The Legal News.

Vol. VII. MAY 24, 1884. No. 21.

CREMATION IN ENGLAND.

In *Regina* v. *Price*, reported in the April number of the Law Journal Reports, Mr. Justice Stephen expresses the opinion that cremation *per se* is not illegal. In a previous case (*Williams* v. *Williams*) Mr. Justice Kay, without deciding the question formally, intimated that in his opinion the practice was not legal according to the law of England. Mr. Justice Stephen, whose opinion has great weight, after full consideration, has arrived at a different conclusion.

The *Law Journal* (April 26, 1884,) says: "The drift of Mr. Justice Stephen's argument may be very shortly stated. In the first place, he says that there is no authority for the proposition contended for by the prosecution, which he has been able to discover after the fullest examination. He admits that Courts have sometimes declared acts to be misdemeanors which have never previously been decided to be so, but suggests that those cases all 'involved great public mischief or moral scandal.' "I do not think,' he adds, 'that it can be said that every practice which startles and jars upon the religious sentiments of the majority of the population is for that reason a misdemeanor at common law.' This view is supported by reference to the Anatomy Act, which appears to him to show that burial was not the only mode of disposing of bodies recognized by the Legislature. His decision, therefore, is that cremation *per se* is not illegal, and is not the subject of an indictment unless done so as to amount to a public nuisance."

Since the decision of Mr. Justice Stephen the Cremation Society have issued the following conditions on which the employment of the Crematorium will be permitted by the council:—

I. An application in writing must be made by the friends or executors of the deceased—unless it has been made by the deceased person himself during life—stating that it was the wish of the deceased to be cremated after death.

II. A certificate must be sent in by one qualified medical man at least, who attended the deceased until the time of death, unhesitatingly stating that the cause of death was natural, and what that cause was.

III. If no medical man attended during the illness, an autopsy must be made by a medical officer appointed by the society, or no cremation can take place.

LAW AND LAWYERS IN BELGIUM.

An English lawyer contributes to the *Law Journal* (London) some notes of a recent visit to Belgium. He praises the advocates' costume. "The robes," he says, "are far superior to our own. The gowns very neat, clean, and fastened in front so as to lie close to the neck instead of falling away from the shoulders in awkward slovenliness, as here; adorned with the pretty white ermine tufts instead of the ugly cowl, and covering the body of the advocate, like our judges' robes, not leaving exposed to view that remarkable variety of shirt front and waistcoat which characterize without adorning the English bar."

The salaries paid to the judges are wonderfully small. The usual stipend is £300 a year, or $1500, and the highest judge in the country gets only £540, or less than one-half what our chief justices receive.

The following passage might have been written of a visit to the province of Quebec: "The thought occurs, As these good people have a Code, what do they want with volumes of reports? We had business in hand, in fact a commission, and some *avocats* of very great intelligence gave us plenty of law—pages and pages of it. They were asked, 'Was there anything in the Code about it?' 'Well, yes, two lines that perhaps had some bearing on it.' 'Where, then, does all this learning come from?' 'Why, from reported cases to be sure.' A lesson to codifiers. But, of course, a Code can only propound general principles evolved from past experience. But legal decisions are evoked by the infinite variety of mundane circumstances, which are exactly what the wisest can neither foresee nor guard against."

BUSINESS IN APPEAL.

The actual reduction of the roll effected by the extra terms in Montreal is rather disappointing. The May term commenced with 78 appeal cases inscribed for hearing. In May of last year the number of inscriptions was 99, while in May, 1882, the number was 95. The actual gain on 1882 is, therefore, only 17, which, it is to be feared, will be almost lost when the September list appears, as the progress during the present term has been unusually slow.

THE LATE CHARLES O'CONOR.

Charles O'Conor, a distinguished lawyer of New York, died May 2, aged 80. The daily journals are full of eulogiums on the deceased, but the *Albany Law Journal* is less glowing. Our contemporary says: "He was a man of strong mental endowments, and perhaps for many years would have been named as the leader of the American bar, but his career has been disfigured by a bad temper, cold manners, and some unseemly squabbles. He will be longest and most unpleasantly remembered for his attack on the Court of Appeals of this State. He was a man of great learning, but there are a score in the country at present his equal. He was a powerful advocate, but he cannot be ranked with such geniuses as Webster and Choate."

