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THE Report which we publish in this number of the case of *Miller* v. *Nash*, decided by the Court of Appeal in England last year, but not hitherto reported there, will be of interest to those of our readers who have the unpleasant duty of conducting a solicitor and client action. Some of the points raised are similar to those which were recently disposed of by our own Court of Appeal in *Thompson* v. *Robinson* (16 A.R., 175), while others appear to carry the law against solicitors' negligence beyond any case with which we are familiar. The report was prepared from certified copies of the pleadings, evidence, and judgments obtained from England.

IT is related of a well-known legal practitioner of this Province, who some years ago vanished from the scene, that, years ago (when arrest for debt was the law), he was employed by a client who resided in the United States to manage his estates in Canada. In the course of his management he received some considerable sums of money, which he neglected to account for. The client died, and after his death his widow paid a visit to this Province, for the purpose of obtaining an account from the defaulter. The account was duly rendered, and showed a considerable balance in the lady's favour, which the attorney declared himself unable to pay. She inquired anxiously from him what was to be done. "Well, madam," said he, "according to the law of this Province, when a debtor is unable to pay his debt, the creditor is entitled to take his body, and that, I fear, is the only remedy open to you in this case." So the lady, in order to liquidate the debt, "took his body," by marrying him.

THE *Law Times* of February 1, on the subject of Queen's Counsel tells us that, "Last Wednesday, the barristers who have been recently appointed Queen's Counsel, were sworn in before the Lord Chancellor, in his private room at the Law Courts. They were afterwards welcomed within the bar by all Her Majesty's Judges sitting in the High Court." It will thus be seen that in England a barrister, on being appointed a Queen's Counsel is required to be sworn in. There are some other peculiarities regarding English Queen's Coun

sel. In England no Queen's Counsel, can take a brief against the Crown except by license of the Crown, first obtained from the Crown, which, in England costs, it is said, about £9. In England no Queen's Counsel can accept a brief as junior counsel, but is compelled, by the etiquette of the profession, to confine himself to leading business. In England, a barrister, when he has attained a sufficient standing at the bar to warrant his giving up business as a junior, applies to the Lord Chancellor to be made a Queen's Counsel. The granting of the application, however, is in the discretion of the Lord Chancellor. There is, however, nothing *infra dig.* or unseemly on the part of the barrister in making such an application. It will be seen, therefore, that the mode of appointment, and the consequences of appointment of Queen's Counsel differ very much in Canada. In Ontario it has not been customary to require Queen's Counsel to be sworn, though why that preliminary to their exercising this office is dispensed with we do not know. Queen's Counsel hold briefs against the Crown in Ontario without obtaining any license for so doing; and they even take business as juniors, both in Chambers and in Court. If they apply to be appointed, it is too often not because their position at the bar entitles them to, and justifies them in claiming, the distinction, but principally because they or their friends think their services to the party machine merit the reward.

TRIALS IN CAMERA.

The case of *Malan* v. *Young*, an action to recover damages for alleged libel and slander by the head master of Sherborne school against an assistant master, was down for trial before Mr. Justice Denman and a special jury in the beginning of November last. Upon the case being called, Sir Charles Russell for the plaintiff, with the consent of Mr. Lockwood, Q.C., who represented the defendant, asked that the case might be heard *in camera*, upon the ground that a public trial would prejudicially affect the interests of third parties, who were not before the court. The learned judge at first doubted his power to make the order asked for, but after consulting some of his brethren on the Bench, he consented to hear the case in private, without a jury. The withdrawal under protest of "a barrister robed," who claimed the right to remain in court as one of the public, and as the father of boys who are being educated at Sherborne school, imparted a momentary dramatic effect to the prosaic, but by no means trivial, incident, and the hearing of the cause proceeded in private.

While the matter is still to some extent occupying public attention, it may be interesting and instructive to trace shortly the history of judicial practice in England in regard to the trial of actions *in camera*.

In 1860, a petition for declaration of the nullity of a marriage, reported as *H.* v. *C.*, in the first volume of Swabey & Tristram, at p. 606, came before Sir Cresswell Cresswell, as Judge Ordinary of the new Probate or Divorce Court. An application was made for a trial *in camera*, on the ground of the painful nature of the evidence to be adduced; but the Judge Ordinary, with the concur-

rence of Baron Bramwell and Justice Williams, held that he had no power to sit otherwise than with open doors; and this ruling governed the practice of the Divorce Court in petitions for declaration of nullity till 1864. In that year the case of *Marshall* v. *Hamilton* (3 Swabey & Tristram, 517) came on for trial before Sir J. P. Wilde, afterwards Lord Penzance. The evidence was so offensive that His Lordship heard it in private, with consent of the leading counsel engaged, and signified a desire that such cases should in future be tried *in camera*. From that time the practice of the Divorce Court reverted to the rules of the old ecclesiastical courts; suits of nullity, and even petitions for the restitution of conjugal rights (A.V.A., 3 Prob. & Matr., 230, 1875), being heard in private whenever the publication of their details would, in the opinion of the presiding judge, have been an outrage to decency and morals. To the power thus exercised by the Divorce Court there is a strange and somewhat illogical limitation. No suit for the dissolution of marriage can be heard with closed doors, even if both parties consent to privacy. The *raison d'etre* of this exception is partly historical and partly grounded in public policy. The old ecclesiastical courts had no power to grant divorce. The present Divorce Court was in substance created by the statute 20 & 21 Vict., c. 85. The 22nd section of that statute enabled and directed the new tribunal to follow the practice of the old ecclesiastical courts in all proceedings other than suits for the dissolution of marriage. No authority to hear divorce petitions in private was given by the statute. Nor was the omission unintentional, for an enabling clause in an amendment to the Divorce Act was rejected by the legislature (C.V.C., 1 Prob. & Div., 640, 1869). It was no doubt felt that the dissolution, like the solemnization, of marriage should take place under the eyes of the public.

In two other classes of cases * have the English courts hitherto asserted a right to order trial *in camera*: (1) where the public hearing of an action would defeat the purpose for which it was brought, and (2) where publicity would inflict an irreparable injury upon *one* party, without being absolutely necessary to the protection of the other.

Of the former class, *Andrew* v. *Raeburn* and *Mellor* v. *Thompson*, of the latter, *Badische Anilin* v. *Levinstein* may be taken as examples. Let us consider them in turn.

Andrew v. *Raeburn* (1874, 9 Ch.App., 522) was a suit to restrain the defendant from publishing certain letters. Lord Cairns, L.C., intimated that if the argument could not have been conducted without these letters being read aloud in court, he would probably have tried the case *in camera* without consent; but as the defendant's counsel undertook not to refer to their contents if the case was heard with open doors, a direct decision upon the point now under consideration was avoided.

Mellor v. *Thompson* (1885, 31 Chy.D., 55) went a little further. This was an action to restrain the defendant from disclosing information communicated to him as a solicitor. Upon an assurance by the plaintiff's counsel that a public

*It is unnecessary to deal here with the jurisdiction to order a hearing *in camera* in matters affecting lunatics or wards of Court.

hearing would defeat the object of the suit, the Court of Appeal made an order *in invitum* for a trial *in camera*.

In *Badische Anilin und Soda Fabrik* v. *Levinstein* (1883, 24 Chy.D., 156)—an action for the infringement of letters patent—the defendant, while under examination, stated that he was working under a secret process, the publication of which might do him an irreparable injury if the patent should turn out to be bad. Justice Pearson continued the trial for several days without requiring the defendant to disclose his process, but eventually called upon him either to do this or to submit to an adverse judgment. Thereupon the trial was continued with closed doors, and the process was made known to the Court, no one being present except the professional advisers of the parties.

