillips, W. F. Smith, H. V. H Cawthra, A. C. Boyce, O. E. Fleming, W. A. Smith.

TUESDAY, 30th JUNE, 1885.

Convocation met.

Present—Messrs. Beaty, Bell, Britton, Ferguson, Foy, Guthrie, Hoskin, Irving, McKelcan, Maclennan, Martin, Morris, Moss, Murray, McMichael, Smith, L. W.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

Mr. Moss, from the Legal Education Committee, reported the names of the candidates who, under the new rule of 29th May last, were entitled to be admitted into the Society as Students-at-Law in the Graduate Class, as of Easter Term.

The report was received and read.

Ordered for immediate consideration and adopted.

A letter was read from Mr. J. F. Smith, dated 10th June, 1885, resigning his seat as a Bencher.

Ordered, that a call of the Bench be made for Tuesday 8th September, to fill the vacancy created by Mr. Smiths' resignation.

Mr. James F. Smith was elected Editor-in-Chief of the Law Reports.

Ordered, that in view of the valuable services rendered to the Profession and Convocation by Mr. David B. Read, Q.C., lately, and for twenty-nine years continuously as Bencher, as Lecturer and as Chairman of the Finance Committee, and otherwise, the sum of two thousand dollars be paid to him as a remuneration for such services. Carried unanimously.

Convocation adjourned.

MONDAY, 7TH SEPTEMBER, 1885.

Convocation met.

Present—Messrs. Blake, S. H., Crickmore, Ferguson, Irving, Kerr, Maclennan, Murray, Moss and McMichael.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The petitions of Messrs. Eddis, Langtry, Brock, Kershaw, Gibson, S. A. Jones, G. H. Douglas, H. W. Mickle, Forin, Grierson, Murray, Howard, G. H. C.

Brooke and Thomas were referred for consideration to the Legal Education Committee, to ascertain whether they came within the resolution of Convocation of Easter Term, and to report generally upon the petitions now referred to them.

Convocation adjourned.

TUESDAY, 8TH SEPTEMBER, 1885.

Convocation met.

Present—Messrs. Blake, S. H., Britton, Crickmore, Ferguson, Foy, Hoskin, Hudspeth, Irving, McKelcan, Maclennan, Martin, Meredith, Morris, Moss, Murray, McCarthy, McMichael.

Mr. Irving was appointed Chairman in place of the Treasurer, who was absent.

The Legal Education Committee, presented their report on the cases of students and articled clerks, who had been on service with the volunteers in the North-West.

The report was received, read, considered and adopted.

Ordered, that the resolutions passed by Convocation on the 19th May (Easter Term) last, relating to the volunteers ordered out, in consequence of the rebellion in the North-West Territories, be extended so as to include the present term, and embrace within their scope all students-at-law and articled clerks who had entered on such military service, at any time before or after their adoption, and notwithstanding they may not have given notice, and that the same shall apply as regards such students and clerks to any examination for the present term, notwithstanding such students or clerks, have now been discharged from active service.

Ordered, that upon the representation of Mr. Hudspeth, the above resolutions shall apply to Mr. Alexander Skinner upon his attaining the full age of twenty-one years, he having passed all his examinations except those for call and for admission as a solicitor, and having been on military service in the North-West during the whole campaign, and whose period for call and time for solicitor have expired, and who cannot now avail himself of the said resolution, because he has not attained the full age of twenty-one years.

Mr. Maclennan, from the Special Committee, presented their report on the case of Mr. G. L. Taylor, a barrister from Manitoba, recommending that he be called to the Bar, he having passed the special examination. The Committee further recommend that he be required to pay the ordinary fees only.

The report was received, read and considered. The first clause was carried, the second clause was struck out. The report as amended was adopted.

The following gentlemen were elected Benchers of the Law Society, to supply vacancies of the Bench, viz.: Mr. Christopher Robinson, Mr. Thos. H. Purdom, Mr. A. S. Hardy, Mr. T. B. Pardee, Mr. W. G. Falconbridge.

Pursuant to notice given by Mr. Murray, The following resolution was moved, that the prizes of $25 and $15, which were competed for in April last, be awarded to W. D. McPherson and J. M. Clarke, they having obtained the requisite number of marks.

