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THE *Sydney Morning Herald* recently advocated the appointment of some leading Australian judge to the English Bench, with a view to his ultimate transference to the Judicial Committee of the Privy Council. For the ultimate destination of such a judge there is much to be said, but the intervening step would not meet with much favour: in fact, the proposal to appoint colonial judges to the English Bench would, we fancy, very naturally and very properly meet with a good deal of opposition from English lawyers. Would colonists be prepared to reciprocate, and appoint English lawyers to the Colonial Bench? We fancy not. Such a proposition would not find much favour in any Province of this Dominion, we are quite sure, however much we might aspire to see some eminent Canadian lawyer in the Privy Council.

OUR namesake and contemporary in England thus speaks of recent changes on the Bench in England:

"The appointment of Sir Horace Davey as a Lord of Appeal in Ordinary, in succession to Lord Russell, of Killowen, is satisfactory in more respects than one. It is probable that the members of the Bar would have viewed with still greater satisfaction the promotion of Lord Justice Lindley, who, since the retirement of Sir Henry Cotton, has presided over the Second Court of Appeal with conspicuous success. But the qualifications of Lord Justice Davey to occupy a seat in the highest tribunal in the land are beyond all question. His wide legal attainments, his great career at the Bar, and the reputation he has acquired as a judge during the nine months he sat on the Bench, entitle him to the honour that has now been conferred upon him."

"It appears to be generally held that the vacant position in the Court of Appeal ought to be given to Mr. Justice Chitty, and there is reason to believe that this appointment will be made. In that event either Mr. Cozens-Hardy, Q.C., M.P., or Mr. Warmington, Q.C., M.P., will be raised to the Bench. There has not been a Chancery judge appointed since 1890."

It is said that nothing succeeds like success. This saying appears somewhat in a new light in a statement of a proposition of law in a recent number of the *Central Law Journal*, which lays it down as law that, "in estimating the value of an attorney's services, the result thereof is a very important factor, and, indeed, one of the main elements." The writer does say that there are other elements which must be equally considered; but he lays great stress on the success attending the services. His remarks are based on a recent decision of *Randall* v. *Packard*, 36 N.E. Rep. 833, where the Court of Appeals of New York held to be erroneous the charge of the court below to the effect that the main element of value in reference to a suit for attorney's fees was the *result*. The Court of Appeals said that if this statement had stood alone it would have been distinctly incorrect and misleading, inasmuch as the result of a lawyer's services, though one of the main elements, was not the only element in determining their value. We are inclined to think that both the Court of Appeals and the writer in our contemporary misstate the law. An attorney having proper learning and skill for the conduct of the case, who does his duty by his client honestly and faithfully, is entitled to his reasonable fees if he fails as much and to the same extent as if he should succeed. The result has nothing to do with it.

CRUELTY TO ANIMALS.

We notice, in a recent number of *The Legal News*, the report of a case tried at the Recorder's Court, Montreal, on a prosecution under s. 512, s-s. (*a*), of The Criminal Code, which provides that every one who "wantonly, cruelly, or unnecessarily beats, ill-treats, abuses, overdrives, or tortures any cattle, poultry, dog, domestic animal, or bird," shall be guilty of an offence, and liable

to a certain punishment. The offence charged was that a horse, standing by the side of a roadway, and harnessed in a carriage, was ill-treated and tortured, within the meaning of that statute, by the application of a check-rein, The evidence was conclusive that the animal was suffering great pain from a tight check-rein, which kept its head in an unnatural and painful position. Judging from the evidence as reported, a clear case under the statute was made out.

The defence was that the horse was a "hard puller," and was difficult to drive without a check-rein. It was also stated by a witness for the defence that some horses require a check-rein whilst being driven, and that a horse looks handsomer with a check-rein than without. Another of the witnesses stated that the animal did not suffer pain; but this statement was unsubstantiated, and was manifestly untrue in the opinion of the other witnesses.

Doubtless to the astonishment of the prosecutors (the Society for the Prevention of Cruelty to Animals) and the large number of highly respectable witnesses called for the Crown, and, we should suppose, to the great astonishment of every reader of the report of the case, the Recorder dismissed the charge. He said that it had been proved the check-rein was necessary to manage the horse, and that, moreover, "it was quite lawful to use a check to render an animal handsomer, and thus give more value to the property of the owner, who, being a sportsman, had an interest that his horse should show well, and thus bring a better price. No doubt the check-rein causes a certain amount of annoyance until the horse gets accustomed to it, but the annoyance was not caused unnecessarily." Had the learned Recorder been subjected to the same treatment, he would have probably used a stronger word than "annoyance." It would be an interesting subject for a cartoon to represent the horse on the Bench, and the Recorder harnessed to a cart, with a tight check-rein on.

It is scarcely necessary to point out the manifest fallacies of this extraordinary decision. Even if a check is necessary to manage a horse when driving, it is not, therefore, necessary when a horse is "standing at ease"; nor does ill-treatment and cruelty cease to be ill-treatment and cruelty because it is said to be necessary to make the unfortunate subject of it look handsomer, or bring a higher price.

DIVORCE MADE EASY.

We have been accustomed to look upon the United States as the home of divorce, and as an El Dorado where might be found a means of putting a final end to conjugal infelicities for very slight reasons, and, indeed, we have only to read a recent case from Omaha to realize what frivolous grounds for a separation have been urged. In this case the applicant complains that his spouse, who had previously rejoiced him with her dusky tresses, had taken the pernicious notion to bleach them, and by reason thereof it had become necessary that she should paint her face—presumably to harmonize—and that thereby she has acquired a "giddy, fast, and sporty appearance," which was foreign to his notions of decency.

Such being our ideas of divorce, as it obtains in the United States, we are naturally surprised on turning to the statistics of Japan to find that this sixteenth century nation with a nineteenth century government recognizes grounds of separation between husband and wife which would put even Omaha to the blush. In the number even of divorces Japan leads the van of the nations, for it is stated that in the year 1890, during which period there were 340,445 marriages, there were no less than 107,478 divorces. The grounds of divorce are (1) infidelity; (2) disobedience to either the husband or his parents; (3) kleptomania; (4) contagious or incurable disease; (5) sterility; (6) jealousy; and (7) excessive talkativeness. The second ground would seem to be on a par with the alleged mother-in-law nuisance of the western nations. The sixth ground, although apparently trivial, has more importance than might be supposed; for while a Japanese may legally have but one wife, he may have two concubines, who are permitted to live in the same house as does his wife.

When a divorce, sought on the ground of "excessive talkativeness," is opposed by the wife, we imagine the fun would begin. Such opposition, however, is rare, as the women are as yet, for the most part, not sufficiently free from the control of their liege lord to attempt to thwart his wishes, and the recent law giving women the right to sue for divorce is as yet made but little use of. The right to the custody of the children remains in the husband, no matter whence the cause of divorce emanated.

Notwithstanding the expressed desire of the government of Japan to assimilate to European ideas their laws regarding both sexes, it will be seen that the Japanese women have not, as yet, reached that degree of emancipation which has been obtained by their western sisters.

Speaking of divorces, we are glad to see that one of the courts at least, in the United States, is waking up to the objectionable character of advertisements that occasionally appear, such as the following: "Divorces legally obtained very quietly; good everywhere. Box 2344, Denver"; in *People v. MacCabe*, 18 Colo. 186, it was held that the above was against good morals, a false representation to the public, and a libel on the courts of justice, and that the continued publication of it in a newspaper constitutes an offence for which the court is empowered to strike the offending attorney from its roll. And he was accordingly struck off.

CHIEF JUSTICE MEREDITH.

The vacancy in the Court of Common Pleas caused by the retirement of Sir Thomas Galt has been filled with commendable promptitude by the appointment of William Ralph Meredith, Q.C., formerly of London, Ont., and now of Toronto. The appointment is, in every respect, an admirable one, and has commended itself without a dissenting voice both to the profession and the public.

Mr. Meredith was born near London, Ont., on March 31st, 1840, and is, therefore, in the prime of life. He was called to the Bar in 1861, was made a Queen's Counsel by the Ontario Government in 1875, and subsequently by the Dominion Government.

To the public, Mr. Meredith was best known as the leader of the Opposition in the Provincial Legislature of Ontario. Though nominally a Conservative in politics, he was, in truth, a radical reformer. He was a warm advocate of manhood suffrage; he urged a more sweeping measure for increasing the jurisdiction of the local courts than was suggested even by the leader of the Reform administration; the Mechanics' Lien Act, through which politicians were supposed to get at the hearts of the workingmen, was strongly supported by Mr. Meredith and his followers in the Legislature. In fact, his career as a

legislator was marked by a strenuous advocacy of many measures which are generally supposed to be on the line of the traditional policy of the party to which he was politically opposed. But however this may be, Mr. Meredith was a brilliant example to those who may come after him of intelligent criticism of all measures introduced, and, though occupying a trying position, he leaves the record of a politician who has left public life with clean hands and an unblemished reputation, and enjoying the confidence and respect of both friends and foes.

