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The BARRISTER

A. C. MACDONELL, D.C.L., Editor.

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The Barrister.

VOL. II. TORONTO, SEPTEMBER, 1896. No. 9

EDITORIAL.

The Canadian Bar Association.

A Bar Association is at last an accomplished fact. On the 15th and 16th September the first meeting was held at Montreal, and a constitution was adopted with the following objects: To advance the science of jurisprudence and international law, to promote the administration of justice, to secure proper legislation, to uphold the honour and dignity of the profession of the law, and to encourage cordial intercourse among the members of the profession in Canada. The following officers were then elected: Hon. President, Sir Oliver Mowat; president, Mr. J. E. Robidoux, Batonnie-General of Quebec; vice-presidents, Messrs. T. C. Casgrain (Quebec), O. A. Howland (Toronto), C. S. Hanington (Nova Scotia), Wm. Pugsley (New Brunswick), F. Peters (Prince Edward Island), A. Morrison (British Columbia), J. S. Ewart (Manitoba), Mr. Haultain (North-West Territories); treasurer, Mr. C. B. Carter, Montreal; secretary, Mr. J. T. Bulmer, Halifax; Executive Council, Messrs. F. Z. Beique, D'Alton McCarthy, Sir Charles Hibbert Tupper, F. Langlier, John A. Gemmill, L. H. Davies, G. F. Gregory, D. McNeill.

The association was treated to an admirable address by Sir Antoine Lacoste, Chief Justice of Quebec. That the attendance from Ontario was small was due only to the busy season of the year, and perhaps the fact that the meeting was held rather hastily and without a long notice. However small the beginning, there is now a nucleus, and we think success is yet in store for the association.

* * *

Unprofessional Conduct.

Though there is much of a trifling and rubbishy character that is often incident to an elevated standard of professional etiquette, there is nevertheless every necessity that a high standard be permanently maintained. All over the world

to-day the interest of the legal profession is for a relentless and aggressive crushing out of those who bring disgrace and distrust for their calling. There cannot be such a thing as giving another trial. The good reputation of the whole Bar being at stake, consideration for the individual would be a wrong to the whole body. The Bar cannot continue to have as one of its members a detected culprit. In our country we have but little ungowning, and that has been generally for using clients' money. What are often of equal importance, however, are the dishonourable and ungentlemanly acts, which unfortunately obtain to some extent everywhere; but which are not generally regarded as serious enough to provoke investigation by the governing authorities. Now and again, however, an example is made of some of the more grievous offenders, and no doubt such prosecutions have a good effect on many with unprofessional tendencies. From the distant colony of Australia comes the account of a peculiar case, where the question of unprofessional conduct in its purest form has arisen. The junior member of a law firm defended a gentleman accused of attempting to kill his wife by slow poison. A conviction resulted, and as there were some grave doubts generally prevailing as to the prisoner's guilt, the senior member of the firm, who was a member of the Local Legislature, proposed to bring the case before that body. His partner gave him to understand that there had been a miscarriage of justice, and that the prisoner protested his innocence. Not satisfied with this, however, the junior was prevailed upon to go to the jail and get an unequivocal account as to the fact. When he went to the jail, however, the prisoner confessed his entire guilt. Instead of making his senior aware of this, we find that the junior member gave an wholly false account of the interview. and urged that the matter be brought before the Legislature. This was done accordingly, and a Royal Commission issued to investigate the whole case. In the course of this investigation the fact of the confession was revealed. Proceedings were then instituted to have the junior partner struck off the roll of solicitors for New South Wales. In a careful and elaborate judgment, the Court, composed of Chief Justice Darley, and Judges Stephen and Owen, on the first June decided that, though it was a painful duty, yet they owed it to the public, that the solicitor's name should no longer remain on the Roll as an accredited practitioner. There will be a general agreement of feeling, that the decision is sound. Gentlemen of an honoured profession must

bear in mind that their position demands of them a greater uprightness than if they were in private life. Many a foolish act is done in thoughtlessness, and in moments of weakness; but that will not excuse one. The profession is very much in the position of Cæsar's wife. It must be above suspicion. Chief Justice Andrews, of Connecticut, has put the matter very well when he says that it is not sufficient that a lawyer must be honest—he must be believed to be honest, and it is essential to his usefulness that he enjoy the confidence of the community. Lawyers generally occupy prominent positions in the community. They thus become shining marks, and not infrequently "the fierce light that beats upon a throne" is turned upon them. His only course, therefore, is to walk circumspectly, and to be above reproach.

* * *

A Question of Color.

Notwithstanding the supposed triumphs of modern civilization, and the loud proclaiming of the equality of men, we find the Louisiana Legislature and the United States Supreme Court making laws that colored people in that State must ride on separate railway cars. This enactment can be viewed only with feelings of unmixed regret and surprise. In a great country like the States, which has ever boasted of the freedom and equality that flourished under her ægis, the unkind and slighting distinction is certainly something most unlooked-for. The cause of Africa's children, for personal freedom and for equality of citizenship, has enlisted some of the greatest and noblest of men, whose example the people of Louisiana would have been honoured in following. Even Shakespeare has found one of his greatest heroes, the brave Othello, from the colored race, and in the Merchant of Venice we find the Prince of Morocco, in words of great dignity, pleading for Portia's hand, and excusing his African blood—

"Mislike me not for my complexion,
The shadowy livery of the burnished sun,
To which I am neighbour and near bred."

And Portia, the beautiful European, finds no reproach to him on that account.

Something in the nature of a reflection on colored people arose here in Toronto about seven years ago. Mr. Johnston, a colored person of means, while touring through Canada, presented himself at the Queen's hotel in this city, and was refused accommodation because of his being colored. An action was thereupon instituted by the aggrieved gentleman, asking an award of damages. The case,

which is entitled Johnston v. MacGaw, is not reported, but the facts are well known. The defence was to the effect that the Queen's was a select and high-class hostelry, whose patronage would be injured by the reception of colored guests.

The plaintiff was not able to prove that he could not get accommodation elsewhere, or that he had suffered actual damage, and his claim was dismissed. But this was practically a private case, while the Louisiana case was a public one. Of course the matter is not entirely one-sided, but we still believe that equality of citizenship should be the rule.

* * *

Chattel Securities.

We direct attention to the case of *Baker and wife* v. *Ambrose*, among our reports of English cases in this issue of *The Barrister*. It will be there seen that a decision of considerable importance in this country has been recorded. A bill of sale has been declared invalid because the affidavit of execution had been sworn before the solicitor who acted for mortgagee. The effect, should this decision be followed here, would be to invalidate nearly every chattel conveyance now in force; and the same effect will doubtless be produced in England if the case is not successfully appealed. The case cited in the argument of *Baker and wife* v. *Ambrose* by counsel in favour of the validity of the conveyance is a straight decision in their favour, and it is difficult to understand what influenced Mr. Justice Wright in the decision he eventually came to. Certainly there is nothing in *In re Johnston ex parte Chapman* to fortify such a decision. On the other hand *Vernon* v. *Cook* is an unequivocal authority, and the matter seems to have there received thorough treatment on all sides. In single Court it had been decided that the fact of the affidavit being sworn before the Solicitor who acted for all the parties was a fatal defect; and the matter then came before the Divisional Court. Mr. Arnold Morley, so well known as a leading Minister in the Gladstone and Lord Rosebery administrations, supported the validity of the mortgage, and Mr. Cave (now Mr. Justice Cave) appeared contra. In the result the Court (Lord Justice Bramwell in particular), decided that the Rule of Court as to affidavits being sworn before the Solicitor for the party, applied to matters in litigation only, and not to chattel securities. Now *Baker and wife* v. *Ambrose* upsets all this. Something may perhaps be made of the fact that the solicitor in this case acted for the mortgagee solely, while in *Vernon* v. *Cook* he acted for all the parties. But this would not seem to make any substantial differ-