Ordered, that the subject-matter of the resolution be referred to the Legal Education Committee for report on the facts.

Convocation adjourned.

SATURDAY, 12TH SEPTEMBER, 1885.

Convocation met.

Present.—Falconbridge, Ferguson, Foy, Hoskin, Irving, Maclennan, Morris, Moss, Murray.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

Mr. Moss, from the Legal Education Committee, reported as follows, namely:

That the following students and articled clerks, who had been on military service in the North-West, were entitled under the resolutions adopted by Convocations in that behalf to be called to the Bar, and to receive Certificates of Fitness, namely: Messrs. D. H. Allan, F. W. G. Thomas, H. W. Mickle, John Frederick Grierson.

That Messrs. F. A. Eddis and G. S. Macdonald, were entitled to be called to the Bar.

That the cases of Messrs. Brooke, Flint, Morris, Blake, Howard and Forin, were reserved for further consideration, their papers not being complete.

That Mr. Dowdall's papers had been examined, and the proof of the completion of his service found satisfactory, and his Certificate of Fitness issued. The report was received and adopted.

The report of the Special Committee

to strike standing committees recommending that Mr. Falconbridge be put on the Reporting Committee, Mr. Robinson, on the Legal Education Committee, Mr. Purdom on the Finance Committee, Mr. Hardy on the County Libraries Committee and Mr. Pardee on the Journals and Printing Committee was received, read, considered and adopted.

The Secretary's report on the Intermediate Examination cases reserved from Easter Term was received, read and adopted.

Ordered, that the examinations named in the report be allowed them as of Easter Term last in accordance with the report, and that the same be duly recorded.

Convocation adjourned.

J. K. KERR,
Chairman, Committee on Journals.

SELECTIONS.

AN EARLY CRIMINAL TRIAL.

IN the course of recent reading I came across an amusing and instructive account of a criminal trial occurring in England about six hundred years ago (say, A.D. 1302), and but a few years, comparatively, after the enactment of Magna Charta. It not only illustrates the manners and customs of the time, but sheds light on the mode of making use of "benefit of clergy," of "trial by one's peers," of challenging jurymen, of refusing counsel to prisoners on trial for felony, and of judicial protection and countenance to an abashed prisoner, which are in some respects the glory, and in others the shame of English criminal law.

The account of the trial is in Latin, and I have ventured to give a free translation of it. The reporter of the case performs a peculiar function in making side remarks as he goes along, by way of criticism and suggestion. I shall follow his practice, and, in passing, throw in some modern explanations.

Curiously enough, though the account of the trial is perfectly authentic (being found in ancient English Court papers), neither the name of the judge, nor of the prisoner, nor of the reporter is ascertainable. Nothing is known of the prisoner except that he is "Sir Hugh," and a knight, presumably of "gentle blood." For convenience' sake, the various actors will bear assumed names, taken from the same old papers, also illustrative of the times. The prisoner will appear as Sir Hugh Bad; the judge, as "his honour, Judge Tynterel;" and the reporter as "Adam Worry." Sir Hugh had a serviceable friend, whose name was "Leyr," a personage useful in Court matters even in our own day.

The case opens with a presentment by "*the twelve* of Y" (apparently acting as a grand jury) to the effect that Sir Hugh had committed the offence of rape, with the usual legal statements and descriptions of the offence. He was thereupon brought to the bar (*ad barram*) by two persons, perhaps his bail. Tynterel thereupon said to one of them, named Brian: "I understand that this man is your relative; you may stand by him and give him your countenance, but you must not advise him." Brian replied: "That is true, he is my relative; but, that I may not be suspected of having anything to do with the controversy, I will take my leave." And so this very prudent and circumspect relative departed. Then Tynterel said to the prisoner, "Sir Hugh, there is a presentment against you, that you have committed the crime of rape, etc.; how do you propose to defend yourself?" Then Sir Hugh: "Your honour, I ask for counsel. Give me counsel, that I may not be tripped up in the king's Court for want of counsel." Then said Tynterel: "You ought to know that the king is a party in this case, and prosecutes you *ex officio*, and in such a case the law does not permit you to have counsel against the king—indeed, if the woman had been prosecuting you, you should have had counsel against her, but not against the king. Accordingly I now order, in behalf of the king, that all the pleaders who are here in order to be of your counsel shall depart." Mr. Worry then interposes that all the counsel are removed.