In 1871 he was elected Bencher of the Law Society. It will be regretted by many that in this capacity, and as a public man, he advocated that which is bad enough as it is, but which, if carried further, will work a serious injury to the judiciary, and be hurtful to the public interests. We refer to the stand he took in connection with the decentralization of the courts. The opinion we have frequently expressed on this subject is concurred in by the great mass of the profession, and, we believe, by the whole of the judiciary of Ontario. We fail to understand how any one who has taken an intelligent view of the whole situation, and the results of decentralization in the Province of Quebec, and the result of centralization in Ontario and the mother country, could have fallen into the error of which Mr. Meredith was one of the most powerful exponents.

This, however, is now a matter of history, and we gladly change the subject, and are, with the rest of his brethren at the Bar, well pleased to know that one so well fitted for the position has been raised to the Bench. Mr. Meredith is now in his right place. His duties will be most congenial to him, for his mind is eminently a judicial one. It needs no prophet to say that he will make an excellent judge. He is a thorough lawyer, having an exceptional experience in all the legislation connected with this Province. He is painstaking and conscientious, whilst in manner he is both dignified and courteous, and his character, public and private, is irreproachable. We congratulate the country on the new Chief Justice of the Common Pleas.

CURRENT ENGLISH CASES.

WILL—OBLITERATION—WORDS OF WILL BEFORE OBLITERATION, APPARENT——EXPERTS—EVIDENCE—WILLS ACT (1 VICT., C. 26), SS. 20, 21—R.S.O., C. 109, S. 23).

Finch v. *Combe*, (1894) P. 191; 6 R. May, 61, is the only case in the Probate Division which seems to require notice here. From this we learn that a testator who seeks to obliterate a passage in his will by pasting paper over it must, in order to do so effectually, be careful to use paper that is not transparent, for where he omits this precaution, and the obliteration is made after the will is executed, and such obliteration is not properly attested, the words of the will in its original form, if they can be deciphered, will prevail. In this case a testator had altered his will in this manner, and, by the consent of parties, the will was submitted to an expert to see if he could make out what was originally written, with instructions not to use chemicals, water, or to remove the slips of paper pasted on. By surrounding the slips with cardboard, and holding the will to a window pane, the expert was able to decipher what had been originally written. The president decided that the words thus made out were "apparent" within the meaning of the Wills Act, s. 21 (R.S.O., c. 109, s. 23), and must be admitted to probate.

COPYRIGHT IN PAINTING—TABLEAUX VIVANTS—FINE ART COPYRIGHT ACT, 1862 (25 & 26 VICT., C. 68).

In *Hanfstaengl* v. *Empire Palace*, (1894) 2 Ch. 1, the Court of Appeal (Lindley, Kay, and Smith, L.JJ.) affirmed the decision of Stirling, J., that the representation of a picture by a *tableau vivant*, formed by grouping living persons dressed in the same way and in the same attitudes as the figures in a picture which was the subject of copyright, is not an infringement of the copyright. A photograph or drawing of such a tableau would be an infringement of the copyright of the painting, notwithstanding that the tableau itself was not: *Hanfstaengl* v. *Newnes*, 8 R. May, 127.

HIGHWAY—CONVEYANCE OF ADJOINING LAND—PRESUMPTION—REBUTTAL OF PRESUMPTION.

Pryor v. *Petre*, (1894) 2 Ch. 11, was an action brought to establish the plaintiff's title to the soil of a certain highway

called Coldhall lane. The defendant had conveyed to the plaintiff a wood abutting on the lane, and the wood was minutely described in the conveyance by its acreage and by reference to a map which did not include any part of the lane. The property conveyed was also described in a schedule to the deed by reference to the numbers in the ordnance map, in which the wood and lane were marked by different numbers, but the number on the lane was not included in the schedule. The deed recited that part of the consideration was the value of the trees, and that they had been valued, and the amount of the valuation paid by the plaintiff. The lane was very little used as a highway, being a grassy lane on which trees and underwood were growing, and it was proved that the trees on the lane had not been included in the valuation. Under these circumstances, the question arose whether the presumption that the defendant had granted the plaintiff the highway *ad medium filum viæ* was rebutted, and Romer, J., held that it was, and that the evidence as to the omission of the trees on the lane from the valuation was admissible, and that that fact, coupled with the fact that the lane was not included in the measurement, or the map, was sufficient to rebut the presumption of the lane being included in the grant.

DEBTOR AND CREDITOR—ORIGINAL JOINT DEBTOR BECOMING SURETY—RELEASE OF SURETY—GIVING TIME TO PRINCIPAL.

In *Rouse* v. *Bradford Banking Co.*, (1894) 2 Ch. 32; 7 R. April. 33, the question is discussed as to what was the precise effect of the decision of the House of Lords in *Oakley* v. *Pasheller*, 4 Cl. & F. 207: Kekewich, J., and Lindley and Kay, L.JJ., being of opinion that that case decided that if a creditor has two principal debtors, one of whom by subsequent arrangement between themselves, to which the creditor is no party, and *does not assent*, becomes primarily liable for the debt, and such arrangement is notified to the creditor, the one secondarily liable has thenceforth the rights of a surety as against the creditor, and is discharged if time be given to the other debtor without his consent; Smith, L.J., on the other hand, was of opinion that in *Oakley* v. *Pasheller* the creditor not only knew of, *but assented* to the arrangement between the debtors, and that his assent to the arrangement is essential to the alteration of the debtor's position from that of principal to that of surety, so far as the creditor is con-

cerned, and that mere knowledge of the arrangement by the creditor was not enough. When such high authorities differ as to the exact point determined by *Oakley* v. *Pasheller*, it would be presumptuous to offer any opinion as to which of them is right; but without venturing an opinion on that point we may say that *a priori* there seems much to be said in favour of the view of Smith, L.J., on the abstract principle involved, and if the House of Lords did hold, as the other learned judges are of opinion that they did, that a contractual relationship between two parties may be changed without the consent of one of the contracting parties, it seems to us very like an invasion of a very elementary principle of law. The views expressed in this case as to the effect of *Oakley* v. *Pasheller*, though valuable, are, after all, merely *obiter dicta*, as on the merits of the case the Court of Appeal came to the conclusion that the surety debtor had not, in fact, been released, inasmuch as the arrangement whereby he became secondarily liable authorized the other debtors to obtain the extension of time, on the giving of which the claim of the surety to be released was based. The principle involved in this case, and in certain decisions in our own courts, we may observe, has been recently very carefully and ably discussed by Mr. F. A. Anglin in a paper contributed by him to the *Canadian Law Times*.

WILL—CONSTRUCTION—NIECE—GRANDNIECE OF WIFE—ILLEGITIMACY—EXTRINSIC EVIDENCE.

In re Fish, Ingham v. *Rayner*, (1894) 2 Ch. 83, a testator gave his residuary estate to his "niece Eliza Waterhouse." Neither he nor his wife had any niece, but his wife had a legitimate grandniece and an illegitimate grandniece, both named Eliza Waterhouse. The illegitimate grandniece tendered evidence that she was the one intended, but the Court of Appeal (Lindley, Kay, and Smith, L.JJ.) agreed with the Vice-Chancellor of Lancaster that such evidence was inadmissible, and that the legitimate grandniece was alone entitled to the benefit of the devise.

MORTMAIN—MORTMAIN ACT (9 GEO. II., C. 36) S. 3—DEBENTURES CHARGED ON REVENUE OF LANDS.

In re Pickard, Elmsley v. *Mitchell*, (1894) 2 Ch. 88, the simple question was whether the debentures of a municipal corporation which were charged "on the revenue of all landed and other

property of the corporation" were a charge on land within the meaning of the Mortmain Act (9 Geo. II., c. 36), s. 3. North, J. decided this question in the negative, holding that a charge on the revenue of land is not a charge on the land itself.

PARTNERSHIP—DEATH OF ONE PARTNER—BUSINESS CARRIED ON BY SURVIVING PARTNER—REMUNERATION OF SURVIVING PARTNER FOR SERVICES—BUSINESS CARRIED ON AT A LOSS.

In re Aldridge, Aldridge v. *Aldridge*, (1804) 2 Ch. 97; 8 R. April, 141, a surviving partner, with the consent of the executors of his deceased partner, carried on the partnership business for the benefit of himself and the estate of the deceased. The business was so carried on at a loss, and the surviving partner claimed compensation for his services from the estate of the deceased partner. North, J., held that the claim could not be allowed, although if profits had been made he would have been entitled to remuneration thereout.

VENDOR AND PURCHASER—TITLE—SALE OF LEASEHOLDS BY EXECUTORS—SALE BY EXECUTOR AFTER TWENTY YEARS FROM THE TESTATOR'S DEATH.

