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THE BARRISTER.

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The Barrister.

VOL. II. TORONTO, FEBRUARY, 1896. No. 2.

EDITORIAL.

The Benchers and the St. Mary's Solicitor.

IN view of the fact that every lawyer in Ontario has had sent to his address a copy of "*The Brotherhood Era*" containing two leading articles dealing with this case it is impossible that a publication like the BARRISTER could avoid referring to the subject. We speak of *avoiding* the subject as we are at no pains to conceal the fact that we have no relish for it. The fact is that it is a case with some painful phases that would have prompted us were it not for *The Era's* article to have left the affair severely alone. Our feeling in this regard is, of course induced by a sympathetic regard for the unfortunate individual. And, on the other hand, as to the corporate body of Benchers we have no desire to enter on a course of antagonism like that which we have found signs of in not a few quarters. Looking at the results and for the moment shutting our eyes to the causes it is apparent that an extreme course involving very disasterous results to a Solicitor has been pursued by the Benchers. A Solicitor of the Supreme Court of Judicature for Ontario has been stripped of his professional attributes and in a large measure crushed down into other walks of life. After years of toil and considerable expenditure of money his professional extinction is brought about in one short moment and, for one cause only—his inability to raise a paltry few dollars for fees. These, according to *The Era*, were the bald facts unrelieved by any extenuating circumstances, and as it did seem to us a most monstrous case we were inclined to feel very strongly and were prepared to break a lance in a cause that seemed founded in justice. Besides this, *The Era* had given the impression that the Solicitor in question was snuffed out for but one year's arrears of fees, and we were prepared to contrast his case with that of arrears of taxes where four years of arrears can accumulate before the law reaches out its arm to inflict any extreme penalty. We were also inclined to think that the impecunious Solicitor could bitterly revolve in his mind that his way was harder than that of his sinning brother, who had not been particular about distinguishing *meum* and *tuum* when dealing with client's moneys, inasmuch as the clever scalawag is generally allowed to continue to *prey* again so long

as he can patch things up with the client who has petitioned to have him struck off the rolls. In fact, we felt that if the color put on things by *The Era* was warranted then it was time for all of us to feel uneasy. But THE BARRISTER did not forget that every story has two sides to it and that we could not form a fair opinion from one side only. To be brief, an investigation of all the facts puts a different complexion on things. *The Era* has given so wide a publicity to this case that it cannot do any harm to state all the circumstances. The one fact that stands out in bold prominence is that the gentleman concerned acted with most lamentably poor judgment and it seems to us, brought the trouble on himself by assuming the most invincible unconcern, never lifting a finger to avert the impending blow nor making any request that time be allowed him. Though not bound by precedent or law to do so, it is not unusual to grant indulgence in the way of time. But in this case it seems from the beginning judgment was allowed to go by default, and though written to three times before being served, he maintained absolute silence and continued the same course during the currency of the proceedings, neither appearing personally nor being represented at any stage. As an attempt has been made to fire the heather over this case we feel it a duty in fairness to the Benchers to give two more facts, though from feelings of genuine sympathy with the person most concerned, we regret the necessity. The first is, that the arrears were for two full years, irrespective of those for the year in the 10th month of which action was taken; and secondly, there had been a similar difficulty in the past, when a great deal of consideration had been shewn and every leniency dealt out and the case was likely viewed as one that was getting worse. On the whole, we are glad to be able to feel that though it is a case for commiseration, yet no substantial injustice has been done. On the broad question of the large statutory powers conferred on the Law Society, which *The Era* views with such alarm, we offer no opinion at present.

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The Popular Idea of the Dryness of the Study of Law.

THERE is probably no opinion so deeply rooted in the unprofessional mind as that law is a wretched bore that is so oppressive and tedious that no one would ever enter upon its study for pleasure. The idea is a near relative to the one which regards the legal profession as a necessary evil; and it seems to us that the profession must feel concerned to disabuse the popular mind of such very wrong impressions. The element of diffidence and modesty being a professional characteristic we do not venture to attempt to rebut the charge of being an evil necessary or otherwise, as it might involve something like self-praise, but the charge that the study of law is dry can we think be overcome without difficulty and without impropriety by the profession. If the world only knew it the world over amuses itself and finds recreation in mental exercises of great diversity. Playing a game of checkers with an

opponent, or a game of Patience with oneself are pastimes to please and cheer the spirits, but the very cream of the enjoyment is derived from close mental study and hard thought. The study of law is much the same. There is unlimited scope for the expansion of the intellectual faculties and we feel certain that when there is fair room for argument and a nicely balanced contest, when it comes to working out the principles and applying the learned decisions of the courts, there is no lawyer who does not take pleasure in arraying and marshalling his facts and working out the law of his case. But if the world itself consi lers law so dry it has a rather equivocal way of showing it. For it is noticeable that with all its dryness whenever a Court sits to dispense Law and Equity there is an eager crowd of spectators who seem to take as much pleasure in the proceedings as though they were at the theatre. But perhaps a more conclusive argument can be found in the popularity of fiction, which attempts to depict the law and lawyers. After reading such cases as that of *Jarndice v Jarndice*, in "Bleak House;" Portia's sophistries when turning the law against the cunning old Jew; and Sergeant Buzfuzz when building up on no foundations his case of legal quibbles, no one can think of dryness. There is in these cases exquisite wit and irresistible humour tempered with sober and clever reasoning. But it will be said that these are imaginary characters and cases having no counter part in the world. No idea could be more incorrect. Each of these cases is a most accurate portrayal of characters met at every corner of the corridors that wind through the world legal; and every lawyer has witnessed events in actual practice not dissimilar to those depicted in such works. We took considerable pleasure from the reading of an article in *The American Lawyer* reproduced from *The St. Louis Globe-Democratic* on lawyers and novelists. Some notable instances are given of fascinating fiction in which the law and the lawyer are mirrored. We cannot refrain from referring to a very bright story where this object is attained with unusual success. It is H. Ryder Haggard's "Mr. Meeson's Will" and the explanation of its being so true to life is that the author is himself a limb of the law. About one-third of the story leads us into active practice and through the intricacies of a moderately involved legal point. There is a lightness and dash about the way events transpire and a droll way of putting the dialogue which fastens one's interest. Yet from the office boy to the Registrar of the Court and Fiddlestick, Q.C., there is not an exaggerated character; from the discussion on Champerty and Maintenance to the amending of the Statement of Defence there is no new law: and from the ridiculous attempts made by the briefless barrister to appear occupied and keep up appearances, to his nervousness when opening his case, and including the diversion created by his compassionate opponent, Fiddlestick, Q.C., in order to allow him time to recover himself there is no passage where human nature is held up in any but its natural state.

There is one passage that we are glad to feel is well lived up to in actual practice. It reads: "The stomach of "the bar collective and individual is "revolted and scandalized at the idea "of one of its members doing any-"thing for nothing." The book is very nice reading, is most life-like to laws and lawyers and being like all of the author's works, popular, rather negatives the idea that law is dry.

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Editorial Notes.

WE are anxious to extend the usefulness of THE BARRISTER and it is our aim to report as many County and Division Court decisions as possible. But to ensure this end we look to our subscribers throughout the Province. We shall be glad to receive memoranda of cases deciding new or doubtful points and hope that this means will be taken to preserve important decisions by voluntary effort on the part of those interested in such cases.

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THE BARRISTER always feels a warm pleasure in reading its "Exchanges." They come as so many friends with cheerful greetings. Besides this, we find many of them containing scraps of news of interest to our readers. As an instance, when reading the bright pages of *Law Notes*, published in London, England, we noticed the fact recorded that Mr. A. C. F. Boulton lead the negative in a debate held at the Law Institute Chancery Lane on 26th Nov. last. It will be seen by this that Mr. Boulton—who was called to the Ontario Bar and practiced in Toronto—has since his removal to England once more identified himself with the legal profession.

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Chief Justice Snodgrass, of Tennessee, is being subjected to some very severe censure at the hands of the American press on account of his figuring in a first-class sensational episode with Attorney Beasley, a practitioner in Tennessee. The circumstances are decidedly what may be described as thrilling and would dovetail in as part of the life tale of a Jesse James with more fitness then in that of a high judicial functionary. THE BARRISTER is charitable enough to feel certain that the case is a rare exception. It seems His Lordship was indiscreet enough when off the Bench to allow himself to get into an altercation with the lawyer over what seems to have been in our estimation a very grave contempt of court by the latter. The Chief Justice aggressively attacked the learned counsel with reproaches; words were followed by blows, and before the lawyer knew it the judge had drawn a revolver and shot him twice. The condemnation and obloquy which we find our American exchanges heaping on Chief Justice Snodgrass for his forgetting his position cannot be gainsayed. The dignity of the Bench should not be too jealously guarded, and we are glad to find such a publication as *The American Lawyer* speaking out unreservedly on the point. It should be remembered that the judicial function is one of the most elevated among the executive institutions of the State and it is meet that every element

contributing to its honour and respect should be matter of public concern. We cannot refrain when recording these views — but with great deference—from referring to the fine display of good sense and dignified bearing exhibited by one of the members of The Supreme Court Bench of Ontario some time since when, having his finer feelings outraged and suffering serious inconvenience by being ejected from a railway coach on his way to Toronto because of a bungling arrangement of the Company, he abstained from taking legal proceedings entirely through a sense of the degradation of his position had he sought the aid of the courts.