Tynterel resumes: "Hugh, respond; the deed charged against you is possible, it is your own deed, and you can respond very well without counsel, whether you committed it or not. The law is common

to all, and must be uniformly administered, and the law is that when the king is a party *ex officio* you shall not have counsel against him." He then proceeds to make this remarkable statement, which he must apparently have done in a manner not audible to the bystanders, while he was certainly heard by the inquisitive Mr. Worry. "If I, in opposition to the law, should give you counsel, and the 'country' (meaning the jury) should be with you, as, please God, they may, then the common talk would be that you had been set free by the favour of the justice. So I do not dare to award you counsel, and you ought not to ask it; so answer." Sir Hugh said no more about counsel.

This absurd and barbarous rule, denying a prisoner charged with a felonious crime the privilege of stating his case by counsel, rooted in the very outset in the system of trial by jury, continued unchanged in England, except in cases of high treason, down to the memory of men now living. There was a preposterous idea prevailing that the judge should be, as it were, counsel for the prisoner. The rule applied to all—to the ignorant, the deaf, the young. Nothing, however, could shake the rule until it met with the terrible and scathing invectives of Sydney Smith in the *Edinburgh Review*, in 1826, where he maintained at length the proposition, set forth with italics, that a prisoner accused of felony ought to have the same power of selecting counsel to speak for him as he has in cases of treason and misdemeanour, and as defendants have in all civil actions. This seems almost incredible.

Counsel were allowed for the first time by 6 & 7 Wm. IV. c. 114 (1836-37).

It is very noticeable that the justice in the present case feared to allow counsel because of the public opinion of the time. The people demanded an impartial administration of the laws against knights and nobles as well as common men. The judge did not dare to face the opinion. A sound public opinion was then, as now, a healthy check upon the administration of criminal justice.

Sir Hugh next takes up his defence, and instead of pleading not guilty, he pleads in opposition to the jurisdiction of the Court. He played the following card. He said: "Your honour, I am a clergyman, and I ought not to be called on to respond without my 'ordinary'" (meaning the bishop, or ecclesiastical superior). "Then," said the judge, apparently astonished, "are you truly a clergyman?" Whereupon Sir Hugh replied: "It is true; I have been a rector of the church of N." Then the bishop appeared in Court, and said to the judge: "I demand him as a clergyman." Whereupon Sir Hugh cried exultingly, "You hear what he says." "But," said the judge, "I say that you have lost the 'benefit of the clergy,' because you are 'bigamous,' that is you married a widow, and you must answer whether, when you married your wife, she was a virgin or not, and you may as well tell the truth at once as to seek any evasion, for I shall immediately submit the matter to the country" (the jury). We may hope that Sir Hugh, being a knight, was a man of truthful disposition; but he was on trial for a vile crime, and, if convicted, subject to a terrible punishment, involving personal mutilation. So he put a bold face upon the matter, and said without the quiver of a muscle, "My wife was a virgin when I espoused her." Then said Tynterel: "I must find out the truth of this matter right away." So the reporter says he asked "*the twelve*," and they declared upon their oath that she was a widow when Sir Hugh married her. Mr. Worry thereupon remarks that it was a noteworthy thing that Tynterel did not administer a cumulative oath to jury for this purpose. Then the Court said, "You must respond not as a clergyman but as a layman, and you must submit yourself to these twelve 'honest men,' who are unwilling to lie for the king."

This is certainly a very graphic description of the way in which even a man of military rank would strive to pass himself off as a clergyman, in order that he might escape the dreadful severities of a criminal trial and punishment in the king's Court. Had Sir Hugh been successful in his plea to the jurisdiction of the Court, he would have been handed over to the bishop who claimed him. His trial before him would have been a farce. At most, if convicted, he would have been sentenced to be branded in the hand, and the sentence would very likely have been carried out with a *cold iron*. This it was to have "benefit of clergy," and this

existed down to the time of the American Revolution, when a new plan of punishment by imprisonment and transportation to a penal settlement took the place of the former barbarous methods (applicable to the laity), while unmeaning privileges were swept away, and the same rules of punishment were applied to all, without distinction of clergy and laity. When the case now in hand was tried, the distinction between the two classes was a real one; before it was abolished it was merely a line drawn between those who could read and those who could not. The case seems to show that a clergyman then could be married, except to a widow, but whether this was canon law or only Tynterel's law may be open to discussion.