NOTES OF CASES.

COURT OF QUEEN'S BENCH.

MONTREAL, January 23, 1884.

DORION, C.J., RAMSAY, TESSIER, BABY, JJ.

PRENTICE (deft. below) Appellant, and MACDOUGALL (plff. below), Respondent.

Partnership—Partition—Warranty.

Art. 1507 *C.C. does not apply to partition between co-partners. Where two partners made a partition of shares forming a portion of the partnership property, and one was evicted from his share, the other partner was held not liable for more than the value of the share at the time of the partition, i. e., his obligation was merely to equalize the value of the portions, without a new partition.*

RAMSAY, J. This is an action to account brought by one of the members of a partnership against his co-partner after the dissolution of the partnership by mutual consent. At first there appears to have been a number of questions at issue between the parties, but the only one submitted for our consideration is as to the disposal of 160 shares of the Silver Islet Company. Apart from the Silver Islet transaction, the respondent admitted his account was overdrawn by the amount of $7,296.01.

Before proceeding to examine into the only question with which we have to deal, it is necessary to say that by the articles of partnership the appellant was to have two-thirds of the profits of the general brokerage business, and three-fourths of the profits resulting from the sale of mines and mineral rights, and from the formation of companies in Canada, the United States and Europe. After some preliminary details, which are wholly unimportant as regards the issue before us, the appellant and respondent, as co-partners, obtained on the 18th April, 1870, the right to purchase the whole property of the Montreal Mining Company (really the Silver Islet property) for $225,000, this right to purchase being open till the 1st June, 1870. As the right to purchase for so short a time was insufficient to allow of the negotiations contemplated by Prentice in England, the firm of Prentice & Macdougall on the 6th May obtained from The Montreal Mining Company the right to an extension of time till the 1st September following, by their paying the company $2,000, or giving an approved note for $2,000, to be forfeited to the company in case Prentice & Macdougall should fail to accept and pay for the property according to agreement. In order to procure the $2,000 necessary for this deposit Prentice turned to a friend in London, Mr. McEwan, and obtained the necessary funds from him, on the promise that he should share equally with Prentice & Macdougall in the profits of the transaction. The deposit was duly made, and on the 25th May the Montreal Mining Company made a bond in favour of Prentice alone. When it became necessary to pay up the balance of the first instalment ($48,000) under the bond on the 1st of September, 1870, Pren-

tice & Macdougall were unable to provide the money, which was furnished by one Sibley, of New York. In exchange for this Prentice conveyed to him "all and singular the within written bond," that is, the bond from the Montreal Mining Company to Prentice, by a memorandum of sale written on a copy of the notarial bond by the Montreal Mining Company to Prentice. This memorandum was extended and made more full by a deed called an indenture, purporting to be made on the same day between Prentice and Sibley. By this deed it appears that Sibley was to hold nine-tenths of the property in trust for his friends and one-tenth or 160 shares for Prentice. By another bond of indenture we learn that the persons for whom Sibley was acting when he treated with Prentice, besides himself were E. B. Ward, Edward Learned, Peleg Hall and C. A. Trowbridge. We also learn that Prentice was to have his one-tenth, that is 160 shares. These shares were transferred to Prentice's name, and he got certificates for them. This last indenture was executed on the 2nd November, 1870. In December of that year, Mr. Learned wished to acquire 80 shares of the 160 shares held by Prentice, and Prentice sold them to him for $9,000. In all these transactions it seems the promises to McEwan were overlooked by Prentice and Macdougall, and he was getting restive under this neglect. Prentice and Macdougall then agreed that Macdougall's share should be 40 shares, and in order to put the remaining 40 shares out of the reach of Mr. McEwan's litigation, the whole 80 shares were on the 3rd March, 1871, assigned to Macdougall, on the understanding that 40 shares should be passed over into the name of Mr. Ashworth, in trust for Miss Auldjo, Prentice's sister-in-law, but really to be held for Prentice. In 1871 Mr. McEwan brought his action in the United States against Prentice and Macdougall, and attached the whole 80 shares which had been left standing in Prentice's name notwithstanding the transfer. In this suit of McEwan, Prentice & Macdougall succumbed, and the whole 80 shares were lost save eight which McEwan abandoned to avoid the risk of an appeal. Now Prentice's pretention is that he owes Macdougall an account of the whole 160 shares, because although they stood in Prentice's name, they were undoubtedly the property of the firm, that is three-fourths were Prentice's and one-fourth Macdougall's, that by the transactions of the firm the whole of these shares were lost save the price of the 80 sold to Learned for $9,000, and the eight shares given back by McEwan, and that Macdougall has, therefore, only a right to be credited for one-fourth of $9,000, and two shares of the eight or their value; that the one-fourth of $9,000 is $2,250, and the value of the two shares *nil*, so that plaintiff's *débat* is unfounded, and, moreover he is entitled to nothing, for his account is greatly overdrawn, and that the *reliquat* is due by Macdougall and not to him.