In re Venn & Furze, (1894) 2 Ch. 101; 8 R. May, 116, Stirling, J., held that the twenty years' rule laid down by Jessel, M.R., within which executors might execute a power of sale of freehold estate without the intervention of the court, does not apply where they are selling leaseholds; and that where a testator died in 1852, and the leaseholds were not sold by his executor until 1878, in the absence of anything to show the contrary, the executor must be presumed to have acted in discharge of his duty as executor; and that neither the circumstance that the deed did not purport to be executed by him as executor, nor the lapse of time between the testator's death and the sale, were sufficient to raise a presumption that he had acted otherwise. A requisition requiring proof of the executor's power to sell was disallowed.

STATUTE OF FRAUDS (29 CAR. 2, C. 3), SS. 7, 8—ASSIGNMENT OF LEASEHOLD BY WIFE TO HUSBAND TO ENABLE HUSBAND TO RAISE MONEY—ASSIGNMENT ABSOLUTE IN FORM—PAROL EVIDENCE OF INTENTION.

In re Marlborough, Davis v. *Whitehead*, (1894) 2 Ch. 133, 8 R. June, 107, an interesting question under the Statute of Frauds is discussed. The Duchess of Marlborough, in order to

enable her husband to raise money to pay his debts, assigned to him a leasehold house, by an assignment absolute in form, and purporting to be made in consideration of natural love and affection. There was no writing evidencing the terms on which the property was conveyed, but it was proved by parol that the understanding between the Duke and Duchess was that the house was lent to the Duke merely to enable him to raise money by mortgaging it, and that it was still to be the Duchess' property. The mortgage was effected by the Duke, the Duchess being a party thereto and joining in the covenant for the repayment of the loan, but the equity of redemption was reserved to the Duke alone. The Duke having died without having reassigned the house to the Duchess, the creditors of the Duke claimed that the equity of redemption in the house formed part of the Duke's estate, and set up the Statute of Frauds against the claim of the Duchess thereto. Stirling, J., held that the parol evidence was admissible, and that the case came within that class of cases in which it has been held that the Statute of Frauds cannot be set up to perpetrate a fraud, and that, as the Duke could not have set it up as an answer to an action by the Duchess to compel a reassignment of the house by him, so neither could his creditors do so in answer to her claim.

INJUNCTION—HIRE AGREEMENT—ACCEPTANCE OF RENT FOR PART OF A NEW QUARTER AFTER NOTICE DETERMINING TENANCY—LANDLORD AND TENANT—WAIVER OF NOTICE.

Keith v. *National Telephone Co.*, (1894) 2 Ch. 147, was a motion to continue an interim injunction until the trial of the action, restraining the defendants from disconnecting the wires and removing the telephone instruments, the use of which the plaintiffs had hired from the defendants for three years at a rent payable quarterly. After the term had expired the parties continued the agreement by mutual consent. The ground upon which the motion was based was that the defendants had given a notice determining the tenancy at the expiration of a quarter which expired on the 30th December, but it was proved that they had also demanded and accepted payment of rent up to and including the 31st December, being one day beyond the quarter, and it was claimed that this acceptance of rent for the day beyond the quarter operated in law as a waiver of the notice determining the

tenancy. The objection was taken that an injunction was not the proper remedy, as the plaintiffs were, in substance, seeking specific performance of an agreement to supply them with telephone communication; but Kekewich, J., was of opinion that the court might properly interfere by injunction to restrain the breach of the agreement on the defendants' part. He was also inclined to the opinion that there having been an overholding and an acceptance of rent after the original term of three years had expired, the relation of tenant from year to year had been acquired by the plaintiffs, and that the defendants were no longer in a position to give a notice to terminate the tenancy forthwith under the original agreement, but that they could now only terminate the agreement by a six months' notice; but, though doubting the sufficiency of the notice determining the tenancy, his decision is based on the acceptance of rent for a day beyond the 30th December as having worked a waiver of the notice, even if it were good.

Reviews and Notices of Books.

Ontario Game and Fishing Laws. A Digest, alphabetically arranged, with references to the various Statutes and Orders in Council in force on October 1st, 1894. By A. H. O'Brien, M.A., Barrister-at-Law. Second edition. Issued under the authority of the Ontario Fish and Game Commissioners. The Docket Publishing Co., Toronto, 1894.

As stated by the editor, the numerous alterations in these laws since the publication of the first edition have required a complete revision of the Digest. The result is that the manual has been largely increased, both in size and the number of references.

The existing conflicts between the rights of the Dominion and Provincial authorities as to fishing will, we understand, be settled by a case now standing for argument in the Supreme Court, which will define the jurisdiction to be exercised by each legislature.

The Ontario Fish and Game Commissioners, after careful examination of this "Digest," have recognized its value, correctness, and completeness, and have permitted the editor to issue it under their authority, and we can rely upon their estimate of its value.

Life and Present Value Tables. For ascertaining the present value of Dower, Curtesy, and other Life Estates, Annuities and other stated incomes, damages for death or disability from wrongful act, negligence, or default, etc. Computed and compiled by Florien Giauque, A.M., and Henry B. McClure, A.M., members of the Cincinnati Bar. Cincinnati: Robert Clarke & Co., Publishers, 1894.

This book contains, among other matter, a brief account of tables of mortality, annuity, etc., showing the basis and history of these tables, the authors pointing out some erroneous methods sometimes followed. Also tables and rules for their use, compiled from single-life annuity tables, for ascertaining the present value of *vested* dower and of curtesy, and of other life estates, besides other tables too numerous and elaborate for description. Our readers will please take it for granted that they are all there. It is stated that every computation for each of the 304 tables mentioned above was made by Mr. Giauque and by Mr. McClure and by a third person, each working independently, and their separate results were afterward compared. We confess that we are utterly incompetent to express any opinion as to the value of this work; but feel great respect for any man who could go through so many figures and then survive to put them in book form.

Treatise on the Patent Law of the Dominion of Canada. Including the Revised Patent Act, as amended to date, with Annotations. The Patent Office Rules and Forms, General Forms, and Forms relating to Practice in the Exchequer Court of Canada, etc. By John G. Ridout (late C.E.), Barrister, Solicitor, etc., of the firm of Ridout & Maybee, Solicitors of Patents and Experts, of the city of Toronto, Canada. Toronto: Rowsell & Hutchison, 74 and 76 King Street East, Law Publishers and Booksellers. 1894.

The appearance of the book is timely. It is now half a century or so since Patent Law has become an important branch of learning and interest in this country, and up to this time there has been no book of reference and no collection of cases bearing on the subject. Resort was necessarily had to English and American authors.

Every man's work must, of course, depend on its intrinsic

merits, but it is always interesting to know who an author is, what are his antecedents, education, and fitness for the task he undertakes.

In the year 1873 two Canadians went up for examination at Her Majesty's Staff College, Sandhurst, the great school of the British army for engineering, mathematics, and scientific learning, and open to the whole of the army. Their names were Lieut. J. G. Ridout, then of the 100th (Canadian) Regiment, and Lieut. Charles W. Robinson, now Governor of the Mauritius, then of the Rifle Brigade, and son of the late Chief Justice Robinson. There were twenty-six officers up for examination. Lieut. Ridout came out at the head of the list, with 2,699 marks, more than 200 marks above the next man, whilst the man lowest on the list, who was rated, had only 1,081 marks. Lieut. Robinson was fourth with 2,425 marks. Ridout and Robinson were the only Canadians on the list, a very fair showing for "the colonies." It is, therefore, with somewhat unusual interest we take up the book Mr. Ridout has now given to the public.

As stated in the preface, the object of the author is to provide a treatise on the Patent Law of Canada from a Canadian standpoint, embodying therein all the reported cases in the different Provinces and in Canada from the earliest dates to the present time, some unreported Ontario cases and standard cases, as well as a large number of the latest English and American decisions of courts of last resort, not to be found in other text-books; to analyze the provisions of our Revised Patent Act as amended to date; to point out what are deemed errors and inconsistencies, as well as to suggest improvements, and to endeavour to supply a want long felt by Canadian lawyers, as well as by solicitors of patents in this and other countries.

As our Patent Act is largely framed on United States enactments, containing, however, matter original to this country, the author has sought to select only those English and United States cases which are applicable as precedents to the present state of our law, or which illustrate differences or which bear on points of interest most likely to arise in practice. The text of the Patent Act in the body of this work, as well as in Appendix III., where the various sections have been assembled, includes all amendments up to date; the Acts being noted at the end of each section. Besides the Patent Office Rules and Forms in

Appendix I., there will also be found a number of General Forms relating to Patents and to Practice in the Exchequer Court of Canada, which will be useful to practitioners in the Courts and in the Patent Office, as well as to inventors.

A table giving the terms of patents in the principal countries of the world gives a large amount of valuable and interesting information in condensed form. The Index is very full, containing 50 pages out of a total of 590.

The author, so far as we have had an opportunity of examination, has done his work excellently well. His thorough knowledge of engineering, mathematics, and high scientific attainments, coupled with a subsequent legal education, has given him peculiar facilities for thoroughly grasping the law which is elucidated in the book before us.

Whilst this may safely be said, we may remark that we had noted several mistakes, notably on pp. 411 and 412, but we have just received a reprint of these pages correcting the errors. The *errata* are larger than they should be. We trust a second edition will be called for, when these matters will be set right, as well as a few other details in book-making which can be improved upon.