ence. The question is whether the rule applies to transactions outside of litigation. Indeed, so slight is the difference between a solicitor acting for one of the parties and where acting for all the parties that it is not likely that in a matter before the Courts, with a solicitor acting for all the parties, an affidavit sworn before him would be received. The difficulty is not confined to chattel securities, for, should the decision be sound, may it not be argued that it also applies to real estate mortgages. It will be seen that the wording of the rule and the section of the Act in England is practically identical with those in force in Ontario, so that it is difficult to avoid the force of the application of the decision. In *Vernon* v. *Cook* it was freely stated that to hold the affidavit defective would upset a great number of instruments supposed to be valid, and reference to the custom of English Solicitors shows that practice there is similar to that in Ontario. The report given in another column is taken from *The Law Journal* (Eng.), but as yet we cannot find any other report of it either in our exchanges or on the files at Osgoode Hall. After the recent case before Judge McDougall, where an unsuccessful attempt was made to invalidate a chattel mortgage because the commissioner taking the affidavit described himself as " a commissioner, etc., merely, the case here treated of will be of interest. It is to be hoped that on appeal there will be a reversal. Legally considered it does not look like sound law, and on the merits it does not lean towards justice, but is a move towards red tape law.

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The Holiday Season.

Some one has been asking why we had not any reports of Ontario cases last month. We are very sorry, but just then there were none to be had—even in hothouses. Like the provision merchants with "Fish and Fruit in Season," we can only give our readers the delicacies of the particular time of the year, and we cannot get Ontario cases in variation. We had not even any left over since June. *The Barrister* does not keep any stale goods in stock. We had, however, some very choice material from England, where, even in these warm times, litigation seems to keep right on notwithstanding the fine weather for golph and boating.

* * *

Lord Russell of Killowen.

Such elaborate reports have appeared in the daily papers of the tour of the Lord Chief Justice of England and party, that we do not consider it necessary to give any particulars here. In Toronto every effort was made to offer such courtesies as were possible with a flying visit. The Benchers of the Law Society

made themselves as civil as they knew how, and entertained the party at luncheon in the new wing of the library at Osgoode Hall. Yet with all this the profession of this great province of Ontario will not have satisfactory feelings over the affair. Even in Toronto the Bar took no interest in the visit, and we think very few saw Lord Russell, or even knew what he did or where he went, except from the daily papers. The truth is, the Bar felt quite out of the whole affair.

* * *

Give the Devil His Due.

We beg to present our compliments to *The American Lawyer*; and to this we add our regrets that credit was not given it when some months ago we reproduced from its columns an ingenious use of part of Shakespeare's King John as an authority on legitimacy. The omission to give credit was purely accidental, and, in fact, we had not noticed it till seeing a complaint in the August number of our contemporary couched in general terms, we turned up our file, and to our surprise perceived that we had offended in the case referred to. *The Barrister* is a stickler for fairness and hastens to make the *amende honorable*.

* * *

We have pleasure in directing attention to the article of Mr. J. E. R. Stephens, of The Temple, London, England, appearing in another column of this issue of *The Barrister*. Mr. Stephens is a contributor to many leading publications on both sides of the Atlantic, and his article will be read with interest.

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In our August number a typographical error crept into the title to the first of our series of papers entitled "Glimpses into early Upper Canada Litigation." The printer in mistake used the word "Legislation," instead of "Litigation."

THE ORDER OF THE COIF.

(Written for The Barrister.)

By J. E. R. Stephens.

The annals of the coif form an important part of the history of the law of England. It dates from about the middle of the 13th century. Until 1875 the Judges of England were invariably selected from the Order of the Coif, and so strictly was this rule adhered to that even a Queen's counsel, who had spent perhaps half his life under that title was compelled, on his being appointed a Judge, to become a sergeant-at-law, perhaps the day before he was sworn in as a member of the Bench. The small black patch on the top of the wig

distinguishes a sergeant from the other members of the Bar.

The real coif, which is described by Chief Justice Fortescue, as the "principal and chief insignment of habit wherewith sergeants-at-law on their creation are decked," in its original state was of white lawn or silk, forming a close-fitting head-covering, in shape not unlike a Knight Templar's cap; and as on the top of the white coif the old fashion had been for the Judges and sergeants to wear a small skull cap of black silk or velvet, the peruquiers of the last century, when the fashion of powdered wigs in lieu of natural hair reached Westminster Hall, contrived the round patch of black and white as a diminutive representative of the coif and cap. The coif has always represented, like the coronet and the mitre, distinct rank and dignity, and has from time immemorial been conferred with much form and ceremony, and the members of the order had the special privilege of remaining covered even in the presence of the Sovereign.

As far back as the records of our law extend the Order seems always to have had great power in the state, and they were bound by a solemn oath to give counsel and legal aid to the King's people. The great meeting place of the sergeants many centuries ago was the "Parvis" in St. Paul's Cathedral, where they might have been seen daily, wearing their distinctive costume, the robe and the coif, always ready to receive those who sought their aid, to give counsel *pur son donant* to the rich, and gratis to the poor suitor, and to give assistance when called upon in the judicial business of the King's Courts. As the Roman advocates paced up and down the Forum, waiting for their clients, so the old sergeants were to be found at the Parvis of St. Paul's with the same object, or engaged at their allotted pillars in consultation with their clients after the rising of the Courts. The Parvis, or Paul's Walk, was in days long gone by, the great place of general resort. Strictly speaking the Parvis was only the Church porch, but in the case of St. Paul's Cathedral, it included the nave, or middle aisle of the old cathedral. St. Paul's, however, was not the only church in those days where lawyers and their clients congregated to consult and dispose of legal affairs. As late even as the reign of James I. we are told that the Round of the Temple Church "was used as a place where lawyers received their clients, each occupying his own particular post." Ben Jonson in the "Alchemist" refers to such business in the Round of the Temple Church. Chaucer in the "Canterbury Tales" refers to the practice which prevailed of lawyers using St. Paul's as a place for transacting legal business.

"A sergeant of the law, ware and
wise,
That often hadde ben at the
parvis,
Ther was also, full rich of excellence,
Discreet he was and of great
reverence.
He seemed swiche; his wordes
were so wise,
Justice he was ful often in assise,
By patent, and by pleine commissiun;
For his science and for his high
renown,
Of fees and robes had he many
on."

Until within a few years of the abolition of the Order of the Coif there were always appointed a certain number of them as counsel to the Crown, who acted like the Attorney-General, not only as the legal advisers of the Crown, but as the Crown advocates or public prosecutors, and who were called the King's sergeant's. The King's sergeant was at the head of the law in every county, sitting in the County Court with the sheriff, and judging and determining all suits and controversies between the people within the district. We have an authentic record of the institution in the words of the old form of the crier's proclamation on an arraignment of prisoners, calling on "anyone who can inform my lords the Queen's Justices, the Queen's Sergeants, or the Queen's Attorney-General, of any treasons, murders, felonies or misdemeanours done or committed by the prisoners at the bar, or any of them, let him come forth and he shall be heard, for the prisoners now stand upon their deliverence."