Sir Hugh, baffled in his plea of being a clergyman, tries another plan. He objects to the jury, who are ready in Court to try the case. He makes two points: one is that he is *accused* by them, and that accordingly he will not consent to be *tried* by them. The meaning of this would seem to be that the *same men* are assuming to act both as a grand jury and a petty jury. Then, observing that they are men of inferior rank, perhaps yeomen or farmers, he says: "Your honour, I am a knight, and will not be judged except by my peers" (*pares*). To this Tynterel replies: "Since you are a knight, I direct that you be tried by your peers." So knights are summoned to try the case. Then Tynterel says further to Sir Hugh: "Do you desire to propose any challenges in respect to them?" Sir Hugh replies: "I do not agree to them; you may take whatever inquisition you desire *ex officio*, but I will not agree to them." To this Tynterel responds: "If you will consent to them, with the help of God they will act in your case; but if you will not, and refuse to follow the rules of the common law, you will suffer the regularly ordained punishment—viz., one day you will be allowed to eat, and the next day to drink, but the day that you eat you shall not drink, and *vice versa*. When you eat you shall have barley bread without salt, and the day you drink water," etc. Mr. Worry pauses at this point, and remarks that the judge said "many other things," showing why it would not be a good thing for him to adhere to his refusal, and why it would be better to consent. Sir Hugh took the hint, and said: "I will consent to be tried by my peers, but not by these twelve by whom I am accused. Be kind enough to have my challenges read." To this the judge said: "Gladly; let them be read, or, if you can state any ground why the twelve should be removed, proceed orally." Then Sir Hugh: "I *desire counsel*, for I cannot read." Tynterel responds: "No; for this affects our lord, the king." To this, Sir Hugh: "Then you may take the challenges and read them." Tynterel: "No; for they must come from your own mouth." Sir Hugh: "I cannot read." Tynterel then wakes up and says: "How is this, Sir Hugh? It is but a few minutes ago that you were claiming the 'benefit of clergy,' and you were even rector of a church, and now you say you cannot read! Oh, fie!"

At this point the good reporter, Worry, interjects a remark to the effect that Sir Hugh stood silent, abashed and confused. Tynterel now tries to cheer him up by saying: "Be not abashed: now, if ever, is the time to speak." Then the justice turns to Sir Hugh's friend, Leyr, saying: "Would you not like to read the challenges of Sir Hugh?" To which Leyr answers: "Yes, your honour: if I only had the book which he holds in his hands." This was allowed. Then Leyr said: "Here are challenges against many of the jury. Do you wish that I should read them publicly?" Tynterel replies: "No; read them to the prisoner secretly, because they must be uttered by his mouth." And so it was done, and the challenges turning out to be true, all the disqualified jurymen were removed and others substituted. The jury being obtained, Tynterel said to them: "Sir Hugh is charged with the crime of rape. He pleads not guilty, and he is asked how he desires to be tried, and he says by the 'country' (*per bonam patriam*), so he places himself upon your decision for better or for worse. So we enjoin you to declare upon your oath whether Sir Hugh committed the offence with which he is charged or not." The twelve men say: "We declare that the woman was ravished by the 'men' of Sir Hugh." Then Tynterel: "Was Sir Hugh consenting to the crime?" The twelve: "No." Some other questions being asked and answered, which brought out the fact that there was no ravishment, the judge

finally said: "Sir Hugh, because they (the twelve) acquit you, I acquit you."