There is really little difference between the parties as to the main facts, and, to avoid length, I shall advert to the evidence where it is conflicting in setting out Mr. Macdougall's pretentions, which are perfectly clear. He contends that he was no party to the arrangement in London, by which Prentice promised one-half of the profits to McEwan; that in reality, he had, by special arrangement with Prentice, a right to half of the profits of this particular transaction; that for certain reasons of convenience the whole 160 shares got into Prentice's name; that Prentice sold 80 shares, his own half, for an inadequate price, namely for $9,000; that subsequently Macdougall agreed to take 40 shares to terminate a suit between him and Prentice; that Prentice agreed to take the 80 shares he had sold to his own account, and that he had given Macdougall, by a deed of sale *implying warranty*, for his share, a certain forty shares, of which Macdougall had been deprived by the fault of Prentice. Consequently he concludes that Prentice is his *garant* for these forty shares, and that he should, therefore, give him over the eight shares returned by McEwan and pay him for thirty-two or pay him for the whole forty shares. The court below adopted respondent's view and decided that appellant owed respondent forty shares or the value, fixed at $80,000, less the *reliquat de compte*, which, apart from this matter, is in favour of the defendant to the amount of $16,188.51,

leaving a balance due by the appellant to respondent of $63,811.49, to which he is condemned unless he gives the respondent forty shares within fifteen days.

It is manifest that whatever view may be taken of this case the judgment is exaggerated. If appellant is *garant* of respondent for the forty shares transferred to him by Prentice, the least we can say is that Macdougall is *garant* in the measure of his interest of the other forty shares sold by Prentice to Macdougall for the account of Miss Auldjo. But in truth the deed of the 3rd March is not a warranty deed in the sense of the respondent's pretention, or a deed of sale. It is an assignment of all Prentice's rights in the forty shares, and it is made with special reference to McEwan's claim for which Macdougall undertakes to guarantee Prentice proportionally. This will appear by a letter of guarantee from Macdougall to Prentice, of the same date, which is in these words:—

"63 Wall Street, New York, 3rd March, 1871, Edward A. Prentice, Esquire.

"DEAR SIR,—In consideration of your assignment to me this day of your remaining interest in the property formerly belonging to the Montreal Mining Co., and now held by Alex. H. Sibley and other trustees, I hereby agree that any interest therein to the extent of one-half of that conveyed by the said assignment, or one-fortieth of the whole interest originally held by you, shall be liable in said proportion for any damages which may result to you by reason of any suit which Mr. Alex. McEwan, of London, England, may institute against you for failure to secure *his interest*, or any expenses which have been already incurred in the negotiation of the sale of the property by you.

"Yours truly,

"(Signed,) H. T. MACDOUGALL."