At the present day the English Bar recognizes no clients but solicitors. But in the days when the sergeants congregated in the Parvis of St. Paul's, or at their allotted pillars, it was otherwise. Every member of the Order communicated directly with the suitor who sought his aid. In his own chambers, at his accustomed pillar, or in the Parvis, or wherever else he could be most serviceable, the old sergeant was at the proper time always to be found at his post. The sergeant, when retained, gave his legal aid to his client, and stood by him in the hour of trial.

Below the rank of the Coif the legal right to practice in the Courts could only be derived from the Judges. The more skilled "apprentices of law" seem to have been habitually resorted to by the suitors, and were called "Counsellors," although they had not the privilege of appearing in Court.

The ancient costume of the Order of the Coif, according to Chief Justice Fortescue, consisted not only of the coif, but of a long priest-like robe, with a furred cape about the shoulders, and a hood. Fortescue says: "A sergeant-at-law is clothed in a long robe not unlike the sacerdotal habit, with a furred cape, capicium penulatum, about his shoulders, and a hood over it, with two lapels or tippets, such as the Doctors of law use in some Universities with a coif, as is above described." The priest-like robe, the furred cape and the other ornaments of a sergeant, are still worn by the Judges, as well by those who actually belong to the old Order, as by the Judges appointed since the Judicature Act, and who have not taken the degree of sergeant-at-law. The furred cape and hood from a very early period formed part of the robes of the Judges and sergeants, being delivered to them as soon as the Coifs were put on their heads. Fortescue tells us that in his day this furred cape differed only in the case of the sergeants from that worn by the Judges in the circumstance that the Judge's cape was furred with minever, whilst the sergeant's cape was usually furred with white lambskin or budge.

With regard to the colour of the robes of the Judges and sergeants there seems to have been much variation. At a call of sergeants in October, 1555, every

sergeant subscribed for one robe of scarlet, one of violet, one of brown-blue, and another of mustard and murray, with tabards of cloths of the same colours. Much of the ancient costume of the Order of the Coif is still worn at the present day by the Judges of the High Court of Justice, who, excused from the obligation of belonging to the ancient Order adopt its vestments in memory of the past. There is one particular part of the dress belonging to the Order of the Coif—the black cap—which the Judges always put over their wigs when passing sentence of death. This cornered cap, black cap, or sentence cap, as it is sometimes termed, is a piece of limp black cloth, which is put on the top of the wig; it is not the coif, as Lord Campbell repeatedly states, but but was the covering expressly assigned to veil the coif on the only occasion when the coif was required to be hidden. By the ancient privileges of the sergeants the coif was not to be taken off even in the royal presence. The chief insignia of the order, it was to be so displayed when sitting on the Bench, or pleading at the Bar; but this rule seems always to have been departed from in passing sentence of death. The head of the administrator of justice was then covered as a token of sorrow by the black sentence cap. When the Judges sit in the Criminal Courts, and when attending Church in state, they always carry the sentence cap in their hand as part of their regular judicial attire. The black cap is also worn by the Judges over their wigs on the day when the new Lord Mayor goes to the law Courts in state to be sworn in before Her Majesty's Judges.

The ceremony of putting on the coif for the first time was, at one time, a very solemn affair. The white coif having been placed on the head of the sergeant-elect, the Lord Chancellor, or Lord Chief Justice, to whom the royal power was entrusted, addressed the newly-made sergeants in an elaborate speech, setting forth the antiquity, the honour, the rights and the duties of the sergeants-at-law. Among the ceremonies on the creation of sergeants, one of the oldest was that of the presentation of gold rings (about twenty-eight) to several persons of different grades—the Sovereign, the Lord Chancellor, the Judges and the Masters of the Common Pleas. The Sovereign's ring was a very massive one; the Chancellor's and the Judges' rings were about one-third of an inch in breadth, but not very thick. The newly-made sergeant, on his creation, severed his connection with his Inn of Court. If the creation took place during Term, a breakfast was given in Hall, and afterwards he was escorted to the door, which was closed against him, and the bell solemnly tolled in token of his being dead to the society in the future.

In bygone days, on the creation of new sergeants, great feasts were given. The ordinary business of the Courts at Westminster was suspended, the Judges and other members of the Order of the Coif, the benchers and apprentices of the law, with the highest officers of state, and even the Sovereign and members of the royal family, nobles and bishops, and the Lord Mayor and city officials assembled in large numbers to witness the ceremony of call. These feasts were usually held at Ely House, in

Holborn, or Lambeth Palace, or St. John's Priory, near Smithfield. On one of these occasions, the creation of eleven sergeants in 1531, we find that King Henry VIII. and Queen Catherine of Arragon were both present. The proceedings for dissolving the marriage of the King and Queen were then going on, and Queen Catherine came in state to the feast, but we are told she occupied a separate apartment. These feasts gradually lost their importance, and kings and queens ceased to attend the banquets, the royal patronage of lawyers' entertainments being diverted in favour of the masques and revels of the Inns of Court, which had become the order of the day, and were more attractive to courtiers than the grave banquets of the Judges and sergeants.

The members of the Order of the Coif had from an early period their Hostels or Inns in London. There were at various times three of these Inns—one opposite St. Andrew's church in Holborn, called Scrope's Inn; another in Fleet street, belonging to the Dean and Chapter of York, and a third in Chancery lane, held by other members under lease from the Bishop of Ely. The only recognized Inn of late years was that in Chancery lane, the whole of which was sold some twenty years ago, and the proceeds divided amongst the sergeants. On being elected a member of the Inn, a practising sergeant had to pay an entrance fee of £350; a judicial one, that is anyone so created preparative to a judgship, paid £500, and every member paid £15 a year. The Inn was a voluntary association, like any other club, which a sergeant might join or not at his pleasure, without either course in the least degree affecting his newly-acquired rights and privileges.

In the social scale the rank of sergeant-at-law comes immediately after that of Knight Bachelor, and above Companions of the Bath, and a number of persons of noble birth or official status. The sergeant holds a rank quite independent of the profession, while a Queen's counsel has no recognized position out of it.

There have been no sergeants created since 1868, and on the 1st of November, 1875, the degree was abolished.

J. E. R. Stephens.

OSGOODE HALL NOTES.

In the new wing of the library every shelf is now filled, and the appearance throughout is certainly very beautiful. No one should visit the Hall and neglect to visit the new wing. The room is a gem from floor to ceiling. But we warn everyone to beware of the hardwood floors, which are so elegantly polished that there is danger of slipping.

The Judges of the Supreme Court of Judicature held a meeting on Friday, the 28th August, at which the following were present:—Mr. Chief Justice Hagarty, Mr. Justice Burton, Mr. Justice Osler, Mr. Justice Maclennan, Mr. Chief Justice Meredith, Mr. Justice Ferguson, Mr. Justice Rose, Mr. Justice Robertson, and Mr. Justice MacMahon. It

was arranged that the Court of Appeal should sit in two divisions for the purpose of hearing and disposing of the 120 cases on the September list, and that, for this purpose, Mr. Chancellor Boyd, Mr. Justice Ferguson, Mr. Justice Robertson, and Mr. Justice Meredith should sit as judges of the Court of Appeal.

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It must be remembered that under the present law three judges of the Court of Appeal can hear an appeal from the judgment or order of a single judge of the High Court, but four must sit when the appeal is from the order of a Divisional Court of the High Court.