This extraordinary trial is of the highest interest, as showing trial by jury in its earliest infancy. No authentic case dates so far back as this. There seems to be a mystery hanging about this form of trial in the minds of the men of the time. The triers are "the twelve;" they are the "country," the "good country," "twelve honest men." They are but seldom called a jury. The case shows that the word "peers" in the Great Charter meant political equals, and that even a knight might demand a jury of knights. Further, there could be no trial of the facts unless the prisoner entered a plea of "not guilty." If he would not plead, he must be made to plead, by subjecting him to extreme torture in regard to want of food and drink, and in other respects, which the reporter refrained from disclosing. This was the *peine forte et dure* of later days, when a prisoner who would not plead, in addition to a daily supply of a few morsels of loathsome food and a few draughts of the vilest water, was to sustain constantly upon his person as great a weight of iron as he could bear, and more, and this until he died, unless he soon answered. This continued to be law until 1828, when, if a prisoner refused to plead, the humane practice of entering the plea of "not guilty" was adopted. The case further shows that the judges were inclined to administer the law as humanely as its rules would allow, and that a verdict of acquittal was deemed to be final. The system of challenging jurymen for unfitness, now so well established, was at that early day in existence, though with this singular qualification, that the challenges must come from the prisoner's own mouth, though they might be read to him to refresh his memory. There is in this trial a complete absence of formality. Question and answer pass between judge and prisoner, judge and jury, and judge and bystander in rapid succession. Subterfuges are speedily detected, and the kernel of the case soon reached. On the whole, the judges of the olden days set a good example to those of our time in regard for law, respect for an impartial public opinion, kindness to a prisoner on trial, grasp of questions involved, and due regard for the acts and verdicts of the mysterious "twelve" who then, as now, could in general be relied upon to bring a popular, and because popular, salutary element into the administration of criminal justice. Though the law was severe, and the punishments barbarous, nothing else could effectually quell the powerful ruffians who filled the neighbourhood with terror, and dominated all things, except the king when in the field, or when meting out, through the medium of the judges, retributive justice in its most awe-inspiring forms.—THEODORE W. DWIGHT, in the *Columbia Jurist*.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.] [October 5.

BEATY v. HALDAN.

Solicitor and client—Costs—One city solicitor doing work for another on agency terms.

In a certain suit of *Wilson* v. *Wilson*, D. acted generally as solicitor for H. who had been appointed administrator *pendente lite*. In certain matters, however, in connection with the suit, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect to those matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges of which he rendered D. an account. D. made up one bill of costs and rendered it to H., which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill with these charges to D.

Held, that the Master, on taking H.'s accounts with respect to the estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction.

Moss, Q.C., for the appellant, Haldan.

O'Donohoe, Q.C., for the plaintiff.

Ferguson, J.] [October 5.

RE CROWTER, CROWTER v. HINMAN.

Executors—Misappropriation by co-executor.

When D. H., an executor under the will of P. S. C., by tacit consent of his co-executors took the actual management of the estate, and received all the moneys arising from it, including the purchase money of certain of the real estate sold pursuant to the will, and misappropriated the latter,

Held, that a co-executrix, who had joined in the conveyance to the purchaser, but who was not shown to have known that there was a balance of the purchase money in the hands of D. H. after the purposes of the will had been satisfied, viz., the payment of debts and incumbrances; or that he was misappropriating in any way, was not liable to make good the moneys so misappropriated by D. H.

Held, also, that even if she had been liable for the principal of such moneys, she would not have been liable for the interest, as the money never came into her hands at all.

McCarter v. *McCarter*, 7 O. R. 243, distinguished.

Moss, Q.C., for appellant.

J. Kerr, for respondents.

Boyd, C.] [October 14.

EASTMAN v. THE BANK OF MONTREAL ET AL.

Assignment—Proof of claims—Collateral securities—Giving credits for amounts received on collaterals—Up to what time.

F. agreed with the Bank of M. for a line of credit to be secured by the discount of certain bills and notes which he had himself discounted, and which he endorsed and delivered to the Bank. He also arranged with the M. Bank to discount his notes to be secured by the deposit of his customers' notes as collaterals. F. then failed, being largely indebted to both banks, and made an assignment for the general benefit of his creditors. In proving their claims on his estate before the assignee, the banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action by another creditor on behalf of himself and all other creditors entitled to share under the assignment against the banks and the assignee, it was

Held, following *Rhodes* v. *Moxhay*, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole without prejudice to his rights against securities he may hold, subject, of course, to this qualification that he must not ultimately receive more than twenty shillings on the pound; to hold otherwise would be virtually to deprive the secured creditor of any advantage from his security. The state of the accounts at the time the claim is put in is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee as at that date; any moneys received prior to that from collaterals are to be credited; those received after from such sources need not be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cents on the dollar.