SOME PLEASANT READING SELECTED FROM THE LAST NUMBERS OF OUR EXCHANGES.

The Dancing Chancellor.

WHAT was the astonishment of courtiers, of lawyers, and of citizens, when on Saturday, the 29th of April, 1587, it was announced that Queen Elizabeth had chosen for the keeper of her conscience, to preside in the Chancery and the Star Chamber and the House of Lords, and to superintend the administration of justice throughout the realm, a gay, foppish cavalier never called to the bar, and chiefly famed for his handsome person, his taste in dress, and skill in dancing—Sir Christopher Hatton! In the long reign of Elizabeth no domestic occurrence seemed as strange as this appointment; but, with the exception of her choice of Burghley for her minister, she was much influenced in the selection of persons for high employment by personal favor.

Before Sir Christopher was made Lord Chancellor he had been the Queen's Vice-Chamberlain, and one of her especial favorites, and it was said he was the only one of her troop of gallants who remained single for her sake.

While he spent much of his time in dicing and gallantry there were two amusements to which Sir Christopher particularly devoted himself, and which laid the foundation of his future fortune. The first was dancing, which he studied under the best masters; and in which he excelled beyond any man of his time. The other was the stage. He constantly frequented the theatres, which, although Shakespeare was still a boy at Stratford-on-Avon, were beginning to flourish; and he himself used to assist in writing masques, and took part in performing them. He was one of the five students of the Inner Temple who wrote a play, entitled "Tancred and Gismund," which in the year 1568 was acted by that society before the Queen.

When he became a great man, his flatterers pretended that he never meant to make the law a profession, and that he was sent to an Inn of Court merely to finish his education in the mixed society of young men of business and pleasure there to be met with; but there can be no doubt that, as a younger brother of a

poor family, it was intended that he should earn his bread by "a knowledge of good pleading in actions real and personal;" and the news of the manner in which he dedicated himself to dancing, which made his fortune, must have caused heavy hearts under the paternal roof in Northamptonshire.

Some of the courtiers at first thought that the appointment was a piece of wicked pleasantry on the part of the Queen; but when it was seen that she was serious, all joined in congratulating the new Lord Chancellor, and expressing satisfaction that her Majesty had been emancipated from the prejudice that a musty old lawyer only was fit to preside in Chancery; whereas that court being governed, not by the strict rules of law, but by natural equity, justice would be much better administered there by a gentleman of plain, good sense and knowledge of the world. Meetings of the Bar were held, and it was resolved by many serjeants and apprentices that they would not plead before the new Chancellor; but a few, who looked eagerly for advancement, dissented. The Chancellor himself was determined to brave the storm, and Elizabeth and all her ministers expressed a determination to stand by him. He was exceedingly cautious, "not venturing to wade beyond the shallow margin of equity, where he could distinctly see the bottom." He always took time to consider in cases of any difficulty; and in these he was guided by the advice of one Sir Richard Swale, described as his "servant-friend," who was a doctor of the civil law, and a clerk in the Chancery, and well skilled in all the practice and doctrines of the court.

While holding the Great Seal, Sir Christopher's greatest distinction continued to be his skill in dancing, and as often as he had an opportunity, he abandoned himself to this amusement. Attending the marriage of his nephew and heir with a judge's daughter, he was decked, according to the custom of the age, in his official robes; and it is recorded when the music struck up, he doffed them, threw them down upon the floor, and saying, "Lie there, Mr Chancellor!" danced the measures at the nuptial festivity.

At Stoke Pogis, in Buckinghamshire, he had a country house constructed in the true Elizabeth taste. Here, when he was Lord Chancellor, he several times had the honor to entertain Her Majesty, and showed that the agility and grace which had won her heart, when he was a student in the Inner Temple, remained little abated.

The Queen's admiration for him seems finally to have somewhat cooled, and all contemporary accounts agree that her neglect and cruelty had such an effect upon his spirits that he died of a broken heart. In Trinity term, 1591, it was publicly observed that he had lost his gaiety and good looks. He did not rally during the long vacation, and when Michaelmas term came round, he was confined to his bed. His sad condition being related to Elizabeth, all her former fondness for him revived, and she herself, so the story goes, hurried to his house in Ely Place with cordial broth in the hope of restoring him. But all in vain! He died on the 21st of November in the fifty-fourth year of his age.—From *The Green Bag*.

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The Trilby Craze.

We are getting sick of the Trilby craze caused by Du Maurier's charming book. The latest stroke of inventive genius was to register the word "Trilby" as a trademark for ladies' aprons, and North, J. has promptly held in *Re* Holt, that Trilby is.

not a fancy or invented word, but a word in common use, and ordered the trade mark to be expunged from the register.—*Law Student Review.*

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Longevity of Lawyers.

The patriarchal age of ninety-seven, to which Sir James Bacon had attained, will recall to recollection some well-known instances of longevity in the cases of eminent members of the Bench and Bar. Sir Edward Coke, who died in his eighty-third year, was seventy-eight when he suggested, in 1628, the famous Petition of Right, which he succeeded in carrying through the House of Commons, whose chair he had filled in 1593—five-and-thirty years previously. Again, the famous Serjeant Sir John Maynard, in 1689, who in his eighty-ninth year, was selected, notwithstanding his great age, to fill the post of First Commissioner of the Great Seal. Two references made by Sir John Maynard to his years are worthy of immortality. On one occasion, when arguing before Jeffreys, he was told by that judge that "he had grown so old as to forget his law." "Quite true, my Lord," was the reply, "I have forgotten more law than ever you knew." Again, when paying homage as leader of the Bar to William III., the King, amazed at seeing a man who had been a conspicuous member of Parliament in the reign of James I., said, "Mr. Serjeant, you must have survived all the lawyers of your standing." "Yes, sir," said the old man, "and but for your Highness I should have survived the laws, too." In the present century, two occupants of the woolsack have reached their ninetieth year. Lord Lyndhurst was born in 1772; he died in 1863. Lord Brougham was born in 1778; he died in 1863. On the Irish Bench and at the Irish Bar there have been some striking instances of longevity. The Right Hon. James Fitzgerald, who filled the post of Prince Serjeant, an office now abolished, which had the precedence of the Attorney-Generalship, was upwards of ninety at his death in 1830. Again, the Right Hon. Thomas Lefroy, who was Lord Chief Justice of Ireland from 1852 to 1866, was, on his retirement from the Bench in the latter year, ninety-one years old. He survived till 1869. Lord Norbury, an Irish Chief Justice of the Common Pleas from 1800 till 1827, died in 1831 in his ninety-second year. The first Lord Plunket, an Irish Lord Chancellor, lived to enter on his ninetieth year, and the late Right Hon. Francis Blackburne was in his eighty-sixth year when, in 1866, he was appointed for the second time to the post of Lord Chancellor of Ireland.—*Law Times.*

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Intemperate Addresses to the Jury.

A CERTAIN latitude of comment should be allowed counsel, and average intelligence should be taken for granted in the jury. We have read some judicial condemnations of the use of irrelevant and inflammatory remarks, which were sweeping enough to debar a lawyer from quoting the Bible or Shakespeare, or citing ancient history, or, indeed alluding to any possible thing outside the record for purposes of illustration.

Cases of this character should, however, impress upon counsel the duty of self-restraint. In our judgment fully as many deserved verdicts are lost as unjust verdicts stolen through intemperate cant and abuse. If such style of speech does not actually provoke an adverse verdict, it is at least apt to cause a disagreement.

Now, it is well recognized that reformers as a class are apt to be unpopular in their own generation. The future is the-

better for their lives and posterity does justice to their memory. But, even where reformers do not condemn particular individuals, but are impersonal in their assaults on existing institutions, a certain prejudice against them is apt to be engendered. They shock comfortable conservatism, and the average man has difficulty in eliminating the personal equation —of disabusing his mind of the notion that the reformer sets himself up to be as good as the ideal he advocates. When it comes to singling out and scourging individuals, the risk of unpopularity is greater. There will always be in many quarters a lurking sympathy for the under dog, no matter how justly he deserves all he gets, and a latent antagonism towards any man who assumes to act the censor and the Judge. Intemperate denunciation will often produce a reaction in favor of the subject of attack, when a calmly argumentative arraignment would have brought an audience into harmony with the speaker's sentiment as well as his opinions. These traits of our common Adamhood are overlooked by an advocate only at his client's peril. A counsel has no calling to discourse on the exceeding sinfulness of sin, or to accuse the opposite party of breaking all the Ten Commandments. A strong case can be won by soberly calling things by their right names, and we do not think that weak cases are often won by passionate and maudlin rhetoric.—*From New York Law Journal.*

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The Law and The Lady.

It seems that an express law was necessary to prevent the fair sex from attempting to plead to the Roman Courts of Law; for Ulpian in his treatise *Ad Dictum*, tells us that the praetor prohibited them from pleading the causes of others, "that they might not intermeddle in such matters, contrary to the modesty befitting their sex, nor engage in employments proper to men." An exception, however, was made in favor of women whose fathers were prevented from conducting their own suits, owing to sickness or infirmity, and who could not get anyone else to plead for them.—*The Green Bag.*

RECENT ENGLISH DECISIONS.

Note L.J.—Law Journal.
S.J.—Solicitors Journal.
T.—The Times Law Reports.
L.T.—The Law Times.