From which of these three classes of cases does the ruling of Mr. Justice Denman in *Malan* v. *Young* derive its authority? There was no allegation that the character of the evidence required the exclusion of the public. So far from there being any danger that a trial with open doors would defeat the object of the action, the presumable object of the case was to make the vindication of the plaintiff's character at least as widely known as the libel which had aspersed it. It was not asserted that a public trial would do an irreparable injury to either party; and the mere prospect of painful disclosures being made is no ground for a hearing *in camera* (*Nagle-Gillman* v. *Christopher*, 1876, 4 Chy.D., 173). Is it part of the law of England that in an action for libel a Judge of the High Court may, on the bare assertion of an eminent counsel that the interests of third parties will be injuriously affected by a public trial, convert himself into a private arbitrator, and hear the case *in camera*?

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GRAVE-STONES, GRAVE-YARDS, AND GRAVE SUBJECTS.

"Let's talk of graves, of worms and epitaphs."

James the Seventh of Scotland (the gentleman who left England because of a difference with his son-in-law), in 1686, with the advice and consent of the estates of the Parliament of Scotland, passed a law saying that no corpse of any persons whatsoever should be "buried in any shirt, sheet, or anything else, except in plain linen, or cloth of hards, made and spun within the kingdom of Scotland, without lace or point, discharging from thenceforth the use of Holland or other linen cloth made in other kingdoms, all silk, hair or woollen, gold or silver, or any other stuff whatsoever than what is made of flax or hards, spun and wrought within the kingdom, and that under the pain and penalty of 300 pounds Scots, *toties quoties*, for a nobleman, and 200 pounds for each other person, whereof the one-half to the discoverer and the other half to the poor of the parish where the said corpse shall be so interred." While enjoying all the advantages and meekly bearing the burdens of la grippe, we meditated on this Scotch Act, and shuddered to think of the shirt or sheet of plain linen in this

horrible climate of 1890; we did not want any silk or cloth of gold or silver for our own particular winding-sheet, nor even lace or point, but we had a preference for woollen, or some other warm stuff. We felt relieved when we found that Charles II. had, with the aid of the Parliament at Westminster, enacted that the people of England should all be buried in woollen shrouds (30 Car. II., c. 3). We knew our friends would sooner give us soft warm winding-sheets wherein to wrap "that small model of the barren earth which serves as paste and cover to our bones."

The influenza filling our head prevented our clearly seeing how the *toties quoties* applied. How often is the same corpse interred in Scotland?

The Act of James likewise ordained that no wooden coffin should exceed an hundred merks Scots, as the highest rate for persons of the greatest quality, and so proportionately for others of meaner quality, under the pain of 200 merks Scots for the contravention. The "coffin trust" settles the price of these necessary articles now-a-days, and undertakers undertaking to fix rates are more to be feared in this year of grace than all the laws of all the Stuarts on the subject.

We are not sentimental about wishing to have cowslips and violets growing over our grave and flourishing on the disintegrating components of our body, still we were pleased to find that under our Cemetery Act no one can be buried in a vault or otherwise under any chapel or other building, because cold, damp, dank places are distasteful to our feelings (R.S.O., c. 175, s. 10). But why did our wise legislators forbid people being buried within fifteen feet of any such building or chapel? (*Ibid.*) Did they fear a disturbance of the foundation in the event of a resurrecting by medical students or otherwise?

A man who invests his capital in cemetery lots has certain advantages over his friends who invest in other kinds of real estate. For instance, burial sites are exempt from taxation of every kind; he may spend tens of thousands of dollars upon it, and yet snap his fingers at the assessor; they cannot be seized or sold under any execution; the owner is not put to the expense of registering his deed, nor can any judgment, mortgage or encumbrance subsist upon such lots (R.S.O., c. 175, s. 13 and 14). It would seem that a male owner cannot be troubled with any inchoate right of dower, or a female proprietor with that still more troublesome thing, tenancy by the curtesy. Yet after all, one's dealings in such real estate may be hampered, as appears from *Schroeder* v. *Wanzer* (36 Hun, 423). Here a gentleman purchased a lot in Greenwood cemetery for a place of burial for himself, his wife and family; considerable improvements had been made at the expense of both the husband and wife; her father and mother, one son and the husband's brother had all been buried in the lot, when the husband took it into his head to sell it, and he did sell and convey it to a stranger for a valuable consideration. The wife appealed to the courts, and it was held that she could restrain her husband from so conveying the lot, and was entitled to have a judgment specifically devoting the lot to the objects for which it had been purchased and improved. Not only did the court declare that equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee, induced by the promise to give it, has made

valuable improvements in the property, "but went on to say that it would be offensive to the moral sense, and therefore should not be sanctioned by the court, after these bodies had there been buried, to permit the property to be made the subject of speculative disposition, with permission to the purchaser to remove them from their resting place. Such an interference with dust and ashes was not sanctioned by the common law" (*King* v. *Lyon*, 2 T.R., 733; *Com* v. *Cooley*, 10 Pick., 37).

Andrew J. Thompson was mean enough to borrow money from William Hickey upon his lot in Greenwood Cemetery, and then bring an action to have the conveyance given in consideration declared void, and to restrain the removal of the bodies of his children buried therein. The court was with him. Van Vorst, J., said that a lot purchased for a burial plot, in which interments had been made, is in such a condition that it cannot be mortgaged to secure the payment of a debt or the return of money borrowed, and that apart from legislative enactment. The conveyance to Hickey and subsequent transfers were declared void, and ordered to be delivered up to be cancelled. The Judge remarked, "the sentiments and feelings which people in a Christian State have for the dead, the law regards and respects, and however it may have been anterior to our legislation on the subject of cemeteries, the dead themselves now have rights, which are committed to the living to protect, and in doing which they obtain security for the undisturbed rest of their own remains. In any view which may be taken of this subject, I am sure," said the Judge, "that the defendants should be restrained from interfering with the children's graves. If the conveyance executed by the plaintiff to Hickey is supposed to confer any present right, it must yield to the easement of the bodies already buried there, which should in no event be disturbed" (59 How. (N.Y.) Pr. 434; see also *Moreland* v. *Richardson*, 22 Beav., 596; 24 *ib.*, 33; *First Presbyterian Church* v. *Second Presbyterian Church*, 2 Brewst (Pa.), 372.)

It appears, however, if the burial lot is unused, a sale, or conveyance, or mortgage may be good, for it would not be against good morals, public policy, or the spirit of the statute (*Lantz* v. *Buckingham*, 4 Lans., 484). Of course in Ontario the statute clearly forbids mortgaging burial lots in public cemeteries (*vide supra*), but does not refer to ordinary grave-yard lots.

A man seems more likely to find his grave his final resting-place if it is in a public cemetery than if it is in a churchyard. A New York Judge said that every person purchasing a grave in a churchyard does so with the full knowledge and implied understanding that change of circumstances may in time require a change of location (*Richards* v. *N. W. Protestant Dutch Church*, 32 Barb., 42). If a burial ground is expropriated in New York, the relatives of the dead are entitled to be indemnified against the expense of removing and suitably re-burying the remains (4 Bradf., 502). In the parish churchyards in England, corpses are expected *to remain in statu quo* only a reasonable time; the corpse—the cadaver (i.e., *caro data vermibus*)—of to-day must allow itself to be removed by the worms, so as to let the corpse of next year have a resting-place. This seems to be the meaning of *King* v. *Coleridge*, (2 B. & Ald., 806). There, in a parish of

30,000 souls, where 700 burials took place annually in the churchyard, the court would not issue a mandamus ordering the interment of a man in an iron coffin. Best, J., said: "The consequence of enforcing such a mode of burial would produce great public inconvenience; for in a few years the churchyard would be filled and a great additional expense cast upon parishioners in providing other places of burial for parishioners." Because a churchyard is not the exclusive property of one generation, but is the common property of the dead, the living, and the generations yet unborn, one cannot build therein a brick grave without the consent of the proper authorities (*Gilbert* v. *Buzzard*, 3 Phil., 335). In England, by statute, burial boards may sell the exclusive right of burial either in perpetuity or *for a limited period*, in any part of any burial ground provided by such board (15 & 16 Vict., c. 85, s. 33). Our statute authorizes deeds granting the lot of land itself to the purchaser, his heirs and assigns (s. 15).