It is strange, after reciting this letter textually, to find respondent saying in his factum, "This letter was given without consideration, at a time when plaintiff knew nothing whatever of McEwan's claim." Mr. Macdougall may not have known the full extent of the firm's liability to McEwan, but it is evident by this very letter that he knew there was something, and it is difficult to believe from his correspondence with Prentice in 1870 that he did not know from the beginning that Prentice was getting financial assistance in the matter, which had to be paid somehow. Again, if taken with the articles of partnership it would seem, that the assignment was simply a mode of giving Macdougall his proportion of the 160 shares. As the learned counsel for the respondent has pointedly referred to Art. 1507, I shall endeavour to put the argument technically. *Partage* is not *vente*. It is determinative of the right of property and not translative. "Pareillement, lorsque plusieurs personnes ont été conjointement légataires d'un héritage, ou lorsqu'elles l'ont acheté en commun, et que par la suite elles le partagent, chacun est censé avoir été seul légataire ou seul acheteur de ce qui est tombé dans son lot, et n'avoir été légataire ni acheteur de rien de ce qui est tombé dans les autres lots." "Cela a lieu quoique le partage ait été fait avec retour en deniers ou en rente. * * * "Il est évident, suivant ces principes que le partage est un acte qui n'a aucun rapport avec le contrat d'échange, et encore moins avec le contrat de vente, soit qu'il soit fait sans retour, soit avec retour en deniers; car, suivant ces principes, le partage n'est point un titre d'acquisition; je n'acquiers proprement rien par le partage que je fais avec mes cohéritiers ou autres copropriétaires; et tout l'effet du partage se reduit à rendre déterminé à de certaines choses le droit que j'avais, qui était auparavant indéterminé." Pothier, vente, No. 630. Laurent tries to show that this opinion of Pothier is erroneous, and that it is not in accordance with Roman law. He has for him the great name of Dumoulin, but I think he is unsuccessful. He goes back to the feudal law and contends that it was declared by the lawyers, who were hostile to mutation fines, that *partage* was not *équipollent à vente*, in order to avoid the payment of fines. (X. No. 396.) This is not a very satisfactory mode of reasoning, and he admits the C. N. has adopted Pothier's view (Art. 833), but he says that by the use of the word "*censé*" the article indicates a fiction. So it does, but the fiction is not that *partage* is not *sale*. Evidently it cannot be confounded with either.

It would be a fiction to say it was either a sale or exchange.

But leaving these theoretical discussions, let us look at the reason of the thing, as applied to the case before us. The tacit warranty of our law is the warranty by the vendor *de ses faites et promesses.* This warranty never exceeds the nature of the thing, a doctrine decided formally by this Court in the case of *Dupuy & Ducondu*, recently confirmed in the Privy Council,* and not, I believe questioned in the Supreme Court. Now what were the *faits et promesses* of Prentice? He was making over to Macdougall his share of co-partnership property, which stood in Prentice's name for the benefit of the partners. Prentice was, therefore, acting as the agent of the partnership, the thing was lost by a partnership obligation, and, therefore, Macdougall was his own *garant.* "L'obligation de garantie est indivisible." (24 Laurent 213.) But even if it were to be treated as a sale, it must be remembered that there is an exception to *garantie* even in sale, viz., where the purchaser knew the danger of eviction. Macdougall is presumed to have known his danger, for he was evicted for a partnership debt. He is therefore only entitled to what he paid for the thing—24 Laurent, p. 259, and Pothier, Vente No. 187. Now what did Macdougall pay for his 40 shares? Evidently his interest in the 160 shares. One-half of that is swept away by a partnership liability, so that his share was really 20 out of the 80 remaining. But here respondent raises another difficulty. He claims that he is entitled to stock, and that if that cannot be given to him he is entitled to its equivalent as damages, which are to be valued at the time of the eviction, and he cites Troplong, Vente No. 506. This authority does not apply to the case of a purchaser who knows the cause of his eviction. "Si l'acheteur, qui a acheté avec cette connaissance souffre de cette éviction quelque chose au delà du prix qu'il a payé, il doit se l'imputer, puisque c'est une éviction à laquelle il devait s'attendre; ce n'est pas le vendeur qui l'a induit en erreur," Pothier, vente, 187. Here is how Laurent states the principle of Pothier:

"Des que l'acheteur connaissait lors du contrat, la cause pour laquelle il a été évincé, il renonce au droit de réclamer la réparation d'un dommage qu'il doit s'imputer à lui-même. Sur ce point tout le monde est d'accord."—(24, 261.) And he cites Aubry et Rau and Dalloz.