Lord and Bradbury in *re*—(30 L.J., —742; 40 S.J., 113.)—Trustee. Disclaimer.—A. devised and bequeathed his property (in England and America) to five persons as executors and trustees in trust for sale and conversion. The will was proved by B., C. and D., power being reserved to E. and F. Then F. renounced and declaimed. Then E. by deed disclaimed and renounced the offices of executor and trustee as to all property out of America. Then B., C. and D. sold some of the English realty. The purchaser objected to the title. Held that a trustee must disclaim *in toto* or not at all; that the partial disclaimer by E. was a nullity; and that B., C. and D. could not make a good title and were guilty of a breach of trust in selling without E.'s concurrence. (Lindley, Smith and Rigby, L.J.J.)

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Smith, Smith v. Thompson, in *re*—(W. N., 144; 30 L. J., 685.)—Breach of Trust. —A. and B. were trustees with power to invest "in such stocks, funds, and securi-

ties as they should think fit." They did invest £3,000 in debentures of a company on which there was a loss. A. made the investment in the *bona fide* belief it was a good one. B. received a commission of £300 from the company. Held that A. was not liable for the loss unless it could be proved he did not make the investment honestly; that as B. received a bribe, he could not be allowed to say he honestly thought fit to make the investment, and he was liable for the loss; and that, in addition to making good the loss, B. must also pay over the £300 as money received by him for the trust estate. (Kekewich, J.)

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TREGO v. Hunt—(100 L T., 158; 30 L. J., 723.)—Partnership.—If A. and B. are partners for a term under an agreement by which the goodwill is to belong to A. when the term expires, and B. during the partnership extracts from the books of the firm a list of the names and addresses of the customers with the avowed object of soliciting business from those customers for himself after the partnership expires—A. can get an injunction against B. (House of Lords, over-ruling Pearson v. Pearson, 27 Ch. D., 145, and restoring Labouchere v. Dawson (1872) L. R., 13 Eq., 322.) Note.—The practical result appears to be of the utmost importance. A trader who sells the goodwill of his business can still start in competition next door, and can by public advertisement try to allure customers; but he may not represent himself as carrying on the old business, and he may not directly solicit his old customers.

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GRAHAM v. O'Connor—(100 L. T. 159; 30 L. J., 743.)—Specific Performance.—T. contracted for valuable consideration to assign to G. 2,000 shares in a certain company. Then T. transferred these shares to F. as a voluntary gift. G. sued T. and F. for specific performance. Held that the same principles applied as if the property had been land, and that F. as a volunteer could not hold the shares against the prior equity of G. under the contract. (Kekewich, J.)

AINSWORTH, Cockroft v. Sanderson in *re*—(100 L. T., 150; 30 L.J., 725.—Administration action.—A next-of-kin or legatee cannot obtain division of the surplus of the estate of any intestate or testator in a creditor's administration action, but must bring a fresh action for the purpose. (Kekewich, J.)

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PROUT v. Cock.—(40 S. J., 114.—Mortgage. Redemption Action.—The refusal of a decree for redemption is equivalent to an immediate decree for foreclosure; and even an infant plaintiff does not have a day to show cause if his redemption action is dismissed. (North, J.)

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ELLESMERE BREWERY Co. v. Cooper.—(100 L. T., 161; 30 L. J., 744.)—Suretyship.—C. as principal and D., E., F. and G. as sureties, gave a bond to the plaintiffs by which the sureties jointly and severally guaranteed payment to plaintiffs of all moneys collected by C. as plaintiffs' traveller. The bond stated that D. and E. were only to be liable for £50 apiece, and F. and G. for £25 apiece. D., who executed the bond last, added to his signature the words "£25 only:" he did this *bona fide*, and without knowledge of any possible effect of the alteration. Plaintiffs wanted £48 on the bond, and claimed £12 each from D., E., F. and G. Held that the words added by D. to his signature were an operative part of the deed, and formed a material alteration of it; that in a bond like this the sureties shared a common burden distributed unequally; that the principal of proportional distribution must be applied here; and that D.'s material alteration of the proportional liability as understood by his co-sureties released all the sureties from liability. (Russell, L.C.J., and Cave, J.)

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LYNDE v. The Anglo-Italian Hemp Spinning Co.—(L. J., 705; W. N., 150; L.T., 111.)—In order to make a company liable for misrepresentation inducing a contract to take shares, what must be shown?—Romer, J., said that, speaking generally, the shareholder must bring his

case under one of the four following heads: (1) Where the misrepresentations are made by the directors or other the general agents of the company entitled to act and acting on its behalf; (2) where the misrepresentations are made by a special agent of the company while acting within the scope of his authority; (3) where the company can be held affected before the contract is complete with the knowledge that it is induced by misrepresentations; (4) where the contract is made on the basis of certain representations, whether the particulars of those representations were known to the company or not, and it turns out that some of those representations were material and untrue.

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TREVOR v. Hutchins.—Dec. 21, 1895.—Stirling, J.—The court will not order a fund to be paid out to an executor or administrator having the legal title to a statute-barred debt merely in order to enable him to acquire a right of retainer thereout.

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ROTH & Co. v. Tayser, Townshead & Co., and others.—Times Law Reports, p100, Vol. xii.—Dec. 12, 1895.—Damages.—Contract.—Sale of goods.—Repudiation of contract by buyers.—Damages how estimated.—This action which was brought to recover damages for breach of contract to take, delivery of a cargo of maize per the Haverstoe, was argued on Nov. 26 and judgment was given for the plaintiff. It was then agreed that the assessment of damages should be postponed, in the hope that an agreement would be come to; but that not having been done, the matter was again brought before the Judge. It appeared that after the contract the market fell, and buyers on May 28, sent by telegram an ultimatum that unless the contract be altered to suit them, they would not take delivery. After unsuccessful attempts to have the matter settled by arbitration, the plaintiffs brought action, but it was not till more than two months later that they sold the maize, though the price was falling and there seemed every indication that it would continue to do so. The result was the loss at the time of the sale was much greater than it would have been if sold promptly when the defendants had specifically repudiated the contract, and refused to accept. Held that the plaintiff must fail as to the extra loss, judgment being given for the loss that would have occurred had the sale been made promptly.

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MARA v. Browne.—Vol. xii, Times Law Reports, p 111, Dec. 17, 1895.—Moneys came into the hands of a solicitor who was acting for the husband and wife and certain proposed new trustees of a marriage settlement, and before the appointment of the new trustees and without consulting the old ones, he advanced the moneys upon mortgages which were improper securities for trust funds, and a loss resulted. The Court of Appeal held reversing the decision of North, J. (2 chy. 69), that he had not so acted as to constitute himself a trusted *de son tort* and liable to make good the losses and that in any case his partner was not liable.

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FROUTAINE-BESSON v. Parrs' Banking Co.—Vol. xii., Times Law Reports. P. 121.—The plaintiff, who is a French subject, charged that his wife had stolen something over £11,000 from him and had deposited it with the defendants. He was now prosecuting his wife for larceny and procured an injunction restraining the defendants from honouring the wife's drafts on the fund. The wife was not a party to the civil action. The order for the injunction had been made by Mr. Justice Lawrence in Chambers. The Court of Appeal now reversed the order, as it seemed the original order was inadvertently made and there seemed to be no power in the court to make such an order even if the wife had been a party to the action.

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RICHARDSON v. Garnett—Dec. 19th, 1895.—Times Law Reports, Vol. xii., P. 127.—Contract.—Evidence of.—Promise to make provision for another. The action was against the executors of Jos.

Richardson, who was in 1891, a man of means, an ex-Mayor of Newark and a widower. After July in that year, the last of his daughters having married he lived a short time alone. In August, he invited the plaintiff, his niece, to visit him and when she was there suggested that she should take the place of his daughter who last married and live with him. The plaintiff, who was earning £80 a year as governess and was in that way enabled to help to support her parents, seems to have been slow to accept her uncle's offer. Mr. Richardson thereupon, the plaintiff swore, agreed that if she would come and live with him "he would provide for her in the future." This constituted the grounds of action. Apart from that there are other circumstances. In September the plaintiff accepted the offer, terminated her engagement with her employers and then wrote what she had done to the uncle. He replied that he was glad she had taken the first steps. It was not, however, till February, 1892, that she went to live at his house, and in the meantime he had written her, in January that he would allow her £10 a month and travelling expenses. After living with him eleven months she left in consequence of some disagreement. Mr. Richardson died in 1894. The jury found in the sum of £250 damages for the plaintiff, but the tried judge ruled that there was no evidence of a contract and entered a verdict for the defendants. The plaintiff carried the matter to the Court of Appeal where it was held (Lord Esher, M.R., A. L. Smith and Rigby, L. J. J.) that there was a contract that could not be said to be too vague or unintelligible to be binding, and that the agreement of 1892 for £10 monthly was not reconsistent with the contract sued on or to be considered as in substitution; and the appeal was accordingly allowed with costs.