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One division of the Court of Appeal, composed of Hagarty, C.J., and Justices Maclennan, Burton and Street, sat on Tuesday, the 8th September on the Queen's Counsel case, the last named Judge taking the place of Mr. Justice Osler, who desired not to sit upon the question. Judgment was reserved.

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Another division of the Court of Appeal, it is understood, will commence sitting about the 21st September. It is also understood that Chief Justice Hagarty has been given six months' leave of absence, to take effect very shortly.

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From Ottawa the news comes of the sickness of Mr. Justice Gwynne and Mr. Justice Taschereau. Sir Oliver Mowat has introduced a bill in the Senate to authorize the appointment of Judges of the Supreme Court ad hoc in certain cases.

* * *

Rumor is busy in the corridors just now. It is whispered about that in six months there will be some happenings affecting the composition of the Judiciary. The story tells of a severance that will be universally regretted; but happily it looks as though there was to be a substitution that will be thoroughly approved.

* * *

The Benchers met on the 14th and 15th instant and elected the following gentlemen examiners of the Law School: P. H. Drayton, R. E. Kingsford, H. L. Dunn and Edward Bayley.

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The announcement in the local papers that the Benchers had decided to allow women to be called to the Bar is premature, to say the least of it. The matter is not yet—at time of going to press—disposed of.

HUMOR OF CANADIAN BENCH AND BAR.

Mr. Washburn was one of the first solicitors to open up practice in Upper Canada, and was in active practice as early as 1820. Sir Allan N. McNabb, though younger, was in later years also a lawyer and contemporary. One day the latter was riding on horseback down Adelaide street in Toronto, when he beheld Mr. Washburn standing on a street corner and with a rather haughty air surveying the then Mr. McNabb through an eye glass. Quick as a flash Mr. McNabb released his foot from the stirrup and raising it up to his eye gazed through on Mr.

Washburn with the most serious countenance.

* * *

While speaking of Sir Allan McNabb, a story which shows his humorous ways occurs. Once when he was Prime Minister of Canada, being on a campaign tour, he was compelled through poor hotel accommodation to occupy the same bedroom with a colleague. On waking in the morning he found that his friend had already arisen, and to his dismay he perceived him vigorously brushing his teeth with his (Sir Allan's) tooth brush. On becoming aware that he was detected the offender made some apology. But Sir Allan quickly silenced him saying: "Don't mind at all; I assure you no harm is done. You have unfortunately made a mistake. My tooth brush I always keep in an inner compartment of my satchel, and what you have been using is what I have had for scrubbing my toes."

THE LAMENT OF THE BAR.

(Written for The Barrister.)

One day a Chief Justice of world-wide renown,
Came to visit a thriving colonial town,
Then solicitors, barristers, notaries all,
Got out their best clothes and made ready to call.

But that reverend body that governs the Bar,
Whose fame for acuteness has travelled afar,
Said, "Dear me! Bless my heart! this never will do,
"He came to see us, but not to meet you."

"Then a public reception's all jostle and crunch,
"So we'll just give his Lordship a nice little lunch,
"With Judges and Benchers and men of that ilk,
"But of course without those who have not taken silk."

So they gathered in state, well-selected and few,
Just the kind that the "chief" would be glad that he knew;
But the poor junior barrister, hungry and lean,
Might as well have expected to dine with the Queen.

If he chose to be humble and smother his pride,
By losing his time and by waiting outside,
He might have been able his Lordship to see,
As he hastened to join that select coterie.

Now the Bar didn't all want the Benchers to treat,
They didn't hanker for good things to eat;
But they really did wish for a shake of the hand,
When a lawyer so great came to visit their land.

But it seems that such things to the Bar are denied,
The distinction 'twixt it and the Benchers is wide;
For the latter alone can appreciate fame,
The former is only aware of the name.

"Not-Invited."

GLIMPSES INTO OLD UPPER CANADA LITIGATION.

Vol. 1, O. S. 1823-1829.

All those things which are now held to be of the greatest antiquity were at one time new; and what we to-day hold up by example will rank hereafter as a precedent—Tacitus.

PAPER II.

A distinguishing feature of the legal system in force in Upper Canada in early times, and even till recent years, was the division of the legal year into four terms, around which all things seem to have turned. Though a learned authority claims that these terms were instituted by William the Conqueror, there seems better authority to show that they were gradually formed from the canonical cōnstitutions of the Church. The first term in the year was Hilary term, commencing on the 23rd January, and ending on 12th February unless on Sundays, and then the day after. During the seasons of Advent and Christmas, the Church would not allow the tumult of forensic litigation; and this seems to have given rise to the early winter term called Hilary, and the time of commencement of the other terms seems controlled by the same pious reasons. Further on in the year came Easter term, commencing the Wednesday fortnight after Easter day, and ending the Monday next after Ascension day. Next in order came Trinity term, beginning the Friday after Trinity Sunday, and ending the Wednesday fortnight after. The fourth and last was Michaelmas term, commencing on 6th November, and ending on 28th November (unless on a Sunday, and then the following day).

At the opening of Trinity term, 8 Geo. IV. (1827), with the Hon. Mr. Campbell, Chief Justice of Upper Canada, and Mr. Justice Sherwood, composing the Court, there was unusual business for consideration. The reports tell us that on that day there appeared at the Bar the Judge of the District Court of the Newcastle District, and an attorney of the Court, to answer grave charges. The reporter has not mentioned anything of the formalities of this event, but we can imagine that the position of the gentlemen implicated must have ensured on the occasion a display of grandeur and decorum that so well becomes the Bench and a Court of Justice. The judgment pronounced by the Chief Justice is marked for dignity and courtesy, but there is a vein of severe censure running through it that must have made the offenders uncomfortable. It had been brought home to the attorney, that he had been used to taking illegal fees contrary to the statute, and the Judge who now appeared at the Bar of a higher Court had been found guilty of allowing these illegal fees on taxation. The circumstances were aggravated by the fact that a family connection existed between the two, and the Judge appeared to be subject to improper influence by the attorney. The Chief Justice in directing his remarks to the attorney said: "Your conduct is more especially and immediately

under the cognizance of this Court, in which you are a minister, and in virtue of that character are allowed to practice in the local Courts of the country." Upon this gentleman a fine of £50 was imposed. To the erring Judge the Court said: "You have given the best explanation of the misconduct or neglect attributed to you of which you were capable; but that explanation is not satisfactory. The Court feels much pain in finding it necessary to visit, by their reprehension, a person whose respectability of character has been so long and so well established in this province." He was fined £5. One can read in between the lines of the report of this affair a kind desire to let the culprits down easy, yet to do justice. The facts had been presented by the grand jury. The Chief Justice referring in his judgment to this says: "I perceived that the charges included many things which were more fit for the examination of this Court than for the investigation of a petit jury at the assizes." The case proves that blood is thicker than water; and what happened 69 years ago should be an example for to-day. Favoritism is human nature, and the Bench cannot be too careful to guard against what will occur even in the most upright unless they exercise great care.