A *Treatise on the Investigation of Titles to Real Estate in Ontario*; with a precedent for an abstract. Second edition. By Edward Douglas Armour, Q.C. Toronto: The Carswell Co. (Ltd.), Law Publishers, 1894,

When the first edition of this work appeared, it was reviewed with great care and fullness in the columns of this journal. (Vol. xxiv., N.S., pp. 14-19), in view of the great importance of its subject to the profession, and of the position which the author held, as we are glad to say he still does, as one of the lecturers of the Law Society. We then expressed the opinion that the work was likely to prove a valuable addition to our legal literature, notwithstanding some serious defects, as they appeared to us, which we expressed the hope that the author would remove when called upon for a second edition. The work has been found very useful by the profession, which would, no doubt, have welcomed the advent of a new edition long before now, for law books age terribly fast, especially in a Province which is vexed by "the incessant and irritating amendments and alterations of the law," so feelingly alluded to by Mr. Armour.

The present edition is, as might be expected, an improvement on the first, having evidently undergone a pretty thorough revision, and a new and valuable chapter on Payment and Discharge of Mortgages has been added. We could wish, however, that the author had seen his way to adopting the suggestion made in our review of his first edition, and given some account of such matters as estoppel, restrictive covenants, and tax titles. The absence of any reference to the last named subject, in particular, seems to us a serious defect. It may be true that "it cannot be dealt with comprehensively," but surely the Horatian maxim applies, *Est quadam prodire tenus, si non datur ultra*, and we are sure that the hurried practitioner, when called upon to examine one of these thorny and perilous titles, would have got much more help from even a brief discussion than from the "excellent American treatises" to which the author obligingly refers him, and which, we fear, are neither so "easily accessible" in those regions where tax titles most abound, nor so generally useful, as Mr. Armour seems to think. We have only to add that the typographical appearance of this, as of the former edition, is excellent, and in every way creditable to the publishers.

Correspondence.

To the Editor of THE CANADA LAW JOURNAL:

DEAR SIR,—In the issue of your journal dated 10th September is an article on "Mortgagee v. Purchaser Subject to Mortgage," of which the opening sentence is as follows: "The argument that there is a 'want of priority' between a mortgagee and a purchaser of the lands subject to the mortgage, whereby the former is debarred from recovering his debt directly from the latter, does not appear to have been ever seriously questioned." We are told that there is no new thing under the sun, and certainly the question discussed by your contributor is not a new one. Somewhat more than twelve years ago I wrestled with the question as fully as I was able to do, and I arrived, by a different route, at the same conclusion at which your contributor has arrived. My treatment of the question was published in *The Canadian Law Times*, pp. 49, 109, 157, and 217. It may be that your contributor is of opinion that the matter is not there treated

with sufficient solemnity, but I can assure him that I was as serious as an owl when I wrote those articles. The chief difficulty that I see about the matter is that the judges in various subsequent cases have indicated that they do not agree with the arguments there advanced, and it appears to me that their disapproval also extends to the arguments advanced by your correspondent.

Yours truly,

Toronto, September 21st, 1894. A. H. MARSH.

PRACTICE—SUMMARY JUDGMENT.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—In your report of *Hollender* v. *Ffoulkes*, 30 C. & J. 435, it is said that *Solmes* v. *Stafford*, 16 P.R. 78, is followed, and *Hay* v. *Johnston*, 12 P.R. 596, is not followed. It might be inferred from this that *Hay* v. *Johnston* is overruled.

But a little reflection will show, I submit, that *Hay* v. *Johnston* may be good law, notwithstanding the later decisions. There were in that case two separate claims or causes of action joined together for convenience and expedition and economy, but always remaining separate, so that one could proceed, and the other dropped or discontinued at any time. Judgment on the one would not necessarily affect the other. They really were two separate actions.

Why, then, if the reasons existed for giving summary judgment on one claim, should that judgment be delayed till the other claim is tried? The defendant in the action on the note, and the defendant in the other action, are two different persons. The writ as to the promissory note is not the less "specially indorsed" under Rule 739 because it is further indorsed with an unliquidated claim, not connected in any way with the liquidated claim so as to make that unliquidated also. The liquidated claim remains liquidated, and the plaintiff is entitled to judgment on it.

Solmes v. *Stafford* and *Hollender* v. *Ffoulkes* would also appear to be good law (if I may presume to say so); for by connecting an unliquidated claim for interest with a liquidated demand for the principal, the whole claim is rendered an unliquidated one.

There are not two separate claims in the latter cases, but one entire claim for the judgment and interest upon it, and that entire claim cannot be split into two for the purpose of allowing the plaintiff to get judgment upon one branch of it.

I have more than once in my practice joined an action upon a liquidated claim (as a promissory note) with one to set aside a fraudulent conveyance, and have signed judgment for default of appearance and issued execution against the defendant upon the note without an order, which would be unauthorized and irregular if the writ was not specially indorsed for the promissory note. But, I submit, it is a special indorsement under Rules 245 and 705. Would you kindly give your opinion?

If *Hollender* v. *Ffoulkes* does overrule *Hay* v. *Johnston*, such judgments by default can no longer be signed, and the result is that two actions must be brought in every case to get speedy judgment against the debtor, to the increase of costs, and contrary to the spirit of modern procedure.

Yours truly,

Berlin, Sept. 17th, 1894. J. K.

[We have already, on more than one occasion, referred to the subject of the foregoing letter. (See *ante* p. 294, and vol. 29, p. 280.) It is one which is involved in some difficulty, owing to the conflicting decisions, and ought to be set at rest by some Rule dealing explicitly with the matter. Until that is done the profession will have to stumble along as best they may. We think it will be found that the English decisions are perfectly consistent, and uniformly hold that no claim which is not properly the subject of special indorsement can be indorsed on a specially indorsed writ without vitiating the whole indorsement as a "special indorsement." The distinction which our correspondent seeks to draw between the joining of an unliquidated demand for interest with a liquidated demand for principal, and the joining with a liquidated demand a claim for unliquidated damages, or other relief wholly unconnected with the liquidated demand, does not appear to be borne out by the English cases: see *Yeatman* v. *Snow*, 28 W.R. 574; 42 L.T.N.S. 502; *Hill* v. *Sidebottom*, 47 L.T.N.S. 224; nor by some of our own earlier Ontario cases, *e.g.*, *Standard Bank* v. *Wills*, 10 P.R. 159.

Certainly, before the Judicature Act the idea of getting judgment in instalments against the same defendant was unknown

both at law and in equity, except that in equity, by the judgment at the hearing, a reference was frequently directed, and further directions were reserved; and at law an interlocutory judgment was allowed to be signed for damages to be assessed, followed by a final judgment when the assessment had taken place.

Both of these modes of obtaining judgment are perpetuated by the Consolidated Rules, but our correspondent, and those who think with him, seem to have found an entirely new procedure laid down, whereby you can get a final judgment for part of the relief claimed against a defendant at one stage of the proceedings, and then prosecute the action in order to obtain another judgment against him for some other relief. For this novel procedure we think some specific authority ought to be found in the Rules, which, however, we have not been able to discover. There is this to be said against it, that in the prosecution of the action for the further relief the plaintiff may fail, and in the disposition of the costs it might, had the whole case been before the court, be proper to order the costs of the action in so far as it failed to be deducted from the amount which the plaintiff is actually found entitled to recover in the action, but the plaintiff may, in the meantime, have prevented that by levying the amount under his judgment previously obtained, so that the court may be thus deprived of the power of doing complete justice.

The old equity procedure certainly did not permit a plaintiff to obtain relief in that manner. The action had to be heard *pro confesso*, or on the pleadings, or tried in the usual way, as to the whole case, when one judgment was pronounced as to all the relief claimed. If there is any Rule which has changed the practice, which is it? Perhaps our correspondent can point it out. We fear that he will have to fall back on the analogy Rule which is supposed by some judges to sanction all the aberrations of practice which can be devised.

We do not think that in any case two actions are necessary, as our correspondent suggests. If the defendant does not appear it is merely a question whether the judgment is to be obtained according to the procedure pointed out for "specially indorsed writs," or whether the action must be brought to a hearing on motion for judgment as provided in other cases; one course is almost as speedy as the other.—EDITOR C.L.J.]

Notes and Selections.

CHATTEL MORTGAGE—CROPS.—The Court of Appeal of New York held, in the case of *Rochester Distilling Co.* v. *Rasey* (*Central Law Journal*, July 27th), that a chattel mortgage on crops to be thereafter planted is void as against a subsequent purchaser at an execution sale.

NEGLIGENCE—ACCIDENTAL SHOOTING WHILE HUNTING.—In *Hawkins* v. *Watkins*, 28 N.Y. Supp. 867, decided by the Supreme Court of New York, it was held that one who negligently shoots another while hunting is liable for the injury caused thereby, though he did not know of the presence of such other person.