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METROPOLITAN BANK (LIMITED) v. Coppee.—20th Dec., 1895—Vol. xii., Times Law Reports, 129 — Guarantee — Construction—Release of principal debtor—Assent of surety. On January 1st, 1892, the defendant, Mr. Evence Coppee, and one Soldenhoff, entered into a guarantee with plaintiffs for repayment to plaintiff on demand of all moneys which should be due at any time, from Evence Coppee & Company (Limited) to the plaintiffs up to £2,000. The plaintiffs were to be allowed, without assent or knowledge of defendant or Solderoff at any time to grant to the Evence Coppee & Company (Limited) time or indulgence, and to renew bills, notes or other negotiable securities or to compound with the said firm, or any person liable with them, without working a discharge of the defendant. It seems that Evence Coppee & Co. (Limited), drew on one Rogers, and after acceptance the plaintiffs were the endorsees of the acceptance which was dishonoured. The plaintiffs sued Rodgers, and after getting Execution had it withdrawn under an arrangement with Rogers, whereby it was hoped that he would be enabled to make a partial payment to the plaintiffs. Rodgers threatened that should the execution be pressed he would go into Bankruptcy, when it seemed the plaintiffs were likely to lose all. The court leaned to the opinion that the terms of the guarantee were wide enough to hold the defendant, even if the circumstances should be considered a release of Rodgers, but in any event it was clear that at the worst, it was merely a compounding with Rodgers and the defendants were liable.

OBITUARY.

The Late Lord Blackburn.

In recording the death of Lord Blackburn, one of the most eminent jurists of the century, it was a pleasant experience for us when, looking at this early date for a suitable account of his career, to find that the first of our exchanges containing such references is an United States publication, *The Harvard Law Review*. At the present moment when the air is still

a little darkened with war-clouds, it is very agreeable to THE BARRISTER to find our American cousins cherishing the memory of an English Judge and showing that it regards the legal wealth bequeathed by His Lordship to posterity as a heritage that is common property with all English-speaking people. The following short biographical note of Lord Blackburn's life we take from the publication above named:

"The greatest English common law judge of recent years died on January 8 at his country place in Ayrshire, Scotland. He resigned his office as one of the Lords of Appeal in Ordinary in 1888, and it has been understood that his health has since been gradually failing. He was a Scotchman, born in 1 '3, educated at Eton, and at Trinity College, Cambridge, where he was eighth wrangler in 1835. In 1838 he received the degree of M.A., and in the same year was called to the bar at the Inner Temple, and joined the Northern Circuit. In 1845 he published his admirable little treatise on "The Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandise." This is almost a model text-book; it has had a great influence in shaping the law, and it forms the basis of Benjamin's book, in those parts of the subject which it covers. Lord Blackburn said of his little book in 1883, in a private letter, that it "was written when I had literally nothing else to do, as I had then no business at all. I took great pains with it, more as a means of teaching myself than with any hope of making a valuable book; but now, after considerable experience, I am pleased to find how little I should alter, if I were to write the book afresh." A second edition was published in 1885, edited by J. C. Graham. From Michaelmas, 1852, to Trinity, 1858, in the eight volumes of Ellis & Blackburn, and the one volume of Ellis, Blackburn & Ellis, Blackburn was one of the reporters to the Queen's Bench.

In speaking of his appointment to the bench in 1859, Foss says of him, in his Biographical Dictionary, with a tempered approbation which sounds oddly now: "Though with no considerable business as a counsel, he was esteemed a sound lawyer, and after twenty years' experience at the bar he was appointed a judge of the Queen's Bench in June, 1859, and received the customary knighthood."

He had never "taken silk," and it was a strange departure from precedent to appoint a man to be a judge who had not been Queen's Counsel; it created a great stir. It was Lord Campbell who did this. Campbell had become Chancellor on June 18, 1859, and as early as July 3 we find in his diary the following entry: "I have already got into great disgrace by disposing of my judicial patronage on the principle of *detur digniori*. Having occasion for a new judge to succeed Erle, made Chief Justice of the Common Pleas, I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown; whereas several Whig Queen's Counsel M.P.s were considering which of them would be the man, not dreaming that they could all be passed over. They got me well abused in the Times and other newspapers, but Lyndhurst has defended me gallantly in the House of Lords."

Campbell, a Scotchman himself, and Chief Justice of the Queen's Bench from 1850 to 1859, had had Blackburn for his reporter for six of these years, and he knew his man. The wisdom of his appointment was soon abundantly shown. Blackburn's judicial opinions rank among the very best of his time. His later pro-

motion, in 1876, to be one of the Lords of Appeal in Ordinary, was handsomely earned; and when he retired, about eight years ago, he had not his peer upon the English bench. Strong men remain there, but one hardly knows yet where to turn for that combination of sound thinking, exact and instructive discrimination, and large, rational, and just exposition by which the law of all English-speaking countries has profited for these many years."

Death of Mr. P. J. Brown.

We regret to have to chronicle the death of Mr. Peter Johnston Brown, Chief Clerk of the old Queen's Bench Division, which occurred early this month. The profession all knew Mr. Brown and daily contact with him in his official capacity inspired a high respect for his efficiency, and a personal regard that was generally followed by warm friendship, for the deceased was of a particularly genial disposition and not at all reserved in his manner. He was essentially the other extreme of the character that has "the insolence of office" about it and was always kind to everyone, particularly to students. His figure will be much missed at The Hall and his death is greatly regretted.

THE BARRISTERS' OWN WITTY COLUMN.

(NOW FIRST PUBLISHED.)

At a recent sittings of the Assize Court at Lindsay, the Crown business was being conducted by a learned counsel whose figure is a familiar one on King street, and in Goderich, and who has produced a Text book on Dower. There was a prosecution for poisoning of cattle, and our friend was examining a female witness about a barrel of brine she had made. The following colluquy ensued:

The learned counsel—"Mrs. Marshall, aw—what; aw—were the—aw—the ingredients of this brine—aw—the ingredients of this brine?

Mrs. Marshall (with a twang and much emphasis)—"There weren't any ingredients in it at all, Sir I made it of plain salt and water."

We are in possession of a good story about a Toronto barrister who wears curly black locks and a plug hat and generally presents a well groomed appearance. It was some years ago that he was addressing a jury on behalf of a prisoner. Around the lawyer's table were seated the usual number of legal lights waiting for their cases to be called. Presently, one who had been paying special attention to the address to the jury, interrupted their conversation round the table and said: "Look here you fellows—just stop a minute and hear what Joe is saying to the jury. Upon my word, he is making a splendid effort." They all stopped and listened, when one older and more experienced than the first remarked: "Yes! I always liked that speech. I always admired it ever since I first read it in 'Speeches and Orations of John Philpott Curran.'"

SITTINGS OF COURT.

Supreme Court.

THE Supreme Court of Canada holds 3 sittings annually as follows:—On the third Tuesday in February—The first Tuesday in May—The first Tuesday in October. Date of Spring Sittings 1896—Tuesday 5th May.—Last day for filing cases. — 14th April. — Last day for depositing factum.—18th April.—Last day for inscribing appeal.—20th April.

Court of Appeal.

THERE are five sittings of the court each year, at such time as the judges may from time to time appoint. The dates now fixed are the first Tuesday in March and September, and the second Tuesday in January, May and November. Date of Winter and Spring Sittings 1896.—Tuesday 14th January — Tuesday 3rd March—Tuesday 12th May.

THE SPRING SITTINGS OF THE HIGH COURT.

SINCE our last issue there have been several important changes in the dates of the Spring Sittings, and we now give the complete list with the corrections made, leaving out also sittings already held during last month.

WHERE HELD.	Jury or Non-Jury.	DATE.	JUDGE.
Barrie	Jury	Monday, April 6th	Armour, C. J.
"	Non-Jury	" February 17th	Meredith, C. J.
Belleville	Jury	" Feburary 3rd	MacMahon, J.
"	Non-Jury	" March 9th	Meredith, C. J.
Berlin	Both	" March 30th	Rose, J.
Bracebridge	Both	Tuesday, July 7th,	Ferguson, J.
Brampton	Both	Monday, May 4th	Meredith, J.
Brantford	Jury	" April 13th	Meredith, J.
"	Non-Jury	" February 17th	Rose, J.
Brockville	Jury	" February 3rd	Street, J.
"	Non-Jury	" February 24th	Rose, J.
Cayuga	Both	" March 30th	Meredith, C. J.
Chatham	Jury	" March 9th	Boyd, C.
"	Non-Jury	" February 10th	Armour, C. J.
Cobourg	Jury	" February 10th	Ferguson, J.
"	Non-Jury	" March 9th	Robertson, J.
Cornwall	Jury	" March 30th	MacMahon, J.
"	Non-Jury	" February 3rd	Falconbridge, J.
Goderich	Jury	" May 11th	Meredith, C. J.
"	Non-Jury	" March 23rd	Falconbridge, J.
Guelph	Jury	" March 18th	Armour, C. J.
"	Non-Jury	" April 20th	Meredith, J.
Hamilton	Jury	" May 11th	Street, J.
"	Non-Jury	" April 13th	MacMahon, J.
Kingston	Jury	" March 23rd	Robertson, J.
"	Non-Jury	" April 20th	Meredith, C. J.
Lindsay	Jury	Tuesday, June 16th	Street, J.
"	Non-Jury	Monday, April 20th	MacMahon, J.
London	Jury	" May 11th	Falconbridge, J.
"	Non-Jury	" February 24th	Armour, C. J.
L'Original	Both	Monday, April 20th	Robertson, J.
Milton	Both	" February 3rd	Ferguson, J.
Napanee	Both	" March 2nd	Ferguson, J.
Orangeville	Both	" March 16th	Ferguson, J.