It is, however, the principles of *partage* and not of sale we have to examine. In the old law it was for a time held that where in a *partage* the party taking the share knew of the cause of eviction, he had no claim at all. The principle seems to be this, that the contract is so far *aléatoire.* This doctrine appears to have been abandoned on the ground of equity. Pothier, Vente, No. 188. But to what is the *co-partageant* obliged? There has been a greatly contested question as to whether the eviction, at all events of a great portion of the share of one of the *co-partageants*, was a cause of rescission of the *partage.* Dumoulin first thought it was, but later he abandoned this opinion on the ground of convenience, and the better opinion seems to be that the obligation is to equalize the shares without a new *partage.* Therefore Prentice has only to account for the value of what he got at the *partage.* That was unquestionably $9,000. It is therefore a fourth of $9,000 he has to return.

But how are we to deal with the eight shares? This is the only part of the case which has given us any real difficulty as to the principles involved, and although a matter of small importance pecuniarily, it is not easily disposed of. As we have seen, as a rule of convenience rather than of strict right, the *partage* once carried out, is not set aside for eviction, even of the whole of the share of a *co-partageant.* All the latter's rights consist in a demand to oblige his *co-partageant* to equalize the shares—that is, to a money indemnity. The eight shares abandoned by McEwen formed part of those assigned to Macdougall, one-half for his own benefit, and one-half for the benefit of Prentice; therefore, four should go to Prentice and four to Macdougall, then their value should be taken, and three-fourths of it should go to Prentice and one-fourth to Macdougall, precisely as we divide the $9000. But it is very difficult to fix the value of

* 7 L. N. 46.

these shares, which have been sequestrated during all these years, without doing injustice to one or other of the parties; we therefore say this, the rule which has been adopted from convenience does not apply here. These eight shares have never really been mixed up with the property of either party; but, by the operation of the sequestration, they have remained to be dealt with in the same condition as at the time of the *partage*, and therefore they should be divided in the same manner they ought to have been divided by the *partage*, that is, six should go to the appellant and two to the respondent.

The judgment, therefore, will be reversed, with costs, for respondent's *débat de compte* is unfounded, and it appears he has overdrawn his account to a much greater amount than anything coming to him from the $9000.

The following is the judgment of the Court:—

"The Court, etc.

"Considering that by an *Acte* passed before Griffin, notary public, on the 19th of March, 1869, the appellant and respondent declared to have formed a partnership as brokers, beginning from the 24th of February, 1869, including the negotiation of loans and other monied transactions, as well as the purchase and sale of mines, and the formation of companies; the profits in the ordinary transactions, as brokers, to be divided in the proportion of two-thirds for the respondent and one-third for the appellant, and those resulting from the sale of mines or mineral interests and from the formation of companies, to be divided in the proportion of three-fourths for the appellant and one-fourth for the respondent, which co-partnership was dissolved on the 2nd of November, 1871;

"And considering that during the existence of the said co-partnership, the appellant, with the aid of one Alexander McEwan, obtained in his own name but for the benefit of the co-partnership, a promise of sale of the franchise and mining rights of "The Montreal Mining Company," it being understood that the said Alexander McEwan should have one-half of the profits to be derived from said transaction:

"And considering that on or about the 2nd day of September, 1870, the appellant transferred his rights in the said "The Montreal Mining Company" to Alexander H. Sibley, acting for himself as well as for others his associates;

"And considering that the profits realized by the said sale consisted in 160 parts of 1600 parts or shares in the Association termed "The Canada Lands Purchase Trust";

"And considering that in or about the month of December, 1870, the appellant sold 80 of the 160 parts or shares by him obtained in the said "Canada Lands Purchase Trust" for the sum of $9,000, and that on the 21st day of February, 1871, the respondent instituted an action against the appellant in the Supreme Court, New York, by which he alleged that appellant had realized $22,500 of profits by the said negotiation and sale of mining lands, and claimed that the appellant be condemned to pay him the sum of $11,250 as his share of said profits;