In Illinois, a court of equity will enjoin the owner of land from defacing and meddling with graves on land dedicated to the public for burial purposes, at the suit of any parties having deceased relatives or friends buried therein. (The reporter does not say what the court would do were the relatives and friends buried not deceased) (*Davidson* v. *Reed*, 35 A.L.J., 157).

When we had pursued our meditations thus far, we naturally switched off to think of the monument that would be erected over our grave, and of the epitaph that lying living friends will put over us lying dead below. "For man is a noble animal, splendid in ashes, and pompous in the grave." It is satisfactory to know that tombstones can now be had on the "instalment plan," like pianos and sewing machines; but it is unsatisfactory to learn that the vendor of the tablet may enter upon your lot and remove it, should your sorrowing widow or impecunious representative neglect to pay the instalments. A point might arise if the widow acted without the consent of the representative (*Fletcher* v. *Evans*, 140 Mass., 241). Under our Act the directors of the cemetery company have power to make by-laws for managing the grounds, and for regulating the erection of tombs, monuments, or grave-stones (R.S.O., c. 175, s. 27). At common law the parishioner had no power to decide what should be placed on his grave, the ultimate control over that was reserved for the ordinary; so one naturally expects to find that the legislature, in passing the Act under which cemeteries were to be created to take the place of churchyards, would reserve to the managers of the cemetery a control analogous to that exercised by the ecclesiastical authorities at common law over churchyards (*McGough* v. *Lancaster Burial Board*, L.R., 21 Q.B.D. at p. 328.)

McGough paid to the Lancaster Burial Board a guinea, and received a conveyance granting to him, his heirs and assigns, the exclusive right of burial in a certain plot, subject to the regulations then in force or which might be thereafter issued with regard to interments in the cemetery by the burial board or other competent authority. He obtained leave to put up a grave-stone, which he accordingly did. He afterwards placed upon the grave a wreath, and to protect the wreath a glass shade, and to protect the glass shade, a galvanized wire covering. The board never allowed the placing of glass shades on graves in their cemetery, so they

removed this one and its covering without McGough's consent. Thereupon the offended Briton sued them in the County Court, and got a judgment for nominal damages and costs; but the board appealed, and the Queen's Bench Division held in their favour (L.R., 21 Q.B.D., p. 323). Mrs. Harris was more fortunate in her contest with the St. Pancras Burial Board: Mrs. Robotham had obtained from the board the right of constructing a private grave in the cemetery, and the exclusive right of burial and interment therein, to hold in perpetuity, for the purpose of burial, and of erecting and placing therein a monument or stone: with a proviso that if the monument or stone and the appurtenances should not be kept in order according to such regulations as should be made by the board, the grant should be void. In accordance with this grant, Mrs. R. placed her husband in her lot, and placed a head-stone and a kerb around the sides of the grave, leaving an open space at the top over the body without any stone or other covering; for ten years she kept this open space planted with flowers, employing her own gardener, and thus writing her sorrow "on the bosom of the earth." Then the board resolved to undertake the planting of flowers exclusively themselves, and they so notified Mrs. R. After this, Mrs. Harris—not the life-long friend of Sairey Gamp, whose existence Mrs. Betsey Prig doubted, but the wife and assistant of Mrs. R.'s gardener—went to the grave to plant some flowers (by Mrs. Robotham's request); she was told to stop, but went on digging in the space and sowing seeds, when Ashby, the officer of the board, forcibly prevented her. For this assault Mrs. H. summoned the man before the justices, who convicted him and fined him 1s., and 17s. costs. The case was appealed. The court sided with the ladies and upheld the conviction. Bovill, C.J., said, speaking of the exclusive right to a grave, "the grantee would be entitled to plant it, provided she did nothing that was offensive or unsightly. If I could have felt any doubt or difficulty in the matter, it would be very much removed by what Mrs. R. has from time to time been allowed without objection to do." Willis, J., said the board had no right to make special rules which would derogate from prior grants. That whenever memorials are allowed to be put up, they are always allowed to be repaired and decorated, even in places of worship. Byles, J quite agreed, and thought that surviving relatives would value the exclusive right of interment, because they then might plant the grave with their own hands, and from year to year renew the flowers. The Chief Justice thought that if the sorrowful widow could be prevented from planting her husband's grave, she might equally be prevented from visiting it (*Ashby* v. *Harris*, L.R., 3 C.P., 523). Poor Mrs. Robotham did not share in Lord Byron's sentiment when he wrote of the grave of his wife:

> "I will not ask where thou liest now,
> Nor gaze upon the spot:
> There flowers or weeds at will may grow,
> So I behold them not."

Some people have found it difficult to arrange satisfactorily for the maintenance of their tombs by their wills. Mrs. Bates, a Massachusetts lady (perhaps belonging to cultured Boston), inserted in her will a clause as follows, *verb. et lit.*:

"My house and furniture, silver plate, fixtures, and everything, to be sold, if there should not be enough from my husband's estate for a monument. I wish to have my money expended for a monument of granet, with four pillows like one in the grove, only larger, if there should be money enough left from my husband's estate. I want a momento of Hope, Faith and Charity, the expences to be taken from my own estate, and his name cut on the steps, the remainder left I wish to be kept in trust to beautify and keep the it in good order. I wish this to be carried strictly through." The court declined to allow the poor woman's wishes to be carried out, holding that the repair of a private monumental structure is a matter strictly individual and personal; that the fund constituted by the testatrix was to be expended for her own gratification upon an object in which the public had no interest, and which had no proper similitude to a charity; that the provision constituting the fund for the preservation, embellishment and repair of the monument or memento erected by her was therefore void, as seeking to create a perpetuity for a use not charitable. The right to sell even could not be exercised (*Bates* v. *Bates*, 134 Mass., 110; S.C. 45, Am. Rep.; see also *Piper* v. *Moulton*, 72 Me., 155; S.C. 39, Am. Rep. 748). In fact, it has been repeatedly held that a bequest to provide a fund for the permanent care of a private tomb or burial place cannot be treated as a private charity and thus made perpetual, but that such bequest is void (*Giles* v. *Boston Fatherless and Widows' Society*, 10 Allen, 355; *Doe* v. *Pitcher*, 6 Taunt., 370; *Lloyd* v. *Lloyd*, 2 Sim. (N.S.), 264).