SPRING SITTINGS—Continued.

Where Held.	Jury or Non-Jury.	Date.	Judge.
Ottawa	Jury	Monday, April 13th	Robertson, J.
"	Non-Jury	" March 9th	Rose, J.
Owen Sound	Jury	" February 10th	Meredith, J.
"	Non-Jury	" June 1st	MacMahon, J.
Parry Sound	Both	Tuesday, July 14th	Ferguson, J.
Pembroke	Both	" February 18th	Robertson, J.
Perth	Both	Monday April 6th	MacMahon, J.
Peterborough	Jury	" April 13th	Rose, J.
"	Non-Jury.	" March 2nd	Robertson, J.
Picton	Both	" April 20th	Boyd, C.
Port Arthur	Both	Tuesday, June 9th	Armour, C. J.
Rat Portage	Both	" June 16th	Armour, C. J.
Sandwich	Jury	Monday, February 3rd	Meredith. J.
"	Non-Jury	" March 23rd	Boyd, C.
Sarnia	Jury	" February 17th	Armour, C. J
"	Non-Jury.	" April 6th	Falconbridge, J.
Sault Ste. Marie	Both	Thursday, June 4th	Armour, C. J.
Simcoe	Jury	Monday, February 24th	MacMahon, J.
"	Non-Jury	" March 30th	Armour. C. J.
Stratford	Jury	" March 2nd	Meredith, C. J.
"	Non-Jury	" April 6th	Rose, J.
St. Catharines	Jury	" March 2nd	Boyd, J.
"	Non-Jury	" May 4th	Ferguson, J.
St. Thomas	Jury	" February 10th	Boyd, C.
"	Non-Jury	" March 16th	Street, J.
Toronto (Civil) 1st week	Non-Jury	" February 17th	MacMahon, J.
" " 2nd week	Non-Jury	" February 24th	Falconbridge, J.
" " 3rd week	Non-Jury	" March 2nd	Meredith, J.
" " 4th week	Non-Jury	" March 9th	Meredith, J.
" " 5th week	Non-Jury	" March 16th	Robertson, J.
" " 6th week	Non-Jury	" March 23rd	Armour, C. J.
" " 7th week	Non-Jury	" March 30th	Street, J.
" " 8th week	Non-Jury	" April 6th	Street, J.
" " 9th week	Non-Jury	" April 13th	Boyd, C.
" " 10th week	Non-Jury.	" April 27th	Robertson, J.
" " 11th week	Non-Jury	" May 4th,	Armour, C. J.
" " 1st week	Jury	" February 24th	Robertson, J.
" " 2nd week	Jury	" March 2nd	MacMahon, J.
" " 3rd week	Jury	" March 9th	Ferguson, J.
" " 4th week	Jury	" March 16th	Meredith, J.
" " 5th week	Jury	" March 23rd	Street, J.
" " 6th week	Jury	" March 30th	Falconbridge, J.
" " 7th week	Jury	" April 6th	Meredith, C. J.
" (Criminal) 1st week	Jury	" April 27th	Ferguson, J.
" " 2nd week	Jury	" May 4th	Boyd, C.
" " 3rd week	Jury	" May 11th	Robertson, J.
" " 4th week	Jury	" May 18th	Meredith, C. J.
" " 5th week	Jury	" May 25th	MacMahon, J.
Walkerton	Jury	" April 13th	Ferguson, J.
"	Non-Jury	" February 10th	Street, J.
Welland	Both	" April 27th	Boyd, C.
Whitby	Jury	" March 16th	Falconbridge, J.
"	Non-Jury	" April 27th	Street, J.
Woodstock	Jury	" April 27th	Meredith, J.
"	Non-Jury	" February 17th	Falconbridge, J.

THE NEW RULES OF PRACTICE.

By C. A. Masten.

The changes in the new rules may be divided into three branches. 1. Consolidation and centralization of the offices at Osgoode Hall. 2. Minor changes in individual rules. 3. Those embodying the procedure to be followed in carrying on appeals to the Divisional Courts and to the Court of Appeal under the Judicature Act of 1895.

The establishment of a central office at Osgoode Hall ought, and probably will, conduce to the effective and speedy disposition of business, both by officers and the profession. For example—Heretofore one was never sure whether papers from the county had arrived at Osgoode Hall until the office of each registrar, the clerk in chambers and of the accountant had been searched. The establishment of the central offices avoids this and many other similar difficulties.

The systematizing of the business ought also eventually to result in a lessening of the number of clerks necessary and consequently a reduction of this branch of public expenditure.

With the details of these rules relating to the powers and duties of the several officers, the general body of the profession have little concern and the rules will not require any careful examination by them. To appreciate this, any member of the profession will only have to turn to the old body of Consolidated Rules, observe how many of them are devoted to the definition of the duties of ministerial officers, such as the accountant and local registrars, and then think whether he has ever in his practice had occasion to consider the scope or object of these rules. Their interpretation and practical working may safely be left to the consideration of the officers to whose duties they relate.

2. The minor amendments relating to individual rules can only be appreciated by viewing them in *juxtaposition* with the various scattered rules amended by them. The more important of these changes have already been brought to the attention of the profession by my learned friend Mr. Blake in a late article in the Law Journal.

3. The rules which will require most careful consideration by the general profession are those numbered 1484 to 1492, inclusive, being the rules which relate to the practice on appeals to the Divisional Court and to the Court of Appeal and rule 1509 relating to the conduct of pending appeals.

It is to be observed in the first instance, that rules 803 to 827 which lay down the procedure formerly governing appeals to the Court of Appeal are abolished without exception or qualification. So that it may be questioned whether, in respect to any appeal to the Court of Appeal now pending, the old procedure can possibly apply. This question arises upon appeals which have been instituted and partially proceeded with, under the old practice. If security has been given, but the appeal book has not yet been printed, is the appellant bound to print, or may he adopt the new practice? If notice of appeal has been given, but security has not been perfected, is the respondent entitled to security, or do the new rules deprive him of that right? The absence of any regulation upon this point is one of the omissions, shewing the excessive speed with which the new procedure was brought into force.

A number of these cases have been dealt with, on special application to the Court of Appeal, but no reasons of decision have been given, beyond saying that the court founds its orders not so much on the provisions of the rules themselves as on the provisions of S. S. 42 and 43, Sec. 8, of the Interpretation Act, R. S.O., Cap. 1.

Taking up now the principal steps in an appeal to the Court of Appeal.

The notice is no longer a simple notice of intention to appeal, but having regard to rule 804, must be by notice of motion returnable on the first day of the sittings of the Court, commencing after the expiration of one month after the judgment has been signed; and this notice of motion must set out the grounds on which it is based. This setting out of grounds appears to be a work of supererogation when it is remembered that the reasons of appeal are to be served with the notice.

This notice of motion must, according to the rule, be served at latest within 30 days after the judgment complained of, but another provision requiring that the appeal be brought on at the first sitting of court, commencing after the expiration of one month, after the enter of the judgment complained of, coupled with the provision that the notice must be a seven clear days notice, may render it necessary to serve the notice of motion as early as twenty-two days after the judgment complained of.

Rule 803 dispenses with the security formerly required to be given, unless such security be specially ordered by the court to which the appeal is made or a judge thereof. Under the corresponding English rule poverty or insolvency is a ground for granting such security, and it is probable that our courts will follow the English practice by granting such security on special application. They have already ordered security to be given in one case in the sum of $200

As the appeal is a step in the cause whatever is a ground for ordering security in the court below would appear also to be a ground for ordering further security upon the appeal, if that already given has been exhausted.

Rule 818 does not in terms provide for the filing of four copies of the evidence, but the practice adopted has been to file four copies of the evidence, as well as the other documents specially mentioned in rule 818. The reasons of appeal should not be filed separately; and the more convenient practice is to bring in all the documents, including the reasons of appeal, bound together. If the reasons against appeal can be obtained from the respondent in time, it will add to the convenience of the court and counsel to bind them all together.

The rules do not appear to require a copy of the appeal book to be served on the respondent, though such a practice would be a material assistance to respondent's counsel, and as it would not add largely to the expenses, might well have been prescribed.

There does not appear to be any provision in the new rules as to the settlement of the appeal case where the parties differ, but the court will, no doubt, have inherent jurisdiction to deal with that question, when it may arise.

The rules relating to appeals to the Divisional Court do not differ substantially from the present practice, and do not appear to call for any special reference, though it may be noted that appeals are to be set down before the motion is returnable; in the case of motions against judgments, two clear days before the first day of the sittings at which it is to be

heard, and in the case of other motions, the day before the day on which the motion is returnable. The practice so far adopted has been to serve notices of appeal to the Divisional Court, returnable on any day on which the court sits, that is any day except Saturday or Sunday. Having regard to the fact that the statute directs that the Divisional Court should sit monthly and the rules prescribe that sittings of Divisional Courts shall commence on Monday of each week, there may be some question as to the propriety of this practice.

THE LANDLORD'S RIGHT TO DISTRAIN SINCE 58 VIC. CHAP. 26, SEC. 4.

By Allan S. Macdonell.