IN CHANCERY.—EQUITY DELIGHTETH IN EQUALITY.—Note.—This is a very estimable maxim. It rolls off the tongue agreeably, and it conveys a great and unimpeachable verity. Translated into the vulgar tongue, it means that Equity tars everybody with the same brush. What is sauce for the goose is considered an equally fitting accompaniment for the consumption of the gander—the same court fees, the same delays, the same technicalities, the same everything. Yes, Equity delighteth in equality. But let us leave generalization and pull out some practical plums from the pie, which little Jack Horner (another name for the god), sitting in his corner, would fain keep all for himself.

One of the longest Chancery suits on record was that in which the heirs of Sir Thomas Talbot, Viscount Lisle, were engaged with the heirs of Lord Berkeley, concerning some property not far from Wotton-under-Edge, in Gloucestershire. This colossal suit began towards the end of the reign of Edward IV., and lasted until James I. was on the throne. Even then the suit did not die a natural death; that is to say, it was not finished off in the due form of law. Probably it would still be in progress but that some of the persons interested came to the absurd conclusion that, after litigation extending over one hundred and twenty years, it was reasonable and fitting to effect a compromise all round.

This, however, was not the longest Chancery suit on record. For the present no reference is made to *Concha* v. *Concha* (other-

wise *Jarndyce* v. *Jarndyce*, but only the other day Mr. Justice Chitty had to deal with a case which was started as long ago as 1747! Here is its history as given by a legal journal:

"A petition was presented to Mr. Justice Chitty, in the case of *Greenhill* v. *Chauncey*, for the payment out of certain shares in the accumulation of a sum of money which was paid into court under an order of the old Court of Chancery in 1747. The original Greenhill and Chauncey appear to have been partners in the Temple Mills Brass Works, and there were also other persons interested in the firm. Squabbles took place over their respective shares in the business, and some time before 1747 they went to the Court of Chancery for a settlement of the dispute, little dreaming that '*Greenhill* v. *Chauncey*' would still figure in the court list towards the end of the nineteenth century. In the course of the litigation the sum of £1,221 12s. 7d. was paid into court, and invested in South Sea annuities. That sum had grown to the considerable figure of £14,243 6s. 2d., and was claimed by the legal personal representatives of certain of the original partners in the Temple Mills Brass Works, on whose behalf the petition was presented on Saturday. Mr. Justice Chitty intimated that 'Government duties' would absorb a large part of the £14,000, that the claimants would have to prove their title at their own expense, and that it was doubtful what they would receive."

To what extent the prolongation of these ancient and notable suits was due to bribery and corruption will never be known. But certain it is, as before hinted, that in the good old days of the Court of Chancery the long purse could always command a long suit if justice would have been served by a short one. It was quite an understood thing that payment to judges and judicial underlings would either expedite or delay proceedings according to circumstances and the due demands of justice.

The Scotch judges, belonging to a practical people, placed bribery on a plain business footing. By an order of the Court of Session, or Act of Sederunt, particular hours of the day were appointed at which the judges might be "solicited" at their own houses. This, after all, was better than the hypocrisy of Bacon—intellectually, one of the greatest sons of England; morally, one of the most base. For slandering the Lord Chancellor, Wraynham, an unhappy country gentleman, was dragged before

the Star Chamber. In a suit with Sir Edward Fisher he had expended his whole fortune, and, at last, Bacon's predecessor gave judgment in his favour. But no sooner was Bacon himself in the Chancellor's shoes than, without assigning any reason, he reversed the order of the court, and left the unhappy suitor just where he had stood at the beginning of the suit, only that now he was a beggared man. Wraynham appealed to the king for justice, and in his appeal used the language of truth and of desperation. Instead of finding redress, he found himself in prison first, and before the Star Chamber afterwards.

In piteous language he told the story of his suit. He had seen his land taken from him by his rich antagonist; six-and-forty orders and twelve reports had been made in the course of the proceedings, and after motions, hearings, and re-hearings, fourscore in number, and an expenditure of something like £3,000, his costly victory had been cancelled with a stroke of the Chancellor's pen. "And with this," he added, "did accompany many eminent miseries likely to ensue upon myself, my wife, and four children, so that we that did every day give bread to others must now beg bread of others, or else starve."

Then uprose a learned serjeant, Crew by name, who eloquently discoursed upon the Chancellor's virtues and incorruptibility, "For," said Serjeant Crew, "thanks be to God, he (the Chancellor) hath always despised riches, and set honour and justice before his eyes." The judges assented effusively to this view, and, as Wraynham had not been fined enough already, they fined him heavily again. Of course, he could not pay: so he went to gaol.

It was just two years after this vindication of justice and morality that Bacon gave into Parliament, under his own hand, a list of the bribes he had received while holding the seals and keeping the king's conscience. And in that list was entered a bribe received from this very Sir Edward Fisher, Wraynham's opponent in the suit referred to!

One must have a very grim sense of humour, or a sense of very grim humour, to joke in a charnel-house, and for pretty much the same reasons jokes of the lighter sort have never flourished in Chancery. Still, now and again, even in the comparatively "old days," the sounds of merriment was heard in the presence of the Chancellor himself. There was, for example, the famous case about the Patent Hair Brushes, in which Lord Eldon

distinguished himself by much facetiousness. Sir Samuel Romilly, who was counsel for the defendant, produced an old brush made by Fox, a well-known wig maker for the Inns of Court, which he contended was the same in principle as the "patent" brush.

"Lord Chancellor: "It's a *Fox's* brush. Show me the plaintiff's brush."

Thereupon were handed up to the Bench four head brushes, one long broom, one knee-buckle brush, and three clothes brushes, all of which his lordship gravely and deliberately examined, while peals of laughter, unrebuked, resounded through the court. There were more jokes got out of that case, but the above specimen must be taken as a sufficient sample of what followed. Eldon was nothing if not deliberate; and, by the way, it was Romilly who said of him that the tardy justice of the Chancellor was better than the swift injustice of his deputy, Vice-Chancellor Leach. But it was Lord Eldon and another Vice-Chancellor (the first of them), Sir Thomas Plumer, who (rivals in the snail's pace) were referred to in the following epigram:

To cause delay in Lincoln's Inn,
Two different methods tend;
His lordship's judgments ne'er begin,
His honour's never end.

Later on Sir John Leach's swift injustice was compared with Eldon's prolixity in the following lines:

In Equity's high court there are
Two sad extremes, 'tis clear;
Excessive slowness strikes us there,
Excessive quickness here.
Their source 'twixt good and evil brings
A difficulty nice,
The first from *Eldon's* virtue springs,
The latter from his *Vice*.

Those whose criticisms were expressed in prose described Lord Eldon's court as one of *oyer sans terminer*, and Leach's as one of *terminer sans oyer*. But the versifier was not exhausted, and produced the following *à propos* of Leach:

A judge sat on a judgment seat,
A goodly judge was he;
He said unto the Registrar,
"Now call a cause to me."
"There is no cause," said Registrar,
And laughed aloud with glee;
A cunning Leach hath despatched them all;
I can call no cause to thee."

—*The Brief.*

DIARY FOR OCTOBER.

1. Monday.....Wm. D. Powell, 5th C.J. of Q.B., 1887. Meredith, J., Chy. D., 1890.
2. Tuesday.....Supreme Court of Canada sits.
7. Sunday.....*20th Sunday after Trinity.* Henry Alcock, 3rd C.J. of Q.B., 1802.
8. Monday.....County Court sitts. for motions, and sitts., Surrogate Court in York. Sir W.B. Richards, C.J. of S.C., 1875; R. A. Harrison, 11th C.J., Q.B., 1875.
9. Tuesday.....De la Barre, Governor, 1682.
11. Thursday.....Guy Carleton Governor, 1774.
12. Friday.....America discovered. Battle of Queenson Heights, 1812.
13. Saturday.....W. R. Meredith, C.J. of C.P.D., 1894.
14. Sunday.....*21st Sunday after Trinity.*
15. Monday.....County Court non-jury sitts. in York. English law introduced into U. C., 1791.
17. Wednesday...Burgoyne's surrender, 1777.
18. Thursday.....St. Luke.
21. Sunday.....*22nd Sunday after Trinity.* Battle of Trafalgar, 1805.
23. Tuesday.....Supreme Court of Canada sits. Lord Lansdowne, Gov.-Gen., 1883.
24. Wednesday....Sir J. H. Craig, Gov.-Gen., 1807. Battle of Balaclava. 1854.
27. Saturday.....C.S. Patterson, J. of S.C., 1888. Jas. Maclennan, J., Court of Appeal, 1888.
28. Sunday.....*23rd Sunday after Trinity.* St. Simon and St. Jude.
29. Monday.....Battle of Fort Erie.
31. Wednesday....All Hallow's Eve.

Notes of Canadian Cases.

SUPREME COURT OF CANADA.

Ontario.] [May 31

TOWN OF WALKERTON *v.* ERDMAN.

Evidence—Action for personal injuries caused by negligence—Examination of plaintiff de bene esse—Death of plaintiff—Action by widow under Lord Campbell's Act—Admissibility of evidence taken in first action—Rights of third party.