That substantially both banks were in the same position as to the securities in their hands.

That there was a distinct contract for a line of credit to the debtor by the Bank of M., and as long as that line was not exceeded the bank could prove on the footing of that contract as the original debt and hold the customers' notes discounted in pursuance of that contract as securities.

Meredith, Q.C., for the plaintiff.

Street, Q.C., for the Bank of Montreal.

Gibbons, for the Merchants' Bank of Canada.

Moorhead, for defendant, Lucas, the assignee.

Boyd, C.] [October 14.

BURNS AND LEWIS v. MACKAY ET AL.

Fraudulent preference—Necessity of intent to defraud on both sides.

The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor under R. S. O. c. 118 there must be a concurrence of intent so to do on the part of both debtor and creditor, and the rule of the Court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling

circumstantial evidence leading to that conclusion. *Fry* v. *Knox*, 8 O. R. 648, declared to be overruled.

Gibbons, for plaintiff.
Meredith, for J. S. Mackay.
Mulhern, for J. Sutherland.

PRACTICE.

Wilson, C. J.] [Oct. 12.

WALLER v. CLARIS.

Notice of motion—Irregularity—Costs.

Where the defendant's solicitor was served with a short notice of motion which, on the return, was admitted to be defective,

Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to show that the notice was irregular.

Hoyles, for the plaintiff.
F. E. Hodgins, for the defendant.

Mr. Dalton, Q.C.] [Oct. 12.

PEEL v. WHITE.

Limited defence—Appearance—Statement of claim—Rule 68, O. J. A.

The defendant entered an appearance under Rule 68, O. J. A., limiting his defence to one item in the particulars endorsed on the writ of summons.

Held, that after such appearance a statement of claim was unnecessary, and a judgment signed upon a statement of claim for default of a statement of defence was set aside with costs.

Hoyles, for the defendant.
McPhillips, for the plaintiff,

Boyd, C.] [October 14.

ORPEN v. KERR.

Examination—Production of documents—Special examiner—Rule 285, O. J. A.—G. O. Chy. 147.

The powers of the special examiner under G. O. Chy. 147, as to directing the production of documents, extend to examinations under Rule 285, O. J. A.

Upon an examination of a party under Rule 285, at a stage of the action earlier than an examination will be ordered as of course, only material documents should be produced—such as would be produced in the ordinary course at a later stage.

A. H. Meyers, for the plaintiff.
C. H. Ritchie, for the defendant.

Boyd, C.] [Oct. 14.

ROGERS v. LOOS.

Retaining money in Court—Defence—Security for costs.

The statement of defence set up that the assault complained of was in self-defence, and, as an alternative defence, that, while the defendant does not admit his liability for damages, he brings into Court $150 and says that the same is sufficient, etc.

Held, affirming the order of KINGSMILL, local judge of Bruce, that the money paid into Court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case were made for ordering security for costs.

W. H. P. Clement, for the defendant.
Hoyles, for the plaintiff.

Boyd, C.] [Oct. 26.

SERVOS v. SERVOS.

Changing place of trial—Preponderance of convenience.

In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton where also the parties and their respective solicitors and all the witnesses resided; but the plaintiff proposed that the action should be tried at Toronto. The increase in expenses of a trial at Toronto over one at Hamilton was estimated by the defendant at between $50 and $75, and by the plaintiff at about $30.

Held, that there was an exceeding preponderance of convenience in favour of Hamilton, and it was ordered that the place of trial should be changed unless the plaintiff at once paid into the Court $40 to meet the defendant's additional expense.

Shepley, for the defendant.
Holman, for the plaintiff.

Law Society of Upper Canada.

OSGOODE HALL.

TRINITY TERM, 1885.