The sheriff of old times was an executive officer of transcendent importance. Process was executed with uncommon activity, and the sheriffs were not used to handle things in the gingerly and timid way they do now. In consequence there were many actions for trespass and trover, and every sheriff had to expect to be drawn into Court frequently. He was often a victim through no fault of his. In the case of Brook v. McLean, Sheriff, p. 392, of the volume under review, a chance combination of circumstances caused, the sheriff of the old Midland district a loss. Mr. Washburn, the attorney, having become insolvent, and being about to leave the province, had before his departure instructed his clerk to allow one White, a debtor, to be discharged out of custody. The sheriff being so instructed allowed White his liberty, the debt for which he was held being of course unsettled. It seems Mr. Sheriff was well aware of Mr. Washburn's affairs, as well as that he was leaving the province. The plaintiff, at whose suit the debtor had been taken into custody, was not at all pleased, however, when, after Mr. Washburn's departure, he learned what had been done; and he quickly repudiated his attorney's action, and came upon the sheriff in this action; and it was contended on his behalf that Mr. Washburn had not the right to give a discharge to the prisoner. Mr. Boulton, Solicitor-General, appeared for the plaintiff, and secured a verdict for him, though Mr. Robinson, the Attorney-General (afterwards created Chief Justice and a Baronet), appeared for the sheriff; the fact that he had known all about Mr. Washburn leaving the province told strongly against him.

With present conditions of married property law, it is curious to peruse the records of cases which came up for judicial consideration 50 years ago. At the opening of Michaelmus term, 5 Geo. IV. (1824), Mr. Washburn

moved the Court, in the case of Shuter v. Marsh, to set aside the proceedings on the ground that the defendants, who were husband and wife (the latter being sued as an executrix), had not been properly served by service on the husband alone. Mr Geo. Boulton, who appeared contra, denied that there was any difference between a wife sued as executrix, or in the ordinary way, and contended that the service on the husband was sufficient for both. The Court decided that the service was good. Since then time has wrought many a change.

LITIGATION IN THE GRAVE YARD.

"*Let's talk of graves, of worms and epitaphs.*"—RICHARD II.

There is no limit to the odd cases that find their way into Court. About the only thing not yet litigated over is a man's immortal soul. They are, however, pressing close upon it, and after one has slipped into the impenetrable future his fellows follow to the very brink of the precipice, and fire volleys of legal shot and shell after his retreating form. In the *Chicago Legal News* we find a case reported where a tombstone builder and a widower have a contest for possession of an $1,850 monument, which the latter had raised over his wife's grave. He only paid $550, however, and the stronghearted dealer in stone wanted the monument back by virtue of a lien provided for by an Act of the Legislature. The Supreme Court of New York State stood by the mourning husband, and in cold, stony tones told the marble dealer that the Act of the Legislature was unconstitutional, and that he must not disturb the grave of which the tomb was part. Those who "sleep in dull, cold marble" will reap the benefit of this; but in future, when old Father Time does his reaping, the tombstone dealers will have to be paid in cash. Another case of interest is just reported. The inscription which a Mr. Coe, of Missouri, put on his deceased son's tombstone cost him $1,000, which we presume he had to pay in good 16 to 1 coin. Not that the engraver's charge for chiselling cost that amount; but because the wording which Mr. Coe caused to be there inscribed, stated that the deceased came to his death through violence administered with a club by Jesse and Wm. Wright, and in a libel action the Wrights' succeeded, as they had been previously acquitted of the deceased's murder. As yet we have not heard of any actual seizure of a corpse under execution. Once a client who had an unpaid judgment in the Division Court came to the writer in great haste and informed him that the debtor had just died, and he begged that steps should be quickly taken to seize the corpse. On his being assured that the law would not allow such a proceeding, he insisted that he knew it had been done years ago in the town of Oshawa, Ont. It turned out, however, that a very active bailiff had thought that the family of the deceased would not like a

scene in the hour of death, and having presented himself at the deceased's house he practised some bluff on the deceased's father, and the money was paid.

A very unusual claim was recently made against the administratrix of an estate. The deceased had been travelling, when she died without any fixed place of abode. The remains were brought to her native town, when the brother-in-law had the remains brought to his house, from which the funeral afterwards took place. But for this the funeral would have had to have been from the railway station. The daughter and sole heir of deceased, who had been with her mother in her last moments, stated that she had expressed a wish that her brother-in-law should conduct the funeral from his house. The latter put in a claim for $25 for use of his house. The claim was disallowed on the ground that what he did would be presumed to have been voluntary and out of affection, unless a contract could be proved.

Macasam.

SCRAPS OF LEGAL SMALL TALK.

Odds and Ends of Law.

Those of our readers who have read the strange and exciting pages of "The Sign of the Four," in which Conan Doyle gives us another glimpse of the wonderful Sherlock Holmes, will be interested to know that detective work, where the tracking by a dog is used, has received the authority of a Court of competent jurisdiction. The case is State of Ohio v. Hall, 3 Ohio Legal News, p. 14. On the evening following a robbery a basket with part of the stolen property had been found about 200 yards from the place of the burglary. The dog was brought to this spot, and it scented out the defendant, after passing along different thoroughfares. Evidence was given that the dog had been long trained to scenting out people, and had been tested in many ways and found to be reliable. Though strongly objected to, the evidence was admitted.

A very opinionated juror caused something like a deadlock in the case of Cahill v. The S. M. & St. P. Ry. Co. on its trial in the United States lately. The trial Judge directed the jury to return a verdict for the defendant. This was objected to by one of the jury; he no doubt entertaining the mistaken belief that such a course made it a verdict of the jury. The report does not show whether any assurances were made to the juror that the Judge assumed the responsibility. After all, it seems a clumsy practice that a verdict should be entered as the verdict of a jury, when it is in reality the verdict of the Judge. The Judge has the right to enter a verdict one way or the other, when he thinks the evidence warrants it, and that there is no evidence proper for the jury to deliberate upon; but the custom of a verdict being entered under such circumstances in the name of the jury is con-

fusing, and with a slightly dull juror it is not surprising to find confusion arising.

* * *

The celebrated Durrant murder case has reached the civil Courts. A playwright thought the tragic death of Blanche Lamont would have an all-absorbing interest if properly staged; and accordingly a play entitled "The Crime of the Century" soon appeared, and was advertised for the Alcazar Theatre. Meanwhile, an injunction forbidding the production of the play had been obtained on the usual ground that it would prejudice the trial. On appeal to the Supreme Court of California the injunction was dissolved. The decision declares that the trial Judge was too previous, and should have waited until the piece had been actually produced before he had any right to issue an order of injunction. The rationale of the decision is, that to produce a play is but one way of expressing one's sentiments on a particular subject; that the right of free speech is guaranteed to every one by the constitution, and cannot be impaired or arrested by an injunction; but that the individual is responsible for his statements afterwards.

* * *

Following the English "Fairfield Case" on breach of secrecy by a physician, we find a similar case in St. Louis. A child of two years having swallowed a quantity of concentrated lye was for four years compelled to take all nourishment through injections and through a fistula. At six and a half years of age the child was cured by operations that were regarded as great triumphs for scientific surgery. The surgeon subsequently published an account of the operations with a photo of the child stripped to the waist, carefully suppressing the name. It seems the operations were of a most unusual kind, and opens up a new branch of medical science. The mother of the child has now brought an action for breach of the privacy by the issue of a pamphlet on the subject, and also for having allowed medical students to be present at the operation. It will surely be a pity if such an action should succeed.

THE LATEST BICYCLE DECISIONS.

Cyclists will be much interested in a Scotch case decided last month. A paper gave its subscribers an insurance policy on the coupon system, and a cyclist, who was killed whilst out riding, held a coupon for £1,000. Payment was resisted on the ground that cycles are not vehicles, and are not included in the terms "passenger train, passenger steamer, omnibus, tramcar, dog cart, waggonette, coach, carriage, or other passenger vehicle." Lord Kyllachy decided that a bicycle was not covered by the foregoing description any more than a pair of skates, and the company secured the verdict. It behoves cyclists to look closely into the wording of their general accidental policies. Indeed, cyclists or not, we should all do well to consider the wording of our policies.