"And considering that with a view to settle their difficulties with regard to said transaction and suit, the said appellant on the 3rd day of March, 1871, agreed to transfer and did transfer unto the respondent the 80 parts or shares remaining out of the 160 parts or shares in the "Canada Land Purchase Trust," which he had obtained by the transfer of said mining lands and rights, 40 parts or shares out of the 80 the said respondent agreed to transfer unto Miss Auldjo, the remaining 40 parts being in full for his proportion of the profits derived from said transaction;

"And considering that at the time of the said transfer of the said 80 parts in the Canada Lands Purchase Trust by the appellant to the respondent, the said respondent agreed, by a letter dated the 3rd day of March, 1871, that the said 40 parts or shares so transferred to him for his share of profits in said transaction, should be liable in the same proportion to the whole of the parts or shares originally held by the appellant in the said company for any damage which might result to the appellant by reason of any suit which the said Alexander McEwan might institute against him for failure to secure his interest, or any expenses incurred in the negotiations of the sale of the property;

"And considering that the said transfer of

the 3rd of March, 1871, was not only made to secure to the respondent his share of the profits arising out of the said mining transactions, but also to meet the contingent event of the claim of the said Alexander McEwan to the ownership of the said 80 shares, and that in consequence of the judgment hereinafter mentioned, declaring the said Alexander McEwen owner of the said 80 shares, the said transfer became inoperative;

"And considering that before the said transfer was duly completed and registered in the books of the Trust, the said Alexander McEwen claimed before the New York Supreme Court, as his share in the profits in the said transaction, the 80 shares or parts in the said Canada Land Purchase Trust so transferred by the appellant to the respondent, which 80 shares by a decree of the said Supreme Court of the 9th of December, 1871, were adjudged to be the property of the said Alexander McEwen;

"And considering that subsequently the said Alexander McEwen, by compromise, agreed to transfer and did re-convey eight of the said 80 parts in the said Trust, to Walter Shanly and James D. Crawford, trustees appointed by the appellant and the respondent, to hold the said eight shares on their behalf until an adjustment of their claims had taken place, the said Trust being now represented by 288 shares of the nominal value $100 each in the Silver Mining Company of Silver Islet and eight shares of The Ontario Mineral Lands Company;

"And considering that through the adjustment in the present case of the accounts of the affairs of the said co-partnership, exclusive of the rights which the said parties may have against each other with regard to the said mining rights, there is now due to the appellant by the respondent a sum of $16,185.51, as mentioned in the judgment rendered by the Court below;

"And considering that through the claim of the said Alexander McEwen the said respondent has been deprived of the whole of the 40 shares allotted and transferred to him as his share of the profits in the said transaction;

"And considering that he is entitled to claim his proportion of one-fourth of the sum of $9,000, for which the said respondent has sold 80 of the said 160 shares or parts in the said Canada Land Purchase Trust or $2,250 currency, with interest on the said sum from the 30th December, 1870, date of the sale by the respondent of said mining rights, and also his one-fourth part of the said eight shares or parts in the said company now represented by the 288 shares of the nominal value of $100 each in the Silver Mining Company of Silver Islet and eight shares of The Ontario Mineral Lands Company;

"And considering that the said sum of $2,250, and interest as aforesaid, are more than compensated by the sum of $16,188.51, which is due and owing by the respondent to the appellant according to the adjustment of accounts as made in and by the judgment appealed from, to wit, the judgment rendered on the 31st of March, 1881, by the Superior Court sitting at Montreal, and that there is error in the said judgment of the 31st March, 1881;