The law of landlord and tenant in Ontario has during the last nine months received a severe shock and is only now beginning to recover to a state of security. At a moment when we have had a movement spreading through the agricultural districts looking to the increasing by farmers of their number in the Legislature and the decreasing of the number of lawyer representatives we have had a startling example of the kind of legislation the unprofessional are capable of bringing about. We are seeing practical demonstration of the adage that "a little knowledge is a very dangerous thing." Regarding this piece of legislation, no one seems to know of any important object that was in view when it was passed. It seems to be clear however that there is no exception to the general disfavor with which it is viewed. Even those who found it convenient to shield themselves behind its provisions would not pretend that their plea was meritorious. The position taken is one of insistence upon the strict letter of an enactment that could not have been intended to have the revolutionizing effects that it seemed this statute would at least very nearly accomplish. The Legislature seems to have been handling edged tools; and if no serious accidents have happened it is certainly due to good luck rather than skill in handling the instrument. The relation of landlord and tenant with its various incidents carries us back to the oldest times and in its composition is the result of a combination of ancient customs resolved into the common law and of statutes and decisions of the courts. From old feudal customs, from statutes like that passed in 18 Ed. 1, known as *Quia Emptories* and from decisions like our recent case of *Argles v. McMath*, the law on this subject has gradually been formed into a harmonious entity which, while capable of alterations to suit the times had at least been settled and defined to such an extent that the community could rest in security and without anxiety under its operation. It was under these circumstances that the enactment now treated

of was passed. There would be less complaint in the premises did the measure possess the virtue of being for the benefit particularly of any class or object. Were it designed to give the poor man more exemptions or to facilitate the landlord to get rid of bad tenants or otherwise to improve or alter the details of the law it would naturally enlist the support of the interests promoted, but the nature of the enactment is very different. It goes to the bottom of the law and digs up the roots that have the sanction of centuries of growth. The spade was worked deep down and for a moment it seemed as though the right of distress by a landlord was a thing of the past. The landlord who had allowed a tenant in his house might get paid but he would now have to get his money the same way as the butcher or the baker; and an endless variety of interests would be disturbed. The matter however, soon found its way into the courts, and happily it looks as if the seemingly violent effects of the statute will be averted. The objectionable enactment reads as follows:

"The relation of landlord and tenant shall be deemed to be founded in the express or implied contract of the parties and not upon tenure or service, and a reversion shall not be necessary to such relation which shall be deemed to subsist in all cases where there shall be an agreement to hold land from or under another in consideration of any rent. And nothing in this Act shall affect any pending litigation."

As before stated it is difficult to ascertain what object the framer of this section had in view but it is safe to say that it was not intended to do away with the right of distress. And it may not be too hazardous to venture the opinion that the intention was to extend the right of distress to cases where the right might be considered doubtful. But it is very evident from a research into the matter that it was a case of playing with edged tools. There can be no doubt of the source from which the inspiration came. The clause in question is too peculiar for any mistaking as to its origin and its antecedents. It is taken in its entirety from the Imperial Act 23 and 24 Vic. chap. 184, sec. 3 (1860), which introduced it and various other laws on the subject into Ireland. But the person who introduced this Act into Ontario seems to have formed a hasty affection for it without taking the precaution of seeing how it had fared in Ireland. In that country it received on all hands the most emphatic disapprobation; and after being turned inside out by the bench, its supporters were glad to amend it repeatedly till it had lost its distinguishing features beyond recognition. However that may be, we find it now on our statute books and it is certainly capable of some very serious interpretations. Our landlord and tenant law is as ancient as

"The days of old
When Knights were bold
And Barons held their sway."

The retainers held lands of their lord and were to render in return various benefits to the lords, often amounting to an oath of fealty or personal services. In case of default by the tenant the lord was allowed instead of compelling the tenant to forfeit his holding, to take and hold possession of the tenant's goods. Originally the right was confined to holding the goods as a security; but his right of sale was of later date. In early times the lords were finding alienation of land becoming very frequent and the transferee of the land not being personally bound to perform the services, their position was altered for the worse. Moreover the original holder having disappear-

ed there was also loss to the lord in the way of wardships and marriages. The lords then procured the passage of the Act *Quia Emptores*. The terms of this enactment (18 Ed. 1 chap. 18) read as follows:

"That from henceforth it shall be lawful to every free man to sell at his own pleasure his lands and tenements or parts of them so that the feoffee shall hold the same lands or tenements of the chief lord of the same fee by such service and custom as his feoffer held before."

By this means the practice of subinfeudation was stopped. There was nothing to prevent land being enfeoffed and sold, but the enfeoffee held not of his enfeoffer but of the original lord who was the party having the reversion, and the chief lord only could distrain for arrears of services or as they came to be called rent services. That is the chief lord or the person who had the reversion was the only person who could compel the services and make a distress as the enfeoffee was bound to hold of the chief lord. From being the result of the Act *Quia Emptores* the requirement that the landlord should have the reversion in him became the *sine qua non* of the relation of landlord and tenant. The effect of the requirement amounted to this, that there was no right of distress where rent was stipulated for, on an enfeoffment in fee or a lease for life with a remainder in fee. That was known as rent seck and a special provision was necessary to make a distress allowable.

Now to turn to the section of law under review, its provision is that in future the relation shall be deemed to be founded on contract and not on tenure and a reversion shall not be necessary. From this the opinion seems to have prevailed that the effect was to take away the right of distress and even the bench were known in some quarters to hold to that view. But the point is in a fair way to be settled the other way.

In the case of *Harpelle v. Carroll* tried at Kingston about the end of last year, before Chief Justice Meredith, His Lordship has just handed out an elaborate and scholarly judgment, in which he decides first, that the Act is not retrospective, and second, that the Act can be construed as still leaving the landlords' right of distress undisturbed. Having had the privilege of reading the proof sheets of this judgment, which will be reported in the Ontario Reports, I have the advantage, of being able to use some of the very learned arguments therein contained. The chief thing to be remembered is that the Act does not abolish the relation of landlord and tenant. Neither does it pretend to say that where there actually is a reversion in the landlord that that state of affairs shall cease to exist—that hereafter there will not be a reversion True, it says that the relation "*shall be deemed* to be founded in contract and not in tenure," but it does not attempt—for that would of course be preposterous—to declare that where tenure exists and where a reversion exists that such shall cease to exist. Therefore it is obvious that where there was a tenure and a reversion these continue in the face of the Act, to exist and consequently with them the incidental right of distress. Viewing it in this way, that the Act does not, and no matter how worded cannot alter the existing physical conditions, it seems the only cases that the Act can effect are those where the relationship of landlord and tenant, with tenure and a reversion does not exist; and in this sense, as the learned Chief Justice says in his judgment, it looks as though the right to distress is widened and extended by the Act. What it seems was

meant and what can be argued with some show of reason to be the proper interpretation to be given to it is that the reversion and tenure are not to be a *sine qua non*; that they may be present in some cases and that though they will continue in many cases to be present in the relationship between two contracting parties, still they never shall be indispensible conditions, and moreover, whether these conditions are present or not, the relationship of landlord and tenant shall exist with the incidental right of distress and all other incidentals in agreements whereby one holds land from or under another; but in all cases the foundation shall be regarded to arise out of the fact that a contract has been made under which one holds lands from or under another. In the judgment referred to, it is also decided that in any event though the right of distress were taken away still at the worst, it could be regarded as rent seck and since 4 Geo. II, chap. 28, sec. 5, gave a right of distress in rent seck that the landlord in Ontario is still secure.

THE ONTARIO LAW COURTS.

Recent Cases not Previously Reported.

DICKINSON v. Burk.—9th January, 1896.—Municipal Council—Diversion of funds to wrong purpose—Liability of councillor voting for same. E. T. English, for plaintiff, appealed from order of local Judge at Port Arthur, staying forever an action brought by a ratepayer of the town of Port Arthur, on behalf of himself and all other ratepayers, to compel a Town Councillor to refund to the municipality certain moneys diverted by the Council from the sinking fund, and applied to other purposes, the defendant having voted for such diversion. Aylesworth, Q.C., for defendant Burk, and D. W. Saunders, for defendants Town of Port Arthur, opposed appeal. The court, without expressing any opinion on the merits, held that the case was a proper one to be tried. It did not appear that there was any abuse of the process of the court, nor could the action be said to be frivolous. The law under which action is brought is new and uncertain. The court also thought that the plaintiff was not an informer within rule 1,244. Appeal allowed with costs to plaintiff in any event.

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PAVEY v. Davidson—13th January, 1896—Demurrer—Fraudulent conveyance—Private international law—In the Court of Appeal. Judgment on appeal by plaintiffs from judgment of Armour, C.J., in favor of defendants upon a demurrer to the statement of claim in an action brought by plaintiffs, on behalf of themselves and all other creditors of defendant E. L. Davidson, to set aside a conveyance by that defendant to his father, defendant A. Davidson, and a mortgage by the father to defendant A. Purdon of lands in the State of Oregon, as fraudulent and void. The Judge below held that the determination of the question raised must be according to the law of Oregon and must be determined there. Appeal allowed with costs and demurrer overruled with costs, Osler, J.A., dissenting, and Hagarty, C.J.O., hesitating. Gibbons, Q.C., for appellants. T. H. Purdon (London) for defendant Purdon. F. Love (London) for defendant Davidson.