* * *

Another decision interesting to cyclists is one of the civil Courts

of the Seine. It is well known that the railway companies of France will convey a bicycle over any distance for a very small sum, without insisting on the machine being securely packed up. This is a great boon to the cyclist who rides a considerable distance out of town, and one that he largely avails himself of. A Mdlle. Christol has had to sue the Railway Compagnie de l'Est for damage done to her machine during its transport from Nancy to Paris. She claimed 800f. damages, and has gained the day, but must remain satisfied with 250f., the sum awarded her by the Court. In giving judgment it remarked, that the frequency with which bicycles are carried unpacked on railway lines without sustaining injury clearly proves that their fragility cannot be put forward as bringing them under the head of articles for which a carrier cannot be held responsible. Furthermore, as the company contracted without reserve to carry the machine in the condition in which it was presented, they must be held liable for the damage. It will be interesting to see how the English Courts settle this point when it comes before them.—From *Law Notes.*

JUDGMENT SUMMONS' COURT.

Those of our readers who have had disappointments in the Judgment Summons' Court—as what lawyer has not?—will read with interest an account of how matters are conducted in the old country in a Court of much the same constitution. The following account is taken from the "D. T." in its "London day by day column." Apart from the application it has to an important branch of legal procedure in Ontario, *The Barrister* thinks the whole account has a droll humour worth the reproduction itself: "Mrs. Elijah Solly lost her husband's case entirely owing to a desire to honour the Whitechapel County Court by looking smart. She wore a magnificent garden hat, and a charming blouse with lappets and falbalas, and when she said that her husband could not pay the little sum he owed to Mr. Mark Liebermann, the Judge eyed her finery and said, 'Why do you come to Court dressed like that and tell me you cannot pay? Look at your blouse! It must take a little fortune to keep that up.' 'I wash them myself,' replied the lady. 'Do you mean to tell me that you get them up in that elaborate fashion yourself?' 'I do,' said Mrs. Solly, with some pride. 'Where did you get that hat?' continued the remorseless Rhadamanthus. 'I made it myself,' was the answer. 'I suppose you didn't make the feathers?' was his Honor's next suggestion. The witness admitted that she was not equal to that task. 'Is it not ridiculous,' exclaimed Judge Bacon, 'to come to Court dressed like that, and say you cannot pay? You must, of course, wear clothes, but there is no need to dress like that. It is ridiculous.' 'They didn't cost much,' retorted the lady. 'Don't talk nonsense,' continued his Honour. 'What! Feathers and

ribbons and earrings! You had better pay your debts.' 'I can't,' pleaded Mrs. Solly. 'Then I shall send your husband to gaol,' said the Court, 'and that will cut off the supplies. It's rubbish. £1 a month, first payment in a fortnight.'"

THE VOICE OF LEGAL JOURNALISM.

Extracts from Exchanges.

Law Reform.

If the Judges are desirous of effecting a real economy in the administration of the law, they might do worse than turn their attention to the costs that are incurred in almost every case by the attendance of witnesses who are never called. For this wasted expenditure our system of pleading is largely responsible. A number of issues are raised in a statement of defence, and it is necessary that the plaintiff should be prepared with evidence as to all of them; but when the case comes into Court the defendant chooses to rely on one or two of the numerous issues he has raised, and the money paid to the witnesses who were prepared to speak to the other issues is wasted. What is required is that those who unnecessarily raise issues should pay for them, even though they may succeed in the action generally. This is frequently done in patent actions, and there is no reason why a similar rule should not be applied to other cases in which issues are without due cause raised on the pleadings. If this proposal were adopted little would be heard of the abolition of pleadings, for the penalizing of parties who raise unnecessary issues would render it almost certain that the real issues in every case would be defined. Such a system of pleading would inevitably tend to lessen the cost of litigation.—*Law Journal* (Eng).

* * *

The Joys of Matrimony.

In an American paper, *Notes and Comments*, we read that the Court, in holding that $5,000 was an excessive award for alienating a wife's affections, said, that whatever affection she may have previously cherished for her husband "must already have been effectually eradicated when he is shown to have been committed to the county goal for setting his wife on a hot stove." Perhaps this was only his somewhat curious device to increase the warmth of his wife's affection for him.—*Law Notes.*

* * *

Intellectual Tests for Jurymen.

The newspapers are making a great outcry about so-called "knock-out" questions, which have recently been asked jurors, and in some cases witnesses, in criminal trials in New York City. In the trial of Police Inspector McLaughlin, the appellate division of the Supreme Court have recognized certain forms of questions, by affirming the judgment of conviction.

In this case there were eight of these so-called "knock-out" questions asked by the State. One of the questions was as fol-

lows: "In order to justify an inference of legal guilt from circumstantial evidence, the exculpatory facts must be absolutely incompatible with the innocence of the accused. What does that convey to your mind?"

It is well known that questions such as the above are prepared prior to the trial in accordance with the decisions of the Courts in similar cases. Such a course was pursued in the recent Fleming trial, and in which some questions were very lengthy, and were successfully used in the bowling out of panel after panel of average jurymen.—*Criminal Law Magazine.*

* * *

Editing Law Books by Altering the Texts of the Authors.

Irving Browne, in the *Green Bag,* comments unfavorably upon the liberty which Mr. G. Pitt Lewis, Q.C., has taken with the text of "Taylor on Evidence," in his recent revision of that celebrated work. Mr. Lewis has, according to his own statement in his preface, remorselessly pruned all exuberance of expression; in some cases, it may be at a sacrifice of style and rhetorical effact. The editor of the *Law Journal* (London) approves of this way of dealing with the texts of deceased legal authors, and speaks of it as "worthy of praise." Mr. Browne very justly dissents from this view, and cannot imagine that there will be any demand, at least in this country, for "Lewis's Taylor." And this distinguished teetotaller will find himself in a numerous company on this side of the water in his declared preference for "our Taylor straight."—From *American Law Review.*

Waste of Time in Courts.

That in the Court of Illinois mere procedure decisions make up 47 per cent. of all, leaving but 58 per cent. of decisions dealing with the merits of causes, is a striking presentation of the need for reform in legal procedure. Attention has been called to this need time and again, yet Illinois still clings to the same old methods, under which it is difficult to have the attention of the Court centered on the real issue between the contending parties.

The time is ripe for a change. Success ought to attend a combined effort to secure remedial legislation from the next General Assembly.—From *Chicago Law Journal Weekly.*

* * *

Vacation Dream.

So now my vacation is over;
Oh, why did I wander to where
I lived not in peace or in clover,
Nor enjoyed a stray smile from the fair?

The stars glitter bright in the heavens,
Rich odors are borne on the breeze;
But, oh, for a breath of replevin,
Or a glimpse of the basest of fees!

No widow will have me, or spinster,
'Tis my "want of appearance" no doubt;
But in Melbourne or stately Westminster,
That would bring an "attachment" about.

So bring me my reckoning, waiter;
Call a hansom and take me away

To the land where the coy *allocatur*
Sings a song to the gallant *fi. fa.*

Yes, take me away to the court-land,
With text-book and precedents packed,
To assumpsit and trover and tort-land,
Where wives both expand and contract.

There I'll choose me a widow discoverte,
With a house and an ample rent-roll,
Or at large in the gay market overt
Trip it lightly with tender feme sole.