Where a man bequeathed £500 in trust to apply such part of the income thereof as might be necessary in keeping in repair a family vault, and the residue in keeping up his brother's tomb and the parish churchyard, it was held that the gift to repair the churchyard was good, as a charitable gift for a public object, although the other gifts were void. North, J., said, "To put it shortly, I do not see any difference between a gift to keep in repair what is called 'God's house,' and a gift to keep in repair the churchyard round it, which is often called 'God's acre.' A testator providing for the repair of a family tomb is only ministering to his own private feeling or pride, or it may be to a feeling of affection that he has for his own relations, and it is not for the benefit of the parish at large that a particular tomb should be kept in repair. But in respect of the repair of the churchyard as a whole, it is for their benefit" (*Re Vaughan: Vaughan* v. *Thomas*, 33 Chy.D., 187; *Richard* v. *Robson*, 31 Beav., 244). A direction to a widow and another annuitant under a will to keep the testator's tomb in repair out of their life interests has been held good, and they were said to be under an obligation out of their annuities to do so according to the directions of the will (*Lloyd* v. *Lloyd*, *supra*). A man gave his executors £600 to invest, and directed them to apply the income in keeping in good repair his monument and all the tombstones and headstones of his relatives in a certain graveyard; and the surplus, if any, after annually defraying these expenses, was to be given to the poor and pious members of the Methodist Society at G. above the age of two score years and ten. The court held that the trust to keep in repair was honorary only, and that the old Methodists were entitled to the whole benefit of the money, to the utter

exclusion of the poor grave-stones (*Dawson* v. *Small*, L.R. 18, Eq. 114; see also *Hunter* v. *Bullock*, L.R. 14, Eq. 45).

The questions—important as they are—of who is entitled to the custody of a corpse and has a right to decide on the place of sepulture, and when the remains may be removed from one grave to another, we were going to consider, but the exigencies of time and place and space forbade; besides, Mr. John Howard Corwin, of the New York bar, has told the world nearly all that need be known on these points in his interesting paper on Burial Law, published by Diossy & Co., 231 Broadway, last year, and to his production we would refer the readers of THE CANADA LAW JOURNAL; he treats of the subject from the time when "the world was new" down to a few months ago. R. V. R.

COMMENTS ON CURRENT ENGLISH DECISIONS.

We continue the cases in the January number of the English Law Reports:

MARRIED WOMAN—ATTACHMENT OF DEBTS—ORDER xlv., v. 1. (ONT. RULE 935).

A question arose in *Holtby* v. *Hodgson*, 24 Q.B.D., 103, whether upon a judgment recovered against a married woman upon which execution was limited to her separate estate not subject to restraint on anticipation, a sum of money payable under a judgment directed to be entered in favor of the married woman, could be attached before the judgment in her favor had been actually entered. The Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) affirming Mathew and Cave, JJ., held that it could—and that notwithstanding the judgment recovered against the married woman created no personal liability, the judgment creditor was nevertheless entitled to take garnishee proceedings.

WITNESS—ACTION FOR WITNESS FEES.

Chamberlain v. *Stoneham*, 24 Q.B.D., 113, shows that where under Rules of Court a witness is entitled to conduct money and payment of expenses and loss of time, if not duly paid, he may bring an action to recover them against the person by whom he was summoned.

STATUTE OF LIMITATIONS (3 & 4, W. 4, C. 27, S. 25) (R.S.O., C. 111, S. 30)—DEVISE ON TRUST —POSSESSION BY TRUSTEE FOR 12 YEARS—CLAIM BY HEIR-AT-LAW—"EXPRESS TRUST."

In *Patrick* v. *Simpson*, 24 Q.B.D., 128, the troublesome question as to what is "an express trust" within the Real Property Limitation Act (R.S.O., c. 111, s. 30) came up for consideration. The facts of the case were, that a testator had devised a house and all his other real estate to his executors upon trust, as regards the house, but without any declaration of trust as regards the rest of the realty. The executors went into, and continued in, possession of the rents and profits of the whole of the realty for upwards of twelve years. The present action was by the heir-at-law, claiming the realty as to which no trust was declared. The defence of the Statute of Limitations was set up;

and it thus became important whether or not the executors could be said to hold in trust for the heir-at-law by virtue of an "express trust." Upon the authority of a decision of Lord Plunket in an Irish case of *Salter* v. *Cavanagh*, 1 D. & Wal. 668, Huddleston, B., and Stephen, J., decided that though no trust was declared by the will of the property in question, the executors nevertheless held it under the will under "an express trust" for the heir-at-law, and therefore that the Statute of Limitations afforded no defence. The case was distinguished from the recent case of *Churcher* v. *Martin*, 42, Chy.D. 312 (noted *ante* vol. 25, p. 506) on the ground that in the latter case the deed to the trustees was null and void under the Mortmain Act.

LANDLORD AND TENANT—REMOVAL OF GOODS TO PREVENT DISTRESS—11 GEO. 2, C. 19, S. S. 1, 3.

The only point for which it seems necessary to notice *Tomlinson* v. *The Consolidated Credit & M. Co.*, 24 Q.B.D., 135, is the decision that statute 11 Geo. 2, c. 19, which gives landlords an action to recover double the value of goods fraudulently carried off the demised premises to avoid a distress, applies to the goods of the tenant only, and not to those of a stranger. In this case the tenant had given a bill of sale of his goods to the defendants who, with the tenant's consent, removed them to avoid a distress, and it was held by the Court of Appeal (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) affirming Field and Manisty, JJ., that the defendants were not liable under the statute.

ADMINISTRATION—PAUPER LUNATIC.

In the goods of Eccles, 15 P.D.1, the husband of the deceased intestate was a pauper lunatic confined in a county asylum. Notice having been given to her next of kin, and they not having appeared, the Court made a grant of administration to the guardians under whose care the husband was confined, for his benefit, and limited to such time as he should remain insane.

WILL—SIGNATURE OF LEGATEE WRITTEN UNDER ATTESTATION CLAUSE—OMISSION OF NAME IN PROBATE.

In the goods of Smith, 15 P.D. 2, presents some features of similarity to the recent case of *Re Sturgis, Webling* v. *Van Every*, 17 Ont. 342. After a will had been executed and duly attested by two attesting witnesses, the wife of the testator, who was also an executrix and took a life interest in the whole estate, signed her name to the will at the testator's request, not with the object of attesting it, but in order to verify its contents. Under these circumstances the Court granted probate of the will omitting the signature of the wife, after notice to infants having a reversionary interest under the will and no cause being shown to the contrary.

ADMINISTRATIO—DE BONNIS NON—ADMINISTRATOR ABSCONDED—REVOCATION OF GRANT.

In the goods of Covell, 15 P.D. 8, the administrator having absconded after partly administering the estate, and though several years had elapsed, no trace of him having been discovered, the Court revoked the grant, and made a fresh grant *de bonis non* to a residuary legatee.

ADMINISTRATION—GRANT TO COMMITTEE OF LUNATIC—ADMINISTRATION BOND.

In the goods of Morris, 15 P.D., 9, application was made for the grant of administration to a lunatic's estate. It appeared that the estate to be administered consisted of £10,000, of which all but £850 had been paid into Court, and the balance would shortly be also paid in. The Court made the grant and dispensed with security, except as to the £850, as to which a bond for £1700 was required to be given.

EXECUTORS—ADMINISTRATION—DISTRIBUTION OF ESTATE AFTER ADVERTISEMENT (R.S.O., c. 110, s. 36).

Proceeding now to the cases in the Chancery Division, the first which calls for notice is *In re Bracken Doughty* v. *Townson*, 43 Chy.D., 1. This was an action against executors for administration. The defence was that they had distributed the estate after publication of due notice under 22 & 23 Vict., c. 35, s. 29, (R.S.O., c. 110, s. 36); and this was held to be a sufficient answer. Some question was raised as to the sufficiency of the notice published, and North, J., held that there was no inflexible rule, that the notice must be published in a London daily newspaper of large circulation, or that a month should be allowed for bringing in of claims; but that the question as to the sufficiency of the notice depended on the circumstances of the particular case, such as the place of residence, or position in life, of the deceased. In this case, the testator was a small farmer, and had lived in the same place forty years previously to his death, and had never engaged in any other occupation than farming his own land, consisting of about fifty-two acres. The notice was published once in each of the local newspapers, and once in the London *Gazette*. The notice fixed a month from its date for bringing in of claims, but it was not published until a day or two after its date; and it was held by the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirming North, J., that the notice was sufficient, and that the executors who had distributed the estate, were protected from any further claim.