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Re BREWERS and Distillers Licenses.—13th January, 1895.—The validity of Ontario Liquor License Law. Judgment upon questions referred by the Lieutenant-Governor of Ontario in Council to this court for hearing and consideration, pursuant to 53 Vic., ch. 13, an act for expediting the decision of constitutional and other Provincial questions. The ques-

tions were the following: (1) Is sub-sec. 2 of sec. 51 of the liquor license act, R.S. O., ch. 194, requiring every brewer, distiller or other person duly licensed by the Government of Canada, as mentioned in sub-sec. 1, to first obtain a license under the act to sell by wholesale the liquor manufactured by him, when sold for consumption within the Province, a valid enactment? (2) Has the Legislature of Ontario power, either in order to raise a revenue for Provincial purposes, or for any other object within Provincial jurisdiction, to require brewers, distillers and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented, spirituous, or other liquors, to take out licenses to sell the liquors manufactured by them, and to pay a license fee therefor? (3) If so, must one and the same fee be exacted from all such brewers, distillers and persons? The court answered the first and second questions in the affirmative, and the third in the negative, following the previous decision in Regina v. Halliday, 21 A. R., 42. J. R. Cartwright, Q.C., and J. J. Maclaren, Q.C., for the Attorney-General for Ontario. S. H. Blake, Q.C., for the Brewers' and Distillers' Association.

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TRUST & Loan Co., v. McKenzie.—14th January, 1896. — Mortgage — Equity of Redemption—Extension of time of payment with increased interest — Release of mortgagor. Appeal by plaintiffs from judgment of Robertson, J. The defendant after making a mortgage sold his equity of redemption. When the mortgage became due the mortgagee entered into an agreement with the owner of the equity extending the time for payment of principal and increasing the rate of interest without the consent of the defendant mortgagor, but reserving all rights against him. Robertson, J., followed Bristol & West, of England, v. McKenzie, 24 O.R., 286, and found that defendant was released. The court now distinguished that case and held that this case is one of indemnity not suretyship, and therefore defendant mortgagor is not released, and allowed the appeal with costs. Marsh, Q.C., for plaintiffs (appellants.) J. N. Fish (Orangeville) for defendant.

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MANLEY v. London Loan Co.—14th January, 1896.—Mortgage blending payment of payment of principal and interest together—Rights of purchaser of Equity of Redemption. The question raised in this case was whether under the circumstances a mortgage made by one Martin to a loan company upon the well known plan of blending payments of principal and interest made repayable in instalments and assigned to defendants is good in their hands for its face value against the plaintiff, a purchaser from Martin. The plaintiff seeks to redeem, and says he should be required to pay only the amount actually advanced to Martin. Meredith, J., found against plaintiff, who appealed and Boyd, C., and Robertson, J., reversed the trial judgment. The defendants then appealed to the Court of Appeal and their appeal is now dismissed with costs. Gibbons, Q.C., for defendants. W. H. Blake for plaintiff.

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WIMOTT v. McFarlane.—23rd January, 1896.—Rule 271—Jurisdiction—Motion to strike out defence. In this case the Divisional Court dismissed with costs the plaintiff's appeal from the order of the Master in Chambers dismissing plaintiff's motion to strike out defence of defendant Wilson. The court held that where relief is sought as to priority upon assets in the hands of the defendants in the Province of Quebec, the question as to jurisdiction of an Ontario court is properly raised, after appearance by statement of defence, and such cases are not within Rule 271, and moving to set aside service of process is not the proper course. A. C. McMaster for plaintiff, W. M. Douglas for defendant Wilson.

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Re HODGINS and City of Toronto.—13th January, 1896.—The Municipal Act, 1892. —Sidewalks—Notice—Sec. 623 (*b*) Notice by newspaper. Judgment on appeal by the corporation of the City of Toronto from order and decision of Street, J., (26

O. R. 480), quashing certain points of by-law No. 3,239 of the city, passed April 9, 1894, and holding that persons who will be affected by proceedings under section 623 (*b*) of the municipal act, 1892, for the construction of sidewalks, are entitled to actual notice thereof, and to be permitted to show, if they can, that the proposed sidewalk is not desirable in the public interest; and where such notice has been given by advertisement in a newspaper, which has not come to the attention of the applicant, it is just as if no notice had been given. Appeal dismissed with costs, for the reasons given above and other reasons. Fullerton, Q.C., and Caswell for appellants. F. E. Hodgins for respondent.

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PARKER v. McIlwain.—13th January, 1896.—Rule 526 — "Parties"—Attaching. Order of rent due on mortgaged premises. Judgment on appeal by the Scottish-American Investment Co., from order of Common Pleas Divisional Court (16 P. R. 555), setting aside order of Robertson, J., affirming order of Master in Chambers, rescinding certain orders attaching rents as debts, in so far as the tenants of the houses mortgaged to the applicants were concerned, and holding that the appellants were not "parties affected" by the attaching orders, within the meaning of rule 536. The appellants are claimants of the rents attached by virtue of a mortgage to them from the judgment debtor, and by reason of a notice given by them to the garnishees, the tenants, to pay rent to them. Appeal allowed with costs, and orders of Judge and Master in Chambers restored with costs. Held, that the appellants were "parties" within the meaning of rule 536, and that rule applied, and even without it a motion to set aside the attaching orders could be entertained; and (2) that, upon the facts. these orders were properly set aside, as there was nothing to attach, and the tenants had attorned to the appellants. W. Cassels, Q.C., and W. H. Lockhart Gordon for appellants. Aylesworth, Q.C., and J. E. Cook for plaintiff.

WARD v. Davis.—31st January, 1896.—New trial—Misdirection by Judge to Jury—Intemperate language. W. Douglas, Q.C., for plaintiff, appealed from order of Judge of the County Court of Kent, in term, dismissing motion by plaintiff to set aside the findings of jury and verdict for defendant in action to recover $200, the value of certain wheat, rye, straw and lumber, upon the farm sold by plaintiff to defendant. The plaintiff alleged that after agreement to sell the land was made defendant obtained possession and converted the above goods contrary to agreement. The trial Judge's charge to the jury was objected to. He said: "You have heard the whole story, and I can only say that a case so utterly lacking in the elements of honesty has never been tried before me." M. Wilson, Q.C., for defendant, opposed appeal. Appeal allowed with costs and new trial directed without costs.

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REGINA v. Grant.—31st January, 1896.—Jury notice—Striking out—Action against sureties—Sub-collector of Customs. In this case the defendant appealed from order of Robertson, J., striking out jury notice in action upon a bond against defendant and two of his sureties for a shortage in his accounts as sub-collector of customs at Barrie. The particulars of the claim against defendant Grant consist of over 100 items of shortage in sums of from $1 to $1.50, and each item is a matter arising by itself, and requires special proof. The particulars furnished cover 31 pages of type-written matter. The court held that they could not do away with a jury in Crown cases. The jury has always stood between the Crown and the people. That is a reason why the grand jury exists to-day, and it would, in many cases, do injustice to deprive a party on a chamber motion of his right to a jury. Appeal allowed with costs without prejudice to a motion to trial judge to dispense with jury. F. E. Hodgins for plaintiff. Creswicke (Barrie) for defendants (appellants).

KOHLES v. Costello.—31st January, 1896.—Injunction—Jurisdiction of local Judge—Rules 1,419 (a) and 1,419 (b). D. Armour, for defendants, appealed from an order of local Judge at Guelph granting an injunction till the trial restraining defendant from trespassing upon certain lands, upon the grounds that the affidavit of the plaintiff did not show a sufficient case, and that the local Judge had no jurisdiction without consent of the parties to grant an injunction for more than eight days. W. H. Kingston, Q.C., for plaintiff, contra. Appeal allowed with costs here and below, the court holding that the local Judge was not given jurisdiction in a case of this kind by rule 1,419 (c), the solicitors for both parties residing in this country; but was confined in the case of injunctions to the jurisdiction given by rule 1,419 (a).

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BROUILLET v. Towse.—4th February, 1896.—Venue—The Judicature Act, 1895—Section 115. D Armour, for plaintiffs, appealed from order of Master in Chambers changing venue from Cornwall to Toronto. The action is for the price of goods sold and delivered. The plaintiff lives in Montreal, and the defendants lives in Toronto. Appeal allowed, the court holding that the case was not within section 115 of the judicature act, 1895. Costs in cause to plaintiff in any event.

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SMITH v. LOGAN.

23rd January, 1896.—Tender of appearance while registrar in act of signing judgment—Notice of appearance—Rules 281 and 739. Aylesworth, Q.C., for plaintiffs, appealed from two orders of senior local Judge at London directing that judgments signed for default of appearance be set aside, and dismissing plaintiffs' application for summary judgment under rule 739. Appellants contended that their default judgment was regularly signed, and defendant Wilson had disclosed no defence on the merits, but if judgment was not regularly signed and appearance was regularly entered, no defence being shown, plaintiffs were entitled to judgment under rule 739. Defendant Logan did not appear at all, but the order in appeal directed that the whole judgment should be set aside. It appeared that defendant Wilson's appearance was brought in while judgment was being entered, after it had been signed by the clerk, but before it was stamped. W. H. Blake for defendant Wilson, contra. Armour, C.J., was of opinion that the judgment was regular because the clerk, being engaged in signing the judgment when the defendant's solicitor came in with the appearance, was not obliged to give up the business of which he was seized in order to receive the appearance; that would be a reversing of the maxim, "*vigilantibus non dormientibus lex subvenit.*" Falconbridge, J., agreed with the Chief Justice, and was also of opinion that the appearance, after the proper time, was, without a notice of appearance, a mere nullity, and plaintiffs were not obliged to wait all day to see if a notice of appearance should be served. Street, J., dissented, saying that the affidavits showed that the judgment had not been entered when the defendant's solicitor tendered the appearance; that the officer's duty was to receive it when tendered, the nature of it having been made known to him, and after such tender he had no right to proceed with the entry of judgment; also that plaintiffs could not proceed to enter judgment until the time for serving notices of appearance had expired; also that summary judgment could not have been given, having regard to the affidavits filed, and therefore the judgment should be set aside. The order of the court is that the appeal be allowed with costs and the order setting aside the judgment rescinded with costs, and that the judgment and process issued thereupon be restored. But the defendant Wilson to be allowed in to defend upon terms similar to those in Merchants' Bank v. Scott, 16 P R., and the costs upon this branch are to be costs in the cause.