"This Court doth reverse the said judgment of the 31st March, 1881; and proceeding to render the judgment which the said Superior Court should have rendered, doth adjudge and order that the said eight shares in the said Canada Land Purchase Trust, in the hands and possession of the said Walter Shanly and Jas. D. Crawford, in trust, which shares are now represented by 288 shares of the nominal value of $100 each in the Silver Mining Company of Silver Islet and eight shares in The Ontario Mineral Lands Company, so that six of the said eight shares of the Canada Land Purchase Trust or 216 shares in the Silver Mining Company of Silver Islet, and six of the eight shares in the Ontario Mineral Lands Company, shall belong to the said appellant, and two of the said 8 shares of the said Canada Land Purchase Trust, or 72 of the said 288 shares in the Silver Mining Company of Silver Islet and two of the eight shares of the Ontario Mineral Lands Company shall belong to the said respondent, as their respective shares in the said partnership property, and the said parties are hereby ordered to make to each other within one month from the date of this judgment a regular transfer of their respective shares in

the said mining stock, and to grant the necessary discharge for the same to the said trustees, and in default of doing so within the said delay, this judgment shall be held to be in lieu and place of a regular transfer by the parties to each other of the said shares in the said respective proportions, and to be held as a good and valid discharge to the said trustees for the said shares; it being ordered that any profits derived from the said shares now due, or which may have been received by the said trustees, shall be accounted for and paid to the said parties in the above proportions;

"And the Court doth dismiss the other conclusions of the action of the respondent, each party paying his own costs in the Court below, and doth condemn the respondent to pay the costs on the present appeal: reserving to the appellant his recourse for any balance which may be due him by the respondent."

Judgment reversed.

R. A. Ramsay for appellant.
S. Bethune, Q.C., counsel.
Dunlop & Lyman for respondent.
R. Laflamme, Q.C., counsel.

COURT OF QUEEN'S BENCH.

MONTREAL, May 21, 1884.

DORION, C.J., RAMSAY, CROSS, TESSIER and BABY, JJ.

SUNDBERG, appellant, and WILDER, respondent.

Procedure—Correction of clerical error in register of judgments.

DORION, C.J. In this case the respondent moves that the record be sent back to the Court below, for the purpose of having an error in the copy of judgment corrected. It appears that the draft of judgment as prepared by the Judge who rendered judgment is correct, but in the registration a clerical error has occurred, by which a wrong number is given in the description of certain land. The judgment as it is registered is not the judgment rendered by the Court. There are English precedents which show that the Courts go very far in permitting the rectification of such errors. But it is evident that this Court sitting in Appeal has no authority to interfere. The error must be corrected by the Court below. It is not necessary at present to send back the record. The Court below has power to correct the error in the registration, and when that is effected, a correct copy may probably be produced here, and admitted in the place of the copy which contains the error of description. The motion to send back the record, in order to have the error corrected, is therefore rejected for the present.

RAMSAY, J., concurred, on the ground that there is no doubt that a purely clerical error, whether by Judge or the Clerk of the Court, can be rectified. His Honour added that this was one of those matters which members of the bar ought to settle among themselves.

Motion rejected.

Oughtred for respondent moving.
Brown, Q.C., contra.

GENERAL NOTES.

THE N. Y. CODE.—The New York legislature has postponed the question of codification in that State for the present, by passing a bill for the appointment of a commission to revise the draft code, and report as to amendments which may be deemed necessary.

SOLICITORS AND THEIR COSTS.—At the sittings *in banco* of the Queen's Bench Division of the High Court of Justice on Thursday, Mr. Justice Denman, Mr. Justice Manisty, and Mr. Justice Watkin Williams, had before them an application in the case of the *London Scottish Building Society* v. *Charley et al.* which raised an important question as to the costs which a solicitor who appears in person may recover against a defeated opponent. The plaintiffs had brought an action against the defendants, who appeared in person and acted as their own solicitors, recovered judgment and costs against the plaintiffs. Upon taxation of their bill the question arose whether they could claim remuneration for their professional services to themselves as the defendants' solicitors, or whether they were not in the same position as any other litigant in person, and as such only entitled to recover costs out of pocket actually paid, and not any sum for remuneration for time and labour, or what are termed profit costs. The Master decided to allow the defendants' costs as solicitors, and the Judge in Chambers referred the matter to the court. The court now held that, although there was a difference of opinion, the preponderance was in favour of allowing these costs, the opinion of so great an authority as the late Lord Justice Lush being also in favour of a solicitor being allowed to recover them. Thus, upon all grounds, the decision of the Master must be upheld.