Though the cause of action given by Lord Campbell's Act for the benefit of the widow and children of a person whose death results from injuries received through negligence is different from that which the deceased had in his lifetime, yet the material issues are substantially the same in both actions, and the widow and children claim, in effect, under the deceased; therefore, where an action is commenced by a person so injured in which his evidence is taken *de bene esse*, and the defendant has a right to cross-examine, such evidence is admissible in a subsequent action taken after his death under the Act. TASCHEREAU and GWYNNE, JJ., dissenting.

The admissibility of such evidence as against the original defendants is not affected by the fact that said defendants, a municipal corporation, sued for injuries caused by falling into an excavation in a public street, have caused a third party to be added as defendant as the person who was really responsible for such excavation, and that such third party was not notified of the examination of the plaintiff in the first action, and had no opportunity to cross-examine him. TASCHEREAU and GWYNNE, JJ., dissenting.

Aylesworth, Q.C., for the appellants.

Shaw, Q.C., for the respondent.

O'Connor, Q.C., for the third party.

Ontario.] [May 31.

GRAND TRUNK R.W. CO. *v.* WEEGAR.

Railway company—Injury to employee—Negligence—Finding of jury—Interference with on appeal.

W. was an employee of the G.T.R. Co., whose duty it was to couple cars in the Toronto yard of the company. In performing this duty on one occasion under specific directions from the conductor of an engine attached to one of the cars being coupled, his hand was crushed owing to the engine backing down and bringing the cars together before the coupling was made. On the trial of an action for damages, resulting from such injury, the conductor denied having given directions for the coupling, and it was contended that W. improperly put his hand between the draw-bars to lift out the coupling pin. It was also contended that the conductor had no authority to give directions as to the mode of doing the work. The jury found against both contentions, and W. obtained a verdict, which was affirmed by the Divisional Court and Court of Appeal.

Held, per FOURNIER, TASCHEREAU, and SEDGEWICK, JJ., that though the findings of the jury were not satisfactory upon the evidence, a second Court of Appeal could not interfere with them.

Held, per KING, J., that the finding that specific directions were given must be accepted as conclusive; that the mode in which the coupling was done was not an improper one, as W. had a right to rely on the engine not being moved until the coupling was made, and could properly perform the work in the most expeditious way, which it was shown he did; that the conductor was empowered to give directions as to the mode of doing the work if, as was stated at the trial, he believed that using such a mode would save time; and that W. was injured by conforming to an order to go to a dangerous place, the person giving the order being guilty of negligence.

McCarthy, Q.C., for the appellants.

Smyth for the respondent.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

HIGH COURT OF JUSTICE.

COURT OF APPEAL.

From C.P.D.] [Sept. 9.

GOSNELL *v.* TORONTO RAILWAY COMPANY.

Toronto Railway Company—Ways—Negligence.

The Toronto Railway Company have not, under their charter and their agreement with the city of Toronto, an exclusive right of way upon their tracks, or the right to run at any rate of speed they please to adopt or that the corporation please to allow. Whilst the cars of the company must not be wilfully impeded, the company are bound to recognize the rights and necessities of public travel, and so to regulate the speed of their cars that they may be quickly stopped should occasion require it.

Where, therefore, there was some evidence that an accident was the result of a car running at excessive speed, the judgment of the Common Pleas Division, upholding a verdict against the company, was affirmed.

Osler, Q.C., and *Laidlaw*, Q.C., for the appellants.

Fullerton, Q.C., for the respondent.

From FERGUSON, J.] [Sept. 9.

MCKINNON *v.* LUNDY.

Will—Construction—Condition—Forfeiture—Felony.

Where land is devised upon condition that a mortgage thereon be paid by the devisee, and the testatrix herself pays off the mortgage in her lifetime, the devise is good, such a condition being a condition subsequent.

Where a devisee kills the testatrix, and is convicted of manslaughter, he does not forfeit the devise, the element of interest being, in such case, necessarily absent.

Cleaver v. *Mutual Reserve Fund Life Association*, (1892) 1 Q.B. 147, distinguished.

Judgment of FERGUSON, J., 24 O.R. 132, reversed.

Aylesworth, Q.C., for the appellant.

S. H. Blake, Q.C., and *Guthrie*, Q.C., for the respondents.

From C.P.D.] [Sept. 17.

BROWN *v.* DEFOE.

Bailment—Warehouseman—Negligence—Collapse of warehouse.

This was an appeal by the plaintiff from the judgment of the Common Pleas Division, reported 24 O.R. 569, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on the 31st of May and 1st of June, 1894.

S. H. Blake, Q.C., *H. E. Irwin*, and *A. C. Macdonell* for the appellants.
Osler, Q.C., and *J. E. Robertson* for the respondent.

September 11, 1894. The majority of the court, without dealing with the question of law, ordered a new trial, without costs here or below, being of opinion that, from the answers of the jury, it was not possible to say with certainty what the cause of the accident was.

BURTON, J.A., was of opinion that the answers, while ambiguous, did not go far enough to show any negligence on the defendant's part, and, therefore, that the action failed.

From Q.B.D.] [Sept. 26.

MCDONALD *v.* DICKENSON ET AL.

Municipal corporations—Municipal councillors—Pathmaster—Negligence—Ways—Notice of action—R.S.O., c. 73.

This was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 25 O.R. 45, and was argued before HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A., on September 26th, 1894.

J. M. Glen and *J. A. McLean* for the appellants.

N. McDonald and *W. J. Tremeear* for the respondent.

At the conclusion of the argument the appeal was dismissed with costs. The court agreed with the views expressed in the judgment below as to notice of action, and as to the further point raised by the appellants, that the right of action, if any, was against the township, expressed no opinion, thinking that that question had not been properly raised by the pleadings or tried. Leave to amend was given.

Queen's Bench Division.

Div'l Court.] [June 21.

MORTON *v.* COWAN.

Company—Shares—Sale under execution—Validity of assignment not entered in books—R.S.O., c. 157, s. 52—Equity of redemption—R.S.O., c. 64, s. 16.

A *bona fide* assignment or pledge for value of shares in the capital stock of a company incorporated under R.S.O., c. 157, is valid between the assignor and the assignee, notwithstanding that no entry of the assignment or transfer is made in the books of the company; and, as only the debtor's interest in property seized can be sold under execution, the rights of a *bona fide* assignee cannot be cut out by the seizure and sale of the shares under execution against the assignor after the assignment.

R.S.O., c. 157, s. 52, considered and construed.

Semble, that nothing passes by such a sale under execution; for the words "goods and chattels" in s. 16 of the Execution Act, R.S.O., c. 64, do not include shares in an incorporated company so as to authorize the sale of the equity of redemption in such shares.

W. R. Riddell for the plaintiff.

Wallace Nesbitt and *Monro Grier* for the defendants.

Chancery Division.

Div'l Court.] [June 30.

CHURCH *v.* THE CORPORATION OF THE CITY OF OTTAWA.

Damages—Inadequacy of amount found by jury—Right of court to interfere—New trial.

Notwithstanding that it is unusual for a court to interfere with a verdict of a jury on the ground of the inadequacy of the amount of the damages found, still such verdicts are subject to the supervision of a court of first instance, and, if necessary, to a Court of Appeal; and, if the amount awarded be so small or so excessive that it is evident that the jury must have been influenced by improper motives or led into error, then a new trial must be granted.

Held, on the evidence in this case, where a practising physician had been badly, and perhaps permanently, injured in the *tendo-achillis* by stepping into a hole in one of the streets of the defendant corporation, and his professional business also injured, that $700 was not enough, and a new trial was ordered.

Riddell, Q.C., and *Charles Macdonald* for the plaintiff.

Aylesworth, Q.C., *contra.*

Common Pleas Division

STREET, J.] [Sept. 22.

HEROD *v.* FERGUSON.

Contract—Remuneration for services—Subsequent promise to pay by third person—Judgment on—Collateral contract—Novation—Release.

In an action for the value of surgical and medical services rendered by the plaintiff to the defendant, it appeared that, after all the services had been rendered and charged to the defendant only in the books of the plaintiff, the defendant's son had asked the plaintiff to send the account to him; that the plaintiff had done so, making out the account in his son's name, which the son had promised to pay; that the plaintiff had recovered judgment by default against the son for the amount, but, finding him to be worthless, had not issued execution; and had then brought this action. It was found as a fact that the contract for the services had been made with the father and not with the son. There was no evidence of any agreement by the plaintiff to accept the son as his debtor and to release the father.

Held, that the son became liable to the plaintiff, if at all, upon a subsequent promise, which was not a satisfaction of the original cause of action, but collateral to it; that the original cause of action still existed, because there had been no novation of it, no payment or release of it, and no judgment recovered upon it; and the plaintiff was entitled to recover.

Moss, Q.C., and *Guthrie*, Q.C., for the plaintiff.

F. Fitzgerald for the defendant.

Practice.

C.P. Div'l Court.] [March 3.