MARRIED WOMAN—WILL—MARRIED WOMAN'S PROPERTY ACT, 1882 (45 & 46 VICT., c. 75), s. 1, s-ss. 1, 2, 5, (R.S.O., c. 132, s. 5, s-s. 2).

In re Cuno Mansfield v. *Mansfield*, 43 Chy.D., 12, is another decision upon the construction of the Married Woman's Property Act, 1882, 45 & 46 Vict., c. 75, s. 1, s-ss. 1, 2, 5, (see R.S.O., c. 132, s. 5, s-s. 2). In this case the married woman was entitled, under her marriage settlement made in 1863, to certain property which was thereby limited (in default of issue) upon trust for her absolutely, if she survived her husband, but if she should die in his lifetime then upon such trusts as she should by will appoint, and in default of appointment, for her next of kin. During her coverture, by will made in 1886, she appointed the fund to trustees, in case she should predecease her husband, upon certain trusts, and she bequeathed to them upon the same trusts all the property she could dispose of by will. She survived her husband, and died without republishing her will, never having had any issue. The question, therefore,

whether the will passed the estate, which vested in her absolutely on her husband's death? Kay, J., held the will to be inoperative as to this estate, and the Court of Appeal (Cotton, Bowen, and Fry, L.JJ.) affirmed his decision. It was admitted that, as the testatrix survived her husband, the will made in his lifetime was inoperative, unless under the Act she acquired the power of disposing of the property as separate property. This the Court held she did not, because the Act only makes property acquired after its passage separate property, whereas the right to the property in question was acquired in 1863.

PRACTICE—TIME FOR APPEALING—INTERLOCUTORY FINAL ORDER.

Blakey v. *Latham*, 43 Chy.D., 23, is useful for the expression of opinion of the Court of Appeal as to what is an "interlocutory" as distinguished from a final order. In this case the plaintiff's action having been dismissed with costs, he applied for leave to set off against these costs, costs payable to him by the defendant, partly in this action, and partly in another action between the same parties. One Green, the defendant's solicitor, claimed a lien on the costs, payable to the defendant, for his costs in this action. Kay, J., allowed the set off, but as regarded the costs of this action, subject to any lien Green could establish before the taxing officer. Green appealed, and the preliminary objection was taken that the appeal was out of time, the order being merely interlocutory, and the Court of Appeal (Cotton and Fry, L.JJ.) held that it was interlocutory. Fry, L.J., observes, "that where a final judgment has been pronounced in an action, and subsequently an order has been obtained for the purpose of working out the rights given by the final judgment, that order has always been deemed, and rightly deemed, to be interlocutory."

CHARITY—MORTMAIN—INTEREST IN LAND—BONDS OF HARBOUR TRUSTEES—9 GEO. 2, C. 36.

In re David, Buckley v. *Royal National Lifeboat Institution*, 43 Chy.D., 27, the Court of Appeal (Lord Coleridge, C.JJ., and Cotton and Fry, L.JJ.) affirmed the decision of North, J., that certain bonds issued by harbour trustees, and which constituted specific mortgages of a share of the bridge tolls and rates leviable under the act of incorporation of the harbour, were (as the bridge tolls were paid for passing over bridges on the land of the trustees) an interest in land, and, therefore, were impure personalty within the Mortmain Act (9 Geo. 2, c. 36); and therefore a bequest of them for charity was void, although it might, under *Turner* v. *London C. & D. Railway Co.*, 2 Chy.D., 201, have been otherwise, had the bonds amounted to a mortgage of the whole undertaking.

STATUTE OF LIMITATIONS—CHARGE OF DEBTS ON LAND—DEBT BARRED AS TO PERSONALTY, BUT NOT AS AGAINST REALTY—ADVERTISEMENTS FOR CREDITORS—CREDITOR SENDING IN CLAIM NOT EQUIVALENT TO BRINGING ACTION.

In re Stephens, Warburton v. *Stephens*, 43 Chy.D., 39, shows that in England where a testator has charged his debts upon his lands, that although a creditor's claim may be barred as against the personal estate, after the lapse of six years from the time the debt became due, it will not be barred as against the realty

until the lapse of twelve years. It seems, however, that the *rationale* of this decision is the fact that the land comes to the executors charged with debts, not as executors but as trustees, and that in that way a trust is created as regards the land which does not exist as regards the personalty. It may, therefore, be open to question whether in Ontario, since the Devolution of Estates' Act, this reasoning would be applicable, now that the duty of the executor is to administer both the real and personal estate of the deceased, and it may be that here a debt barred as to the personalty would be barred altogether, notwithstanding an express charge of debts upon the realty. Notwithstanding that the debt in this case was held to be not wholly barred as to the realty, Kay, J., nevertheless intimated an opinion, that as the effect of the charge was to make the debts payable rateably out of the real and personal estate, that as to the proportion payable out of the latter, it could not be recovered out of the realty, but on this point he gave no definite decision. One other point arose in the case. The executors had advertised for creditors, and a creditor sent in his claim, it was never admitted, and after six years had elapsed, the executors then took out a summons to have the claim adjudicated upon. It was argued, that the sending in the claim was equivalent to bringing an action, but Kay, J., it is almost needless to say, refused to assent to that proposition.

SOLICITOR AND CLIENT—MORTGAGE BY CLIENT TO HIS SOLICITOR—PROFIT COSTS, RIGHT TO CHARGE.

The short point decided by Kay, J., *In re Roberts*, 43 Chy.D., 52, was simply this, viz.: That where a solicitor takes a mortgage from his client to secure a loan made by himself, he cannot charge his client with profit costs for the preparation of the mortgage. The reasons given for the decision do not appear to be very conclusive, and the case apparently is not covered by any previous authority. There seems to be really no more reason why a solicitor should not be entitled to recover profit costs of a mortgage drawn in his own favor, than that he should not recover profit costs of an action which he brings or defends in person, and yet in the latter case his right to profit costs is, we think, undeniable.

WILL—ADMINISTRATION—COVENANT BY TESTATOR TO PAY ANNUITY—APPORTIONMENT OF LIABILITY BETWEEN DEVISEE FOR LIFE AND REMAINDERMAN.

In re Harrison, Townson v. *Harrison*, 43 Chy.D., 55, a testator having made a covenant to pay an annuity, made a will devising his real estate to certain persons for life with remainder over in fee. The personal estate proving insufficient to meet the liability on the covenant, it was held by North, J., that the annuity must be treated as a debt of the testator, and that it must be apportioned among the estates devised according to their respective values, and that each tenant for life on paying his proportion of the annuity would be entitled in respect of the amount paid to a charge on the *corpus*, but was not entitled to recover any interest on the amounts so paid.

BUILDING SOCIETY—ARBITRATION—AGREEMENT TO REFER—APPOINTMENT OF ARBITRATORS AFTER ACTION.

In *Christie* v. *Northern Counties Building Society*, 43 Chy.D., 62, an application was made by the defendants to stay proceedings and to refer the dispute to arbi-

tration in pursuance of the rules of the defendant society. These rules provided that disputes between the society and any member should be settled by a reference to arbitration, and that five arbitrators should be elected by the members at a general meeting, of whom three should be chosen by lot by the complaining member to decide the matter in dispute. No arbitrators were elected under the rules until after the action was commenced, and it was held by North, J., that as the rules contemplated the election of a standing body of arbitrators, out of whom three were to be chosen, that the society could not, after litigation had been commenced, select the tribunal to decide it, and the application was therefore refused.