During this Term the following gentlemen were called to the Bar, viz.:—

George Morehead, Angus Claude Macdonell, John Jackson Scott, Angus MacMurchy, Leonard Hugh Patten, Spencer Love, James Baird, Philip Henry Simpson, Charles Julius Mickle, Louis Martin Hayes, Stephen Ormend Richards, Ed. William Murray Flock, David Fasken, Sandford Dennis Biggar, Geo. Hamilton Jarvis, John Alfred McAndrew, Archibald Gilchrist Campbell, Joseph Priestly Fisher, George H. Cory Thomson, Henry Thomas Shibley, Douglas Alexander, John Baldwin Hands, Stephen O'Brien, Ambrose Kenneth Goodman, Willoughby Staples Brewster, John Armstrong, John Shilton, John Strange, Henry Brock, Daniel Hugh Allan, Alexander George Murray, Francis Wolferstan Goodhue Thomas, John Frederick Grierson, Henry Walter Mickle, Francis Arthur Eddis, George Sandfield Macdonald, George Hiram Capron Brooke, Albert John Flint, Donald McDonald Howard, John Andrew Forin.

The following Graduates were admitted on 30th June, their admission to date as of Easter Term (18th May) under New Rule 29:—

Robert Maxwell Dennistoun, Heber James Hamilton, John Gumaer Holmes, Gordon Hunter, Matthew Ford Muir, John Irving Poole, William Wallbridge Vickers.

The following candidates were admitted as Students-at-Law, as of Trinity Term, 1885:—

Graduates—Clifford Kemp, Wm. Smith, A. E. K. Greer, E. J. McIntyre, A. D. Cartwright, J. H. Macnee, H. V. Lyon, S. A. Henderson, W. C. Chisholm, J. A. Collins, H. E. Irwin, E. H. Johnston, Jno. Kyles, R. O. McCullough, W. H. Walker, T. Walmsley, H. B. Witton, J. A. V. Preston, A. B. Thompson.

Matriculants—J. B. Holden, W. L. E. Marsh, F. W. Maclean, D. Holmes, A. J. J. Thibaudeau,

Juniors—D. A. McKillop, S. H. Brooke, E. G. P. Pickup, Wm. Mackay, G. B. Carroll, W. J. Hanna, P. H. Bartlett, I. Greenizen, Wm. York, H. D. Macdonald, J. F. Keith, A. F. Wilson, J. Knowles, T. W. Scandrett, J. J. McPhillips, W. F. Smith, H. V. H. Cawthra, A. C. Boyce, O. E. Fleming, W. A. Smith.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

1884 and 1885.

- Arithmetic.
- Euclid, Bb. I., II., and III.
- English Grammar and Composition.
- English History—Queen Anne to George III.
- Modern Geography—North America and Europe.
- Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884.

- Cicero, Cato Major.
- Virgil, Æneid, B. V., vv. 1-361.
- Ovid, Fasti, B. I., vv. 1-300.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.

1885.

- Xenophon, Anabasis. B. V.
- Homer, Iliad, B. IV.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

Mathematics.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb, I., II. and III.

English.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

History and Geography.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

French.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Socity as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bencher, and pay $1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Bencher, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of $2.

FEES.

Notice Fees	$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.
- Cicero, Cato Major.
- Virgil, Æneid, B. I., vv. 1-304.
- Cæsar, Bellum Britannicum.
- Xenophon, Anabasis, B. V.
- Homer, Iliad, B. VI.

1887.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.
- Cæsar, Bellum Britannicum.

1888.
- Xenophon, Anabasis, B. I.
- Homer, Iliad, B. IV.
- Cæsar, B. G. I. (vv. 133.)
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. I.

1889.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. IV.
- Cicero, In Catilinam, I.
- Virgil, Æneid, B. V.
- Cæsar, B. G. I. (vv. 1-33)

1890.
- Xenophon, Anabasis, B. II.
- Homer, Iliad, B. VI.
- Cicero, In Catilinam, II.
- Virgil, Æneid, B. V.
- Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.
Composition.
Critical reading of a Selected Poem:—
1886—Coleridge, Ancient Mariner and Christabel.
1887—Thomson, The Seasons, Autumn and Winter.
1888—Cowper, the Task, Bb. III. and IV.
1889—Scott, Lay of the Last Minstrel.
1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography — Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.
Translation from English into French Prose.
1886, 1888, 1890 } Souvestre, Un Philosophe sous le toits.
1887, 1889 } Lamartine, Christophe Colomb.

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics; *or* Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; *or*, Virgil, Æneid, B. I., vv. 1-304, in the year 1886: and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, *or* Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.