MCDERMOTT *v.* GROUT.

Jury—Findings—No verdict—Ruling of trial judge—New trial—Right to—Motion for.

This action was tried with *Stevens* v. *Grout*, *post infra*, and came before this court upon the same state of facts as that upon which that action came before the Queen's Bench Division.

Held, that the judgment of the trial judge at the first trial was a judgment of the High Court, and, as neither party moved against it, it was a binding adjudication that no verdict could be entered on the findings of the jury, and the judge at the second trial should have proceeded to try the action, and a motion to the Divisional Court was not necessary.

Wills v. *Carman*, 14 A.R. 656, followed.

Aylesworth, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

Q.B. Div'l Court.] [March 3.

STEVENS *v.* GROUT.

Jury—Findings—No verdict—Ruling of trial judge—New trial—Right to—Motion for—Divisional Court—Time—R.S.O., c. 44, s. 84—Rules 789, 792.

At the trial of an action for malicious prosecution, the jury, in answer to questions, made two findings in favour of the plaintiff, but found that he was entitled to no damages The trial judge expressed the opinion that no verdict could be entered for either party, and refused motions for judgment made by both. The plaintiff, treating the trial as void, gave a new notice of trial for a later sittings. A motion by the defendant to set aside this notice was refused by a local judge and by a judge of the High Court on appeal. The plaintiff then entered the action for trial, but the presiding judge refused to try it, holding that it was not properly before him.

Upon appeal by the defendant from the order in Chambers refusing to set aside the notice of trial, and upon motion by the plaintiff by way of appeal from the ruling of the judge at the second trial, or for leave to move against the finding of no damages at the first trial, notwithstanding that two sittings of the Divisional Court had passed since that finding;

Held, that, although no judgment could be entered for either party, the findings of fact remained, and neither party could ignore them and proceed to trial again as if they did not exist; the trial judge could do nothing but order or refuse judgment upon them; it was for the Divisional Court to deal with the action and the findings, either by sending it down for a new trial or by ordering judgment for either party under Rule 755; and, under all the circum-

stances of this case, the proper course was to give leave to move for a new trial, notwithstanding the lapse of time, and upon that motion to set aside the whole of the findings and order a new trial.

R.S.O., c. 44, s. 84, and Rules 789 and 792, considered.

Wills v. *Carman*, 14 A.R. 656, specially referred to.

Aylesworth, Q.C., for the plaintiff.

Shepley, Q.C., for the defendant.

STREET, J.] [Sept. 17.

CHAMBERS *v.* KITCHEN.

Revivor—Order for, after judgment—Motion to set aside judgment—Rule 622—Execution issued before revivor—Rule 886—Irregularity.

After judgment pronounced by the court upon default of defence the plaintiff died, and the defendant, desiring to have the judgment set aside and be let in to defend, issued a *præcipe* order under Rule 622, reviving the action in the name of the executor of the plaintiff's will.

Upon motion to set this order aside,

Held, that Rule 622 should be read as applicable to a case in which final judgment has been entered; and, as it was necessary that the defendant should be allowed to carry on the proceedings, the order should be sustained.

Arnison v. *Smith*, 40 Ch.D. 567, distinguished.

Curtis v. *Sheffield*, 20 Ch.D. 398, and *Twycross* v. *Grant*, 4 C.P.D. 40, followed.

After the death of the plaintiff and before the order of revivor, the solicitor who had acted for her issued a writ of *hab. fac. poss.* upon the judgment, without the leave required by Rule 886.

Held, that the writ was irregular; and it was competent for the party affected by it to apply to set it aside without first reviving the action.

The defendant let in to defend upon terms.

L. F. Heyd for the plaintiff by revivor.

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

STREET, J.] [Sept. 18

HOLLENDER *v.* FFOULKES.

Security for costs—Time—Dismissal of action for default—Waiver—Rule 1251—Effect of.

Where an order for security for costs directs that unless security be given within a limited time the action shall be dismissed, and security is not given within the time limited, the action is to be regarded as dismissed, unless the defendant treats it as still alive.

Rule 1251 does not give a plaintiff any further time for, or relieve him from the obligation of, putting in his security for costs; it only enables him to remove the stay effected by the order for the sole purpose of making a motion for judgment under Rule 739; and, if he does not succeed in that motion, he must obey the order by putting in the full security for costs.

But where the defendant, after the time for giving security under the order had expired, opposed a motion for judgment under Rule 739, and appealed to a Judge in Chambers and afterwards to a Divisional Court from the order made upon such motion, without taking the objection that the action was at an end;

Held, that he had waived the objection, and a bond filed after the time limited was allowed.

Carter v. *Stubbs*, 6 Q.B.D. 116, followed.

Burns v. *Chisholm*, 2 Ch. Chamb. R. 88, not followed.

Newcombe v. *McLuhan*, 11 P.R. 461, referred to.

Teetzel, Q.C., for the plaintiff.

Bartram (London) for the defendant.

ROSE, J.] [Sept. 28.

KAVANAGH *v.* LENNON.

Infant—Money in court—Payment out—Marriage—Foreign law.

Where a female was entitled, at majority, to payment out of court of a sum of money, and it appeared that, although only nineteen years of age, she was married and domiciled in a foreign country, by the laws of which a female is entitled, upon marriage, to receive money due her, an order was made for immediate payment out.

E. T. Malone for the applicant.

J. Hoskin, Q.C., official guardian, *contra*.

OSLER, J.A., In Chambers. [Sept. 28.

RE WEST.

Appeal—Single judge—R.S.O., c. 50, s. 33—Judge in court—Costs.

An application having been made to the Judge of the Surrogate Court of the County of Middlesex to pass the accounts of the executors of the West estate and to fix their compensation, he fixed it at more than $200, and from his order the executors, being dissatisfied, appealed, under s. 33 of the Surrogate Courts Act, R.S.O., c. 50, to a judge of the Court of Appeal, who dismissed the appeal with costs.

Upon taxation of these costs, the executors contended that the appeal was to a Judge in Chambers, and not to the court, and that the costs should be taxed accordingly.

Section 33 permits an appeal "to the Court of Appeal, or to a single judge of such court."

The taxing officer referred the question to OSLER, J.A., who had heard the appeal, and it was argued before him on the 27th of September, 1894.

W. E Middleton for the appellants.

Rowell for the respondents.

OSLER, J.A.: As to the appeal to "a single judge," provided for by the Surrogate Courts Act, R.S.O., c. 50, s. 33, I am of opinion, after consultation with the other judges of this court, that there is no reason to regard an appeal to a single judge as an appeal to a Judge in Chambers, as the statute does not call it so. Costs should be taxed on the usual scale.

MANITOBA.

COURT OF QUEEN'S BENCH.

DUBUC, J.] [July 30.

LATTA *v.* OWENS.

Public officer—Action against—Neglect to execute warrant—Sheriff's bailiff not a public officer.

The plaintiff claimed damages for the defendant's failure to execute a warrant of distress issued by two justices of the peace under the Masters and Servants Act. The warrant was addressed to all or any of the constables or other peace officers in the district of Carberry, and was handed to the defendant, a bailiff of the sheriff. He at first undertook to execute it, but afterwards, on taking advice, he refused to go on with it, and returned it to the plaintiff's attorney. The plaintiff contended that under the provisions of the statute 56 Vict. (M.), c. 32, distress warrants issued under the Masters and Servants Act must be executed by any person who is a peace officer or bailiff within the meaning of s-s. 8 of s. 3 of the Criminal Code of Canada, 1892, ss. 839 to 909, which are made applicable to all prosecutions and proceedings before police magistrates or justices of the peace under the Statutes of Manitoba, and that the defendant was therefore bound to execute the warrant handed to him.

The learned judge of the County Court of Carberry entered a verdict in favour of the defendant.

The plaintiff then appealed to a judge of the Court of Queen's Bench.

Held, that a sheriff's bailiff is not a general, but a special agent of the sheriff who employs him, and cannot be treated as a public or as a peace officer within the meaning of s-s. 8 of s. 3 of the Criminal Code, 1892, and that the defendant had no right to execute the warrant intrusted to him, and could not be made liable for refusing to do so.

Appeal dismissed with costs.

Pitblado for the plaintiff.

Smith for the defendant.

TAYLOR, C.J.] [Aug. 14.

COLQUHOUN *v.* DRISCOLL.

Sale of lands for taxes—Defective assessment—By-law to levy rate ambiguous—Court of Revision—Sale of two parcels may be good for one, although bad for the other parcel.

This was a suit in equity to have a tax sale deed of the west half of section 22-7-8 W. declared void and set aside as a cloud on the plaintiff's title. The northwest quarter was only granted by the Crown on the 29th October, 1888, but it and the other quarter were sold together in 1890 for arrears of taxes for 1888 and 1889.

Held, that the sale of the northwest quarter was void because the land was not subject to be taxed in the year 1888, but that the tax sale in question might have been good as to the southwest quarter but for the other objections, following *Schultz* v. *Alloway*, noted *ante* page 365.