Then be she as fat as a porpoise,
Or be she but cutis and bone,
I will issue a habeas corpus,
And have the dear dame for my own.

Her waste will no more be a common,
I shall hold her affections in fee;
Though at one time affianced to some one,
She'll be levant and couchant with me.

To the feast I'll invite every Fiction,
Every lay-figure known to the Court,
But my fancy outruns all the diction
That would give an idea of sport.

Possession makes love to Reversion,
Defeasance is friendly with Bond,
While Cruelty calls on Desertion
To Marriage's toast to respond.

There is Larceny winking at Trover,
And Fraud arm-in-arm with Trustee,
And the Legal Estate is Won over,
And drinks with the third Mortgagee.

Onus twirls in the waltz with Presumption,
And Fiction is flirting with Fact,
While both give the *pas* to Assumption,
And Argument's rights are intact.

Estoppel to Waiver makes overture,
Due Diligence waits on Lachesse,
Gentle Infancy's setting to Coverture,
And Lunacy romps with Duresse.

Then Divorce bids them all fill their glasses,
And dilates on the soul-stirring theme;
Co-respondent invites all the lasses
To drink deep to the Baron and Feme.

—*Australian Law Times.*

* * *

One of His Converts.

The late Judge Geo. G. Wright, of Iowa, though a deeply religious man, could tell an anecdote in an inimitable way. One of these anecdotes was concerning a Methodist preacher in Iowa, who quit the gospel and went back to the law and afterwards became a judge. Now it happened that this judge was supersen-

sative concerning the fact that he had once been a preacher, and grew nervous and endeavored to change the subject when anyone referred to it. One evening while the judge was walking along a street in Des Moines, a drunken man reeled up and slapped him on the back and called out, "Oh, Jedge." The judge stepped back and said somewhat brusquely, but with the politeness which he had inherited from his clerical profession, "I am not aware that I have the honor of your acquaintance, sir?" Whereat the drunken man fell upon the judge's breast and began to sob aloud, "Oh, Jedge, don't you know me? Have you forgot me so soon, Jedge? Oh, Jedge, don't you know me? I am (hic, hic) one of your co- converts."—*American Law Review.*

REPORTS OF CANADIAN CASES.

SMITH v. LOGAN.

Practice—Tender of appearance while Registrar is in act of signing judgment.

The Court of Appeal has reversed the judgment of the Divisional Court herein reported at page 76 of this volume of *The Barrister*. While the registrar was signing a default judgment for the plaintiff the defendant appeared with his appearance on the day following the last day for appearance. The judgment had not yet been sealed, but the registrar went on and sealed it. The local Judge at London ordered the judgment to be set aside. On appeal to the Divisional Court (Armour, C.J., Falconbridge and Street, JJ.) the judgment was restored (Street, J., dissenting). But the Court of Appeal now reversed the order, setting aside the judgment. The ground is that the plaintiff should not proceed to judgment till the time for giving notice of appearance has expired.

KOLISKY v. LENNOX.

[MEREDITH, C.J., AND ROSE, J., 15TH SEPT. 1896.

Judgment on appeal by defendant from judgment of Robertson, J., reported at p. 199 of this volume of *The Barrister*, in favour of plaintiff in action to set aside chattel mortgage and damages for wrongful seizure and removal of goods, and for trespass and return of goods or value thereof. The chattel mortgage bore interest at the rate of 5 per cent. per month, and the trial Judge held that plaintiff, a Pole, did not understand that to be the rate reserved, but thought that it was 5 per cent per annum, and that mortgage was not to cover all the goods in the plaintiff's house at the time, but only a portion of them. Appeal allowed with costs and action dismissed with costs, except as to the question of damages, which may be spoken to again. Watson, Q.C., for defendant. M. H. East for plaintiff.

HALLIDAY v. TOWNSHIP OF STANLEY.

[Before Meredith, C.J., and Rose and Street, JJ.

[15th Sept.

Judgment on motion by plaintiff to set aside judgment entered by Armour, C.J., dismissing without costs an action for damages for injuries sustained by plaintiff owing to alleged non-repair of Kitchen's bridge in a highway in the township of Stanley. The trial Judge held that defendants were not prejudiced by the absence of the notice required by 57 Vic. (O.), ch. 50, sec. 13, but that there was not reasonable excuse for the want of it. Counsel contended that facts that plaintiff was rendered helpless by the accident for six weeks afterwards, and was many miles away from home among strangers, but ratepayers of defendants, that want of notice was not pleaded until action partly heard in September, 1895; and that Meredith, J., who had presided at first trial, after hearing all the evidence refused to dismiss action for want of notice; and that the Act was passed only five weeks before the accident, afforded reasonable excuse within the Act. Held, following Drennan v. Kingston, that illness was a sufficient excuse. Order made setting aside judgment and directing a new trial, with costs to plaintiff in any event. Osler, Q.C., for plaintiff. Garrow, Q.C., for defendant.

* * *

PICKLES v. TOWNSHIP OF ALVINSTON.

Judgment on appeal by plaintiff from judgment of Armour, C.J., at trial, dismissing without costs action brought to recover damages sustained by plaintiff by reason of non-repair of a highway. Counsel contended that trial Judge erred in holding that there was no reasonable excuse for the absence of the notice required by 57 Vic. ch. 50, in that plaintiff was not at first aware of the extent of her injuries, and gave the notice a few days too late. Held, sufficient excuse. Order made as in preceding case. Counsel may speak to the case on the evidence, if they desire. Aylesworth, Q.C., for plaintiff. Osler, Q.C., and L. G. McCarthy for defendants.

RECENT ENGLISH DECISIONS.

IN RE HAMILTON. CADOGAN v. FITZROY.

[Lindley, L.J., Lopes, L.J., Rigby, L.J., July 10.—Court of Appeal.

Will—Charitable bequest—Gift in remainder—Power for trustees of will to invest on real securities—Exercise of—Effect of, on bequests to charities.

Appeal from a decision of Kekewich, J.

Testatrix, who died on April 4, 1877, by her will, after disposing of her real estate and such parts of her personal estate as could not by law be devoted to charitable purposes, gave to her trustees all the residue of her personal estate not thereinbefore disposed of upon trust to sell and convert the same into money, and invest the net proceeds in Government or real securities, or in such other securities as they

should think fit, and to pay the income of the investments to her daughter during her life, and after her death to raise out of the capital thereof the legacy duty then becoming payable and a certain legacy, and subject thereto to apply the same for the benefit of two charitable institutions as therein directed.

At the death of the testatrix her residuary estate consisted solely of pure personalty, but afterwards, during the life of the tenant-for-life, the trustees invested a small portion of it (£450) on mortgage of real estate, and that sum remained so invested at the time of the death of the tenant-for-life.

Kekewich, J., held that to the extent of the money invested on mortgage the gifts in favour of the charities failed, and such money was undisposed of. He considered the question governed by the observations of North, J., in In re Corcoran; Corcoran v. Riddell, 62 Law J. Rep. Chanc. 267.

The charities appealed.

L. T. Dibdin and J. W. Baines for the two charities.

T. H. Carson for the next-of-kin of the testatrix.

J. E. H. Benn for the trustees of the will.

Their Lordships reversed the decision appealed from. They said that the will contained no illegal direction, and a mere optional power for the trustees to invest on real securities money given to a charity did not invalidate the bequest. The fact that the trustees had for the benefit of the tenant-for-life made an interim investment of part of the trust estate on real security, which was a mere matter of administration, could not affect the validity of the gifts in the will. The case of In re Corcoran; Corcoran v. Riddell was distinguishable, as there the testator had made a bequest to a charity on the death of a tenant-for-life of such part of his residuary personal estate in its then form of investment as could be so applied.