WILL—CONSTRUCTION—CODICIL—EXECUTION OF POWER.

In re Blackburn, Smiles v. *Blackburn*, 43 Chy.D., 75, North, J., was called on to decide whether a power of appointment had been well executed under the following circumstances: A husband having, under a settlement, after the decease of his wife, a testamentary power of appointment, before her decease made a will of all property he "might be possessed of, or over, which he might have power of bequest or disposal at the time of his death." After his wife's death he made a codicil confirming his will. The learned Judge held that although he could not execute the power in his wife's lifetime, the effect of the codicil was to reiterate the words of the will, and therefore the power was well executed.

PRACTICE—PARTITION ACT—INQUIRY AS TO PERSONS INTERESTED.

In *Wood* v. *Gregory*, 43 Chy.D., 82, which was a partition action brought in respect of an estate valued at £10,000, North, J., refused to determine on affidavits at the hearing who were the persons interested, but directed an inquiry, although conceding, that where the estate was of small value and the case simple, the inquiry might be dispensed with.

Correspondence.

DIVISION COURT LAW.

To the Editor of THE CANADA LAW JOURNAL:

SIR,—By section 207 (2) of the Division Courts' Act it is provided that "in all actions or other proceedings brought in a Division Court, in which the plaintiff *fails to recover judgment*, by *reason* of the Court having no jurisdiction over the subject matter thereof, the judge presiding in the Court shall have jurisdiction over the costs," etc. R. 1256 (of Consolidated Rules) makes a similar provision as to County Courts and Division Courts.

Now, in order to give the judge authority to deal with the costs, it would seem to be necessary that it first should appear that the plaintiff's failure to recover judgment was *wholly* dependent on the want of jurisdiction of the Court.

Suppose, in the opinion of the judge, the plaintiff would fail, even if the Court had jurisdiction, could it be said that he failed to recover judgment because the Court had no jurisdiction?

Construed strictly does not the rule mean this, that upon the case being heard, the plaintiff would, in the opinion of the judge, be entitled to judgment, but for want of jurisdiction in the Court, and on that account having failed to obtain judgment, the judge has authority to deal with the costs?

Should not the section or rule be amended so as to provide "that in all cases where the plaintiff fails to recover judgment, or where the case or matter shall not *be heard or disposed of*, by reason of the Court not having jurisdiction," etc?

Yours, etc.,

February 20th, 1890. JUSTITIA.

[Without a recast of the whole subsection, or a special provision by independent enactment, it would be difficult to provide for a case which would "*not be heard or disposed of*" by the judge in open Court. An objection to the jurisdiction might be put in with the defence note; the plaintiff on receipt of that may decide to withdraw the case, or not go on with it. We do not see how the judge would, under the proposed amendment, have power or authority to order costs to the defendant, if any were incurred.—ED. C.L.J.]

IMPRISONMENT FOR DEBT.

To the Editor of THE CANADA LAW JOURNAL.

SIR,—I have read the letter of your correspondent, "Justitia," and notice that you invite opinions from men experienced in the administration of Division Courts' Law. With reference to the proceeding by judgment summons, I would say that I do not regard the procedure as one savouring of "imprisonment for debt" in the ordinary sense of that expression. It is not the *theory* but the *fact* of calling upon a man to answer for his fraud or neglect to pay what he justly owes, and for withholding from his creditors that which is their due—he having the means of satisfying a judgment. Some years ago, the *London Free Press* published articles suggesting the expediency of abolishing the right to sue for small debts altogether. Such a course would have the tendency to bring upon men of small means great hardship, because to some extent the credit system is essential to many. It is a well established fact that the very existence of a tribunal which can make a man honest enough to pay his debts if he is able, though unwilling, causes many to pay what they owe, who would not but for the knowledge that the legal machinery exists whereby they can be sued for their debts. So it is with regard to the proceeding by judgment summons. Many persons would not, were the clause referred to by your correspondent repealed, pay their creditors at all, and so long as they could get into debt, would, without scruple, let their creditors remain unpaid. It is well known that in some counties the administration of this law is so wisely and temperately administered that many thousands of dollars are collected without imprisonment, which would not be

collected but for the order for commitment. This order of commitment is in truth a necessary consequence of indifference or dishonesty, and actual imprisonment seldom takes place. In other counties there is so much laxity and sympathy for the poor debtor, and so little for the poor creditor, that creditors are often unwilling to sue in the Division Court at all, and a careless administration of the law in some counties prevents its being as useful as it ought to be, and might be. I think the law needs no revision, unless it be in matters of mere detail. Its principles must be retained whilst the credit system exists, and this system is so largely (and, I admit, so injuriously) engrafted into the transactions of the country, that no change should, in my opinion, be made in the direction indicated.

Feb. 22, 1890. Yours, etc.,

SENEX.

[Our correspondent has had a very large experience in this matter, and we attach much weight to that fact. His views are, we may say, substantially our own. We should, however, be glad to hear from others on the subject.—ED. C.L.J.]

Notes on Exchanges and Legal Scrap Book.

CAN DIRECTORS OF A COMPANY OVERDRAW?—This was the question raised in a case before the Chancery Court of Lancashire. The liquidator in the winding up of this company desired to obtain the direction of the Court as to the mode of proceeding in the matter of a deposit entered into by the directors of the Ebenezer Loan Company. It appeared that the directors of this company had overdrawn its account at the bank, and having a further need of money, the directors decided to ask for a further overdraft. Application was accordingly made, and the title-deeds of certain property deposited as security. The liquidator considered the company held no power to give such security. Liquidator's counsel argued that no power was given to the directors by the memorandum or articles of association of the company, to give such security, and contended that a power to make a deposit by deed should be obtained at a special meeting of creditors. The question was one in which they must distinguish between the company and the directors if any objection at all could be made to the security. It was upon that distinction that the articles of association prescribed exactly what powers the directors had. The Vice Chancellor ultimately decided that, having regard to the affidavit of the official liquidator, and to the statement as to the memorandum of association and the articles of the company, he was of opinion that the liquidator ought to resist the demand made upon him by the bank to execute a legal mortgage of the property, and to be authorized to demand from the bank the delivery up to him, as official liquidator, of the deeds comprised in the memorandum of the deposit within the period of three weeks, the costs of the liquidator, and of parties appearing, to be costs of the liquidation, with authority to take such other steps as might be advised.—*Law Journal.*

DIARY FOR MARCH.

1. Sat. ...St. David.
2. Sun.... *Second Sunday in Lent.*
3. Mon....Serfdom abolished in Russia, 1863.
4. Tues ...Court of Appeal Sits. General Sessions and County Court Sittings for trial in York.
5. Wed....York changed to Toronto, 1834.
9. Sun.... *Third Sunday in Lent.*
10. Mon....Prince of Wales married, 1863.
13. Thu....Lord Mansfield born, 1704.
16. Sun.... *Fourth Sunday in Lent.*
17. Mon....St. Patrick's Day.
18. Tues ...Arch. McLean, 8th C.J. of Q.B., 1862. Princess Louise born, 1848.
23. Sun.... *Fifth Sunday in Lent.*
26. Wed....Bank of England incorporated 1694.
58. Fri.....Canada ceded to France 1632.
30. Sun. ...*Palm Sunday.* B.N.A. Act assented to 1867. Reformation in England began 1534.
31. Mon....Slave Trade abolished by Britain 1807.

Reports.

ENGLAND.

COURT OF APPEAL.

(Reported for THE CANADA LAW JOURNAL, by A. C. Galt, Barrister-at-Law, Toronto.)

MULLER *v.* NASH.

Solicitor's liability—Misappropriation before partnership—Improper investment—Liability of firm—Negligence—Damages.