[Note—On going to press we have been informed that this case is being appealed. —ED. THE BARRISTER.]

REGINA v. ROSE.

25th January, 1896.—*Habeas Corpus* Impersonation at Municipal Elections, 55 Vic., Chap. 42—Sec. 167. Judgment on motion by defendant for his discharge from custody, upon *habeas corpus*. The defendant was convicted by the Police Magistrate for the City of Toronto upon a plea of guilty of an offence under sec. 167 of the consolidated municipal act, 55 Vic., ch. 42, the offence being charged as applying for a ballot paper in the name of another person, at a municipal election; and was sentenced to one month's imprisonment with hard labor. The question was raised whether the conviction was legal and valid in view of the subsequent provision as to the same offence, in sec. 210 of the same act, which provides (sub.-sec. 2) that every person who applies for a ballot paper in the name of some other person shall be deemed to have committed the offence of personation, and shall incur a penalty of $200, and in default of payment of the penalty and costs the offender shall be imprisoned for a period of sixty days, unless the penalty and costs be sooner paid. This provision is of more recent origin than sec. 167, and the variation is noticeable, the earlier section (sub-sec. 3) rendering the offender liable to imprisonment for a term not exceeding six months with or without labor. Held, that these provisions cannot be read together or reconciled as cumulative punishments for the same offence, nor can they be left to stand as alternative punishments for the one offence at the option of the Magistrate; the very essence of criminal law is that it should be certain in its sanctions so plainly expressed as to be intelligible to the sense of ordinary people; and the law, which is later in date as well as later in position in the statute book, must, in cases of inconsistency or repugnancy, prevail against the earlier in time and place. See Robinson v. Emerson, 4 H. & C., 352, Attorney-General v. Lockwood, 9 M & W., at p. 391, Parry v. Croydon Co., 11 C.B.N.S., 579, 15 C.B. N.S., 568; Mitchell v. Brown, 1 E. & E. 275. Order made for discharge of defendant from illegal custody with the usual protection. Murphy, Q.C., for defendant. J. R. Cartwright, Q.C., for the Attorney-General.

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REGINA v. COHEN.

Bail—Rule nisi—Neglect to arraign prisoner at "next" Court—Release of surety. George Lindsey, for sureties on bail bond of Henry Cohen, moved absolute a rule nisi to quash the order estreat the bail, the estreat roll, the writ of capias and fieri facias, etc. Cohen was arraigned before the police magistrate for the City of Toronto and committed for trial, and bail taken for his appearance before the grand jury at the next court of competent jurisdiction. He was not arraigned at the next court, but at the next but one, at which he failed to appear, and his bail was estreated. The sureties contended that this was without jurisdiction, and, therefore, the proceedings should be quashed. J. R. Cartwright, Q. C., for the Crown, showed cause. Rule absolute quashing proceedings with costs upon the ground mentioned.

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Re THOMPSON.

Garnishment—Res judicata—Creditor's Relief Act, sec. 37—Attaching order—Priority. Before Boyd, C., Rose, J., and Robertson, J. 16th January, 1896. Judgment on appeal by J. W. Lang & Co., attaching creditors of fund in question, from order of Meredith, J., directing the fund in court to be paid out to the sheriff of the County of Elgin under creditor's relief act. Held, that by the result of the proceedings and judgment in the Division Court, the question of the title to the fund is res judicata. That court having found the attaching creditors entitled as against the assignee for the benefit of creditors there is no debt or fund of the debtors in the County of Elgin. Sec. 37 of the creditors' relief act must be construed to refer only to a case where facts would entitle sheriff, if there had been no attaching order issued by a creditor, to obtain an attaching order at his own instance

under sub-sec. 1, and to entitle him to such there must be execution in his hands, and not sufficient lands or goods to satisfy them, and a debt by a person resident in the sheriff's county. Appeal allowed and order made for payment out of court to primary creditors of a sum sufficient to pay their claim and costs including the costs of this appeal and the motion below; the balance, if any, to be paid to the assignee for the benefit of creditors. If such sum is not sufficient to pay the claim of the primary creditors and their costs, the sheriff and the assignee are to pay any costs not thus satisfied. W. H. Riddell and F. J. Travers for appellants. Rowell for sheriff. W. H. Blake for assignee.

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ABRAHAM v. HACKING.

WIFE endorsing husbands notes—Separate estate — Engagement ring, watch and clothing. In this case the Divisional Court dismissed the plaintiff's appeal from the judgment of Robertson, J., in favor of the defendant Annie Hacking. In a weak moment she endorsed $420 worth of notes for her husband. The only separate estate the plaintiff proved she had consisted of an engagement ring and watch and chain and clothing, and the court held, having regard to the amount of the plaintiff's claim, that the defendant cannot be said to have contracted with regard to her separate estate when she endorsed the notes.

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FAULKNER v. CLIFFORD.

NEGLIGENCE—Injury to workman — "*Volenti non fit injuria*" Before Street, J.—Judgment upon the motion by defendant for non-suit and motion by plaintiff for judgment upon the findings of the jury in an action for negligence tried at Hamilton. The jury found that defendants were guilty of negligence causing the accident to plaintiff, and assessed damages at $1,500, but stated that they were unable to answer the question left to them as to whether the deceased voluntarily assumed the risk. Held, that the mere fact that the deceased proceeded with his work after being informed of the danger did not necessarily imply an agreement to take the risks of it. It is a question for the jury whether the workman, in continuing his work, does so because he is willing to incur the risks of it, or whether he does so from some other motive. Motion for non-suit dismissed. Motion for judgment for plaintiff also dismissed, because of the failure of the jury to answer the question above mentioned. See Stevens v. Grout, 16 P. R. 210; McDermott v. Grout, ib. 215.

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LONGBOTTOM v. CITY OF TORONTO.

23rd January, 1896.—Defective sidewalk—Notice under 57, Vic. Ch. 50 Sec. 13.—Effect of rule 402. Before Boyd C., judgment in action tried with a jury at Toronto. Action by Jane Longbottom a widow, a widow residing at 32 Richmond Street East, in the City of Toronto, for damages for injuries sustained by her owing to a fall, caused, as alleged, by a hole in the sidewalk near her home which broke her right wrist. The jury found a verdict for plaintiff for $500 damages. Held, that the notice of action required by 57 Vic., ch. 50. sec. 13, in cases of injury from defective sidewalks is to inform the corporation before action of the nature of the accident and the cause of it, and thus to give the municipal authorities an opportunity of investigating the matter in all its bearings with a view of settling or contesting the claim. Having regard to rule 402, it is the proper practice of the defendant to set up want of notice in case the statement of claim is silent on the point. In this case no preliminary objection was raised to the statement of claim as being insufficient, and no observation was made as to want of notice till the close of the evidence. No evidence was offered by defendants, and the learned Chancellor is not able to say that they were prejudiced by the want of notice of injury within 30 days after the accident. The accident was in January, 1895, and notice was given two months

afterwards, ten days before the action. In April the sidewalk was repaired by defendants. On the whole, the Chancellor is unwilling to turn the plaintiff round on this point, taken at the very close of the contest, when the jury have affirmed her claim to be meritorious. Judgment with costs for plaintiff for $500.

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ARMOUR v. MERCHANTS BANK.

Opening up judgment New evidence —Rule 782. Before Boyd, C. Judgment. Preliminary objection raised as to jurisdiction on motion by plaintiff to open up judgment of Boyd, C., pronounced in April, 1895, on the ground of newly-discovered evidence. The learned Chancellor holds that the application is properly made in court to the judge who pronounced the judgment, and is a proceeding in the cause; Waterhouse v. Lee, 10 Gr. 183. This case is provided for by rule 782, and the same as a bill of review under the old practice. See Dumble v. Cobourg, 29 Gr. 121. Petition to be brought on at first weekly court held by Chancellor. F. W. Anglin for plaintiff. Shepley, Q.C., for defendants.

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THE COMING ELECTION OF BENCHERS.

A number of lawyers think that the big firms in the city monopolize the local representation on the Benchers of the Law Society. A meeting was held in Richmond Hall on Saturday evening and a committee appointed to look into the matter and report to a meeting to be held on Monday evening, the 17th, in Convocation Hall. They propose to make an effort to have only one bencher from a firm. It is also proposed to reduce the term of office from five to two years and to do away with the bencher's free luncheons during a certain period of the year. —*Toronto Globe*, 10th February.