The learned judge, however, held that the sale was void on the following grounds:

(1) That there was no record in the proceedings of the municipal council of any report to the council by the Court of Revision, as required by s. 586 of the Municipal Act then in force. The minutes showed that the council had resolved itself into a Court of Revision, that the Court of Revision had dealt with the appeals brought before it, and that a motion had been carried "that the Court of Revision do now adjourn," followed immediately by a motion "that the council now take up the general business," but there was no mention of any report to council by the court.

(2) That the rate by-law passed by the council for the levying of taxes in 1888 was ambiguous, providing merely "that a rate of six mills be struck for general purposes," and other rates of so many mills and fractions of a mill for other purposes, not saying whether these mills were to be levied on each section or quarter section, or upon each inhabitant, or upon every dollar in value of property.

Although by s. 603 of the said Act taxes were required to be levied equally on all the taxable property in the proportion of its value as determined by the assessment roll in force, the learned judge, following the principle laid down in the case of *O'Brien* v. *Cogswell*, 17 S.C.R. 420,

Held, that he could not assume that the rate was intended to be struck upon every dollar of value, and that enactments imposing and regulating the collection of taxes are to be construed strictly, and in all cases of ambiguity which may arise that construction is to be adopted which is most favourable to the subject.

The defendant, by his answer, set up that the plaintiff was not the absolute owner of the land in question, but that the deed to him from the former owner, one Litton, although absolute in form, was intended to be only a security for moneys advanced to Litton, and, further, that the plaintiff had been repaid all the moneys advanced by him, and that Litton had conveyed the land to the defendant, who prayed that the plaintiff might be ordered to convey the property to him. Defendant's counsel accordingly asked, at the hearing, that, if the sale for taxes should be set aside, there should be a reference to take an account to ascertain whether anything was due to the plaintiff from Litton, and whether the plaintiff really had any interest in the land, but no evidence was offered to support the defendant's contention in this respect. The learned judge refused to order such reference, and made a decree declaring the tax sale void. The court, however, allowed a clause to be inserted that this should be without prejudice to any proceedings the defendant might wish to take to redeem the land.

Tax sale deed set aside with costs.

Howell, Q.C., for the plaintiff.

Ewart, Q.C., and *Ellicott* for the defendant.

Obituary.

HON. STEPHEN RICHARDS, Q.C.

Mr. Richards was one of three brothers, all of whom have occupied prominent positions in this country: Sir William Buell Richards, who was the first Chief Justice of the Supreme Court of Ottawa, and one of the very best judges who ever sat in Canada; Hon. A. M. Richards, formerly of this province, and subsequently of Victoria, British Columbia, a leading man in that province, as he had formerly been in Brockville, Ont., and the subject of this notice.

Mr. Stephen Richards was called to the Bar in 1844, and made Queen's Counsel in 1858. In 1861 he went into political life, and ran for South Leeds in the Local Legislature, but was defeated. In 1867 he became member for Niagara, and was appointed a member of the Executive Council of Ontario, and Commissioner of Crown Lands in the Sandfield Macdonald government.

He was a prominent member of the profession, an excellent lawyer, industrious and conscientious, and painstaking to a fault. He had a large counsel business, and was for many years the senior partner in the well-known firm of Richards & Jackson. Mr. Richards was engaged in many of the most important cases of his time, amongst them the Greenwood murder case, where, however, he failed to obtain the conviction that was subsequently gained by Mr. John Bell, Q.C., who, though his inferior in learning, had great aptitude for *Nisi Prius* work. Mr. Richards was Bencher of the Law Society, and for a short time its treasurer. He retired from active practice several years ago, and spent much of his time abroad.

NEW RULES OF PRACTICE

Passed 29th September, 1894.

1380. Rule 1289 passed 23rd June, 1894, rescinding Consolidated Rule 41, and substituting a new Rule in lieu thereof, is amended by striking out the words "proceedings in the nature of a *quo warranto* under the Municipal Act or to" in the ninth and tenth lines.

1381. Rule 88 (*a*) is rescinded, and the following substituted therefor:

"(*A*) Where he acts as Master in Chambers in a matter within his jurisdiction as Master in Ordinary, the fees payable in stamps shall, in respect of such business, be the same . . are payable for the like business to the Master in Chambers."

1382. Rule 211 is amended by adding thereto the following words:

"(*A*) All documents sent from outside offices to Toronto for use in the weekly court are (in all cases) to be sent to the Clerk of Records and Writs, and the necessary postage or express charges for return of same is to be transmitted therewith."

383. Rule 274 is rescinded.

1384. Rule 1177 is rescinded, and the following substituted therefor:

1177. (1) The costs of every interlocutory *viva voce* examination and cross-examination shall be borne by the party who examines, unless it is otherwise ordered, as to the whole or a part of the examination by a judge of the High Court in actions in such court, and in actions in the County Court by a judge of that court.

(2) No cost of obtaining the allowance of such costs as against the opposite party shall be taxed unless so ordered.

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Depositing money to be taken care of. *Justice of the Peace*, May 26.
Obstructing light. *Ib.*, June 2.
Highways as boundaries. *Ib.*, June 9.
Landlords and weekly tenants. *Ib.*, June 16.
Robbery of railway passengers. *Ib.*, June 30.
Easement in running water. *Ib.*, July 7.
Our neighbour's cattle. *Ib.*, July 14.
Travellers and their tickets. *Ib.*, July 28.
What may be done with a seal. *University (New York) Law Review*, June.
The principle of betterment in its legal aspect. *Law Quarterly*, April.
Breach of promise—How it originated, its present position, and suggested reforms. *Ib.*
Is a right of action in tort a chose in action? *Ib.*
The history of the law of libel. *Ib.*
Attempt and intent. *Ib.*
Recent questions of international law—Behring Sea arbitration *Ib.*, July.
Women as trustees. *Law Journal (Eng.)*, August 4.
Extrinsic evidence in respect to written instruments. *American Law Review*, May-June.
The doctrine of *ultra vires* in relation to private corporations. *Ib.*

The right to try an extradited fugitive for an offence other than that specified in the extradition proceedings. *Ib.*, July-August.
Spendthrift trusts. *Albany Law Journal*, July 7.
Extradition between United States and Canada. *Ib.*, August 11.
Injunction and organized labour. *Ib.*, Sept. 1.
Relation of master and servant—Volunteered service. *Central Law Journal*, June 8.
Law of evidence—Like effects from same cause. *Ib.*, June 22.
Following trust funds under the so-called modern doctrine of equity. *Ib.*, June 29.
Discretionary power of an agent. *Ib.*, July 13.
The law of malpractice. *Ib.*, July 20.
Privileged communications to physicians and surgeons. *Ib.*, August 10.
The doctrine of estoppel as applied to married women. *Ib.*, August 31.

Flotsam and Jetsam.

SOME good stories are going the rounds concerning Sir Matthew Begbie, Chief Justice of British Columbia, who died the other day. Here is one of them: In 1883 a man was charged in Victoria with having killed another man with a sandbag, and in the face of the judge's summing up the jury brought in a verdict of not guilty. This annoyed the Chief Justice, who at once said: "Gentlemen of the jury, mind, that is your verdict, not mine. On your conscience will rest the stigma of returning such a disgraceful verdict. Many repetitions of such conduct as yours will make trial by jury a horrible farce and the city of Victoria a nest of immorality and crime. Go, I have nothing more to say to you." And then turning to the prisoner, the Chief Justice added: "You are discharged. Go and sandbag some of those jurymen; they deserve it."—*Westminster Gazette.*

THE *Australian Law Times* discusses, in an entertaining manner, the question whether or not a young lady who breaks her leg at a dance can maintain an action against her partner on the ground that it was caused by his clumsiness. The writer intimates the opinion that the man who asks a girl to dance does not undertake to return her to her chaperon in as good order as he receives her—"act of God and the Queen's enemies excepted"—but that, at most, his liabilities are those of a gratuitous bailee, not extending beyond gross negligence. Or, looking at the case from another side, that there is no implied warranty on his part that he is reasonably fit for the purpose for which he offers himself as a partner for a dance, as there is no sufficient consideration moving from her to him to support such a warranty. A further point raised is whether or not she did not voluntarily assume the risk of his unfitness.

THE LAWYER FROM A MORAL STANDPOINT.—Since Aristotle's day the world has very largely fallen into the habit of jesting over the alleged dishonesty of lawyers. Who has not heard the oft-quoted epitaph :

> " Here lieth one, believe it if you can,
> Who, though a lawyer, was an honest man ;
> The gates of heaven to him are open wide,
> But closed, alas ! to all his tribe beside."

Or the invitation of the janitor who was displaying to a number of lawyers the conveniences of a newly-built court house soon to be occupied :

> " Come, sinners, round and view the ground
> Where you shall shortly lie."

Or the really excellent story of the Irishman (these witty things in print are always said by Irishmen) who, seeing on a gravestone the legend, " Here lies a lawyer and an honest man," exclaimed, in evident perplexity, " What the divil made thim put two av thim in wan grave ? "