D. and N. entered into partnership as solicitors, in September, 1885. D. had previously received £450 as solicitor for M.

In January, 1886, M. instructed D. & N. to reinvest the money on a mortgage of the life interest of W., in £2,000 (under a marriage settlement), and an assignment of a policy for £600, on W.'s life. These securities were vested in D., but were already mortgaged by him to their full value, of which M. had no notice. At D.'s request, M. executed a reconveyance (prepared by the firm) of the property originally mortgaged to her, and in February, 1885, D. executed a mortgage and assignment (also prepared by the firm) of the new securities, in favor of M., but no notice thereof was given to the trustees of the marriage settlement or to the insurance company. In May, 1887, D. paid off the prior charge on the securities, and sold them to H. for £350. The insurance company went into liquidation, and D., after having paid a year's interest to M., died a bankrupt, in July, 1887.

Held, affirming Grantham, J., that N. was liable for the fraud and negligence of D.; that the debt due from D. to M. at the date of the partnership, was capable of being treated as money in the hands of the firm for investment; and that the measure of damages was the amount of M.'s loss, irrespective of the insolvency of D., or of the insurance company.

[GRANTHAM, J., Nov. 7, 1888—C.A., Mar. 30, 1889.

Action for damages against defendant, as member of a firm of solicitors, for fraud and negligence.

The plaintiff had employed Messrs. Deane & Chubb, as her solicitors, to invest £450, and they invested it on a mortgage. Chubb died in May, 1885. In July, 1885, the mortgagor repaid the money to Deane, who appropriated it to his own use. On September 1st, 1885, a partnership was formed between Deane and the defendant, under the name of Dean & Nash, notice of which was given to the plaintiff.

In January, 1886, Deane informed the plaintiff that the mortgage had been paid off, and he received instructions from the plaintiff to reinvest the money upon a mortgage of certain securities, suggested by Deane, the particulars of which were not given to the plaintiff. A reconveyance of the prior mortgaged property was thereupon prepared by a clerk of the firm, under the instructions of Deane, and was executed by the plaintiff. In February, 1886, a mortgage and assignment from Deane to the plaintiff were also prepared by the firm, whereby Deane purported to mortgage the life interest of one Woodhouse in £2,000 (under a marriage settlement), and to assign a policy for £600 in the Briton Medical Insurance Company, upon the life of said Woodhouse, to the plaintiff.

These securities had, by various assignments, become vested in Deane, who had already mortgaged them to their full value. No notice of the plaintiff's mortgage or assignment was given either to the trustees of the marriage settlement or to the insurance company, but Deane paid interest to the plaintiff for about one year. On May, 17th, 1887, Deane paid off the prior charge upon the securities, and a few days later, sold and assigned them to one Hartland for £350, without the plaintiff's knowledge. The insurance company had gone into liquidation, so that the value of the life policy was greatly depreciated. Deane died, hopelessly insolvent, in July, 1887.

At the trial before GRANTHAM, J., on Nov. 7th, 1888, *Willis*, Q.C., appeared for the plaintiff; *Bompas*, Q.C., for the defendant.

It was admitted on the part of the plaintiff, that the defendant was entirely innocent of any personal misconduct, and it was shown that he had no knowledge of the particular acts complained of.

The defendant contended, amongst other

things, that the plaintiff was merely in the position of a creditor of Deane, who was shown to have been perfectly insolvent from the time he received the plaintiff's money in July, 1885, down to his death in July, 1887, so that the plaintiff had suffered no special damage by reason of the subsequent negligence. Upon this point the following discussion took place:

Mr. JUSTICE GRANTHAM.—That does not follow, because many a man is bankrupt for years, and goes on trading, and people get securities and get paid during all that time.

Mr. Willis.—Yes.

Mr. Bompas.—They may; but surely that is not a thing to be assumed of a bankrupt man that he will pay all his creditors.

Mr. JUSTICE GRANTHAM.—Not "all." We have nothing to do with "all," only with one.

Mr. Bompas.—Surely it is not to be assumed as evidence that he could pay a particular creditor.

MR. JUSTICE GRANTHAM.—That may be, but it is a negative. You have to show that he would not—or could not—have paid Miss Muller.

Mr. Bompas.—I should have thought that I did *prima facie* show it, if I showed that he had no money, and had spent this money.

At the conclusion of the evidence the following judgment was delivered:—

GRANTHAM, J.—I am of opinion in this case that my judgment must be for the plaintiff, and with regard to the amount, I cannot say positively that the security was of the value of £450 at the time that Mr. Bompas relies upon; but I do not think I should be justified in saying that it was not, on the evidence that has been given by Mr. Nash. No doubt, Mr. Dixon Hartland only gave £350 for it; also, that to a certain extent the security was diminished in value, from something that had happened in reference to the Briton office. I do not know whether it was a fire office or a life office, but I suppose it was a life office. Still, I do not think that is sufficient evidence to justify me in saying it was worth only £350. Therefore, under the circumstances, I think my judgment must be for the whole amount; because, after all, the amount is not a question of so very much importance. I am very sorry, for Mr. Nash's sake, that my judgment must be against him, because it is quite clear that he is as innocent in this transaction as Miss Muller. Mr. Nash has been defrauded, and I do not see anything that has happened in this case to justify me in thinking that Mr. Nash was, himself, personally negligent, as was suggested in the case of *Cleather* v. *Twisden*, I think, where it was stated that the other partner ought to have known what was going on, and there was sufficient evidence to have brought it home to him. I think that Mr. Nash also, by the evidence which he has given, has shown that he is an honourable man, and that there was nothing to justify him in supposing that his partner was defrauding him in this transaction at this particular time, or defrauding anybody else; but I have to decide on law, and what I believe to be the law, as applicable to a case of this nature, and although it is not necessary to say what I should have done if Mr. Willis had relied on what he suggested would have been his contention, certainly my impression at the present time is that I should have decided against him if he was simply suing for the money received by Mr. Deane, on the ground that Mr. Nash would be liable for money received by Mr. Deane, at the time it has been proved he did receive it. I do not think Mr. Nash would have been liable. But it is not put upon that ground. It is put upon the ground that Miss Muller was the client of the firm at the time that this transaction, the subject of this action, was carried out. Now, it is quite clear that she was a client of the firm at that time, because I have before me a copy of the book of the firm; whether it is the petty cash book, or account book, or ledger, or bill book, does not signify (it is the bill book, I think), and in that book appears the names of Miss A. M. R. Muller and Puttock. This is in the book of Deane & Nash; and there is the charge against her of £9, 15s. 8d. It turns out—as it generally does in these cases—that they get the money from Messrs. Raper & Freeland afterwards; but Miss Muller is the person, as far as I understand, who is charged, and supposing they did not get the money from Raper, I should be very much surprised if they could not recover it from Miss Muller. Miss Muller is their client, and it is only by arrangement that they get the money from the other side, the mortgagee. But supposing there is any difficulty in getting it, I should think that Miss Muller would be responsible to them because, as she says herself, she considered she was going there as a client to the firm of solicitors, and would be responsible

for a bill of costs. Therefore, in this case, as far as the payment of the money is concerned, and the re-transfer of the first money which had been lent to Mrs. Austin, she appears as their client. Then she goes to them in exactly the same position. The only alteration which has occurred is this—that Mr. Nash, or Mr. Deane, with the consent of Mr. Nash, or Mr. Nash, with the consent of Mr. Deane, or Messrs. Deane & Nash, have jointly sent a notice to her that, in future, her transactions would not be transactions with Deane & Chubb, or with Deane (Chubb had died at this time), but that they would be transactions with Deane & Nash, if she comes there, at least, unless any special arrangement is made. She comes there to him as a client of Deane & Nash, with the knowledge—it must be taken to be—of Mr. Nash. It must be taken to be with the knowledge of Mr. Nash, because the notice has been sent out to her as, I suppose, it was sent to all the clients of the old firm of Deane & Chubb. Then, what is her right when she comes there under those circumstances? Why, the right of believing that Mr. Nash will be responsible for all actions which Mr. Deane is responsible for, for anything done or left undone, *qua* solicitor, any work that is done by either of the partners for her, and in the same way as when she came in September or October (I think it was September).