* * *

IN RE LE BRASSEUR v. OAKLEY. EX PARTE TERRELL.

[JUNE 17, 26.

Solicitor—Taxation of costs—Common order—Fees due to client as counsel — Set-off — General account—Practice.

Appeal from the decision of Kekewich, J.

T., a member of the Bar, obtained a common order to tax the bill of costs of his solicitors in and about the purchase of certain land, and in divers other matters. The order contained a direction that the solicitors were to give credit for all sums received by them of or on account of the client. On the taxation T. set up a counterclaim or right of set-off in respect of fees due to him as counsel in connection with certain railway bills in Parliament, upon which he had been retained by the solicitors, but in no way relating to the bill of costs brought in for taxation. It was alleged that the solicitors had received from their clients in that matter sums sufficient for T.'s fees.

The taxing-master was prepared to deal with the counterclaim, and directed the solicitors to make a further affidavit relating to the fees, and to produce the correspondence and accounts in connection with the promotion of the railway bills.

The solicitors moved that this

order of the taxing-master might be discharged, and that he might be directed to proceed with the taxation without regard to the claim for fees.

Kekewich, J., directed the taxing-master not to include in the taxation any sums received by the solicitors in respect of fees.

T. appealed.

M. Cababé for the appellant.

T. R. Warrington, Q.C., and George Cave for the solicitors.

Their Lordships considered that the direction given by Kekewich, J., to the taxing-master was right. They held (1) that the motion was contrary to the practice, the proper course being for the taxing-master to make his certificate, and the party objecting to it to carry in his objections, upon which he could come to the court; (2) that the moneys for which the solicitors were liable to give credit under the direction in the order to tax were not confined to moneys received in respect of the matter to which the bill of costs related, but included all moneys received by them in their character of solicitors of T., or which they were legally or equitably bound to pay over to him, and against which, if sued for by T., they would be entitled to set-off their costs when taxed; (3) that any money which the solicitors had received in respect of fees due to T. as counsel were not moneys for which they were liable to give credit.

* * *

HOW v. THE EARL OF WINTERTON.

[June 22.

Trustee—Annuitant—Breach of Trust — Payment away of moneys applicable to annuities —Lapse of six years—Account—Statutes of Limitation—Trustee Act, 1888, 51 & 52 V. c. 59, s. 8.

Appeal from a decision of Kekewich, J., reported 65 Law J. Rep. Chanc. 415.

The testatrix directed that surplus rents and profits should be accumulated for fourteen years, and she bequeathed to the plaintiff an annuity which was held by Kekewich, J., and the Court of Appeal, upon the true construction of the will, to be charged on the surplus rents and profits. The testatrix died in 1875, and the term came to an end in May, 1889. The plaintiff's annuity fell into arrear in 1894, and she issued her writ in the action on August 9, 1895, against the trustee, alleging that he had not accumulated anything, and claiming an account of the rents and profits of the real estate of the testatrix received by him during the term, a declaration that he must make good the loss with compound interest, and an account on that footing. The defendant claimed under the Trustee Act, 1888, s. 8, to be protected by the Statutes of Limitation.

Kekewich, J., held that in taking the account the claim as to any items paid away by the defendant more than six years before the issue of the writ was barred by the statute.

The defendant appealed, and the plaintiff gave notice of his intention to apply, upon the hearing of the appeal, to vary the order by directing an account from the death of the testatrix.

Bramwell Davis, Q.C., and H. Godefroi, for the appellant, contended that no account ought under the circumstances to be directed, and that the action ought to be dismissed.

N. Micklem for the plaintiff.

Their Lordships dismissed the appeal with costs. On the notice to vary, they said that the trustee did not come within the exceptions to subsection 1 of section 8 of the Trustee Act, 1888, but he had committed a series of breaches of trust. Assuming that the plaintiff could have sued the defendant in equity for an account if there had been no trust, subsection 1, clause A. of the Trustee Act, 1888, if it applied to trustees' accounts at all, put such accounts on the same footing as other accounts, and no claim could be made in respect of matters more than six years old. The action was maintainable in respect of the defendant's receipts since August 9, 1889, and in respect of rents then in his hands which he ought to have accumulated. To ascertain the amount of them it was not necessary to take an account from the death of the testatrix. Such an account might be necessary to show what he ought to have had in August, 1889, but was not necessary to show what, in fact, he then had. If clause A. did not apply, the case was within clause B, and the defendant was protected from demands more than six years old. Section 8 meant, shortly, that, except in three specified cases, a trustee who had committed a breach of trust was entitled to the protection of the Statutes of Limitation as if actions for breach of trust had been enumerated in them. The application to vary the order must be dismissed, with costs, if any, occasioned by the notice, such costs to be set off against those payable by the defendant.

ROWLAND v. MITCHELL.

[L. T. 234; T. 510; S. J. 636; L. J. 414 W. N. 74.

Is a photograph a "distinctive device" within the definition of what may be registered as a trade mark under the Patents Acts?

It may be, and in this case was held to be, and an injunction was granted to protect the registration. Re Anderson's Trade Mark (26 Ch. D. 409) was distinguished.

* * *

SMITH, RE. DAVIDSON v. MYRTLE.

[L. T. 232; L. J. 413; W. N. 74.

If trustees have power by their trust instrument to invest in the bonds, etc., of any company incorporated by Act of Parliament, can they invest in the bonds of a company incorporated by registration under the Companies Act, 1862?

No, said Kekewich, J., since a company incorporated by Act of Parliament was not the same as a company incorporated under an Act of Parliament.

* * *

BAKER AND WIFE v. AMBROSE.

[July 30.—Queen's Bench Division.

Bill of sale—Affidavit of execution—Commissioner—Grantee's solicitor—Bills of Sale Act, 1878 (41 & 42 V. c. 31), s. 17—Rules of Supreme Court, Order XXXVIII., rule 16).

This was the plaintiff's motion for judgment in an action in which the validity of a bill of sale was in question.

For the plaintiffs (the grantors) the point was taken that the registration of the bill of sale was

invalid upon the ground that the affidavit of execution had been sworn before a commissioner of oaths, who admittedly acted in the matter as solicitor for the defendant (the grantee) alone and not as a solicitor for both parties.

Order XXXVIII., rule 16, of the rules of the Supreme Court provides that "no affidavit shall be sufficient if sworn before the solicitor acting for the party in whose behalf the affidavit is used ...." By the Bills of Sale Act, 1878, s. 17, "Every affidavit required by or for the purposes of this Act may be sworn before a master in any division of the High Court of Justice or before any commissioner to take affidavits in the Supreme Court of Judicature...."

A. C. Salter (T. R. Kemp, Q.C., with him), in support, contended that Order XXXVIII., rule 16, applied to affidavits required by the Bills of Sale Act, 1878, and there had been no compliance with it.

A. M. Channell, Q.C., and E. U. Bullen opposed, and cited Vernon v. Cook, 49 Law J. Rep. Q.B. 767.

Wright, J., having in the course of the argument called attention to In re Johnson, ex parte Chapman, 53 Law J. Rep. Chanc. 762; L. R. 26 Chanc. 338, held that the provisions of Order XXXVIII., rule 16, applied, and that the registration was invalid. Judgment for the plaintiffs.

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