Mr. Willis.—September, my Lord.

Mr. JUSTICE GRANTHAM.—In the same way as when she came in September. If Mr. Deane was not there, Mr. Nash took the money and handed it over to Mr. Deane, so on this occasion if anything had happened to Mr. Deane, and Mr. Deane had not been there, Mr. Nash would have acted as the partner who would have carried out the transaction. Supposing it had not been, I mean that Deane had taken the money, that this particular question had been put on one side, and that somebody else had been the mortgagor, why then, Mr. Nash would have carried out the transaction, and Miss Muller would have been the client of Deane & Nash, exactly in the same way that she was the client of Deane & Nash, although Mr. Deane did the business. Then, what is the business that is done? Why, the business that is done is a mortgage or an assignment of a security to secure this sum of £450. That is what she goes there for. She says, "you must give me the money unless you find me a mortgage.' It is a little bit doubtful whether she knew (I think she did) that it was Mr. Deane's own property. I think we may infer that she did gather from him that he would be the mortgagor, that he would convey, or that he would assign this property to her in which he was interested. Then he fails to do it, and although the deed itself bears date the 1st Feb., it is proved, I think, by the entry in Mr. Phillips' book that it was not drafted until the 19th. I should like to look at that book; I have not seen it.

Mr. Bompas.—The 13th, your Lordship will find it is.

Mr. JUSTICE GRANTHAM.—The 13th, is it? I thought it was the 19th.

(Book handed to His Lordship.)

I see that on the 4th there is an entry by Mr Phillips of Chubb & Muller in reference to work done by him—something or other, in this transaction. There is no date of the 4th Feb. in the bill, but there it is in the book "Chubb & Muller" (and Chubb was not the client) "draft transfer" Chubb was not the client as far as I understand of Deane & Nash, therefore, Muller there would be treated as the client.—However, we are dealing with what happened on the 13th, and so far as that entry is concerned, that is drawing the mortgage, I think it is—

Mr. Willis.—Yes.

Mr. JUSTICE GRANTHAM.—Whether he prepared this document himself or not, I do not know, or whether he really did the draft of it, or copied it, I should imagine that it would be a copying clerk who did that. How is that?

Mr. Bompas.—I think it was a copying clerk, my Lord.

MR. JUSTICE GRANTHAM.—I think it is very likely that the articled clerk would not copy this, but that it would be done by a copying clerk. Therefore, that would be done by the clerks of the firm. As far as Miss Muller is concerned, therefore, she goes there as a client of the firm, and as far as she knows, the work is done by the clerks of the firm, and, in fact, as a matter of fact, the work is done by the clerks of the firm, and not by any clerk of Mr. Deane's alone. As an articled clerk, as I have suggested, if might be that Mr. Deane would have a right to use the sevices of Mr. Phillips for his own private purposes somewhat differently to what

he would the services of an ordinary clerk ; but as far as this is concerned, it is quite clear he was doing it as a clerk of the firm, doing general work for them, especially when I see that there is the other entry on the 4th February in his diary—"Chubb & Muller, draft transfer"—which, I suppose, he prepared in the same way that this draft mortgage was prepared. However, there it is, the mortgage itself is copied by a clerk of the firm, and also, I ought to say, the payment of the stamp is entered in the books of the firm, in the ordinary way, as an ordinary outgoing on behalf of Mr. Deane, the client ; and the very entry before this one of "Deane & Muller" is "Deane" and somebody else, where there is another charge; and where it is charged to him it is put down in the book, and he is treated as a client of the firm. It is quite clear that Mr. Nash knew he was a client of the firm, because he has told us he knew of this work that was being done, and he did, himself, a good deal of it, and there are the charges there against Mr. Deane, £5 in one case, and a good many other charges in other cases, and his name appears as a client of the firm, and, therefore, any question of custom, it seems to me, is got rid of in that way, by the fact that here it was done with the consent of Mr. Nash, with his full knowledge and full consent. Under those circumstances, I think that Mr. Nash must be responsible for the actions of Mr. Deane in work which was done as ordinary legal work, and that being so, that (which is not denied) which ought to have been done (viz.: —A notice given to the office of a company and also to the trustees of the marriage settlement) not having been done, it was negligence on the part of the firm not to have done it ; and, under those circumstances, the firm is responsible for the negligence which resulted in this loss, and I do not see my way to apportion the loss in any other way than saying that in consequence of that negligence and damage which Miss Muller has sustained is the sum which she has lost, viz.—£450.

Mr. Bompas—Will your Lordship stay execution, that we may appeal if we see fit ?

Mr. JUSTICE GRANTHAM.—I think so. I think this is a case of considerable importance.

The defendant appealed, and the appeal was heard on the 30th of March, 1889.

Bompas, Q.C., for the appellant.

F. Mote for the respondent, was not called upon.

THE MASTER OF THE ROLLS.—I think this appeal must be dismissed.

Miss Muller had been a client of the old firm. The first thing that Mr. Nash has to do with it is to inform her, "If you will continue to do business with the firm, that firm will now be Deane & Nash, and Deane & Nash will act for you as your solicitors." That is the first step, and that is done with the knowledge of Mr. Nash. Thereupon Miss Muller goes to the firm, and states that she will continue dealing with the firm, and she instructs the firm to obtain a mortgage for her. It is not correct to say that she knew that she was to lend her money to Mr. Deane, either on his personal security or on a mortgage by him. That is not true—she did not know that. Therefore it is not like that case that has been cited to us where the solicitor says, "I have property in the country, and I will give you a mortgage on my property," and then the man goes down to look at the property, then he knows all about it, he knows then that one partner of the firm of solicitors is to be the mortgagor ; but this lady did not ; she went to that firm—whether she began the conversation or not is wholly immaterial—she instructed Mr. Deane, believing that she was instructing the firm—intending to instruct the firm—to lend her money on the mortgage, the terms of which were not supplied to her—a mortgage of property belonging to Captain Woodhouse. Those are the instructions which she intends to give to the firm, to invest her money on a mortgage described to her, though not fully described to her.

Now, Mr. Deane was the agent of Mr. Nash to accept a client—that is obvious. Mr. Nash had sent word to this lady that Deane and he were partners, and hoping that she would continue the employment of that firm as her solicitors. Therefore he had given Deane authority to accept her instructions as a client of the firm. Then when she gives those instructions to Deane he accepts them.

In my opinion, when he so accepted them, he accepted them as one of the partners of the firm, and the firm, therefore, became her solicitors for that purpose—the firm did.

Now, what was the duty of the firm in that case as her solicitors ? why, to see that her money was invested upon a mortgage to a Cap-

tain Woodhouse ; to see that the mortgagor's title was all right ; to see, if it were necessary, that proper notices should be given to all parties ; in truth, to act for her as her confidential solicitors in investing her money in that way. That is what the firm were employed to do, and what they undertook to do. From that moment everything that was done was done by Deane, or by clerks paid by both Deane & Nash. There was nothing done by a clerk who was the clerk of Deane alone, and paid by Deane alone for doing it ; it was done by the clerks of the firm ; and, what is more, here in a book of the firm, the clerk who copies the mortgage or drafts the mortgage, puts it down as a mortgage which is being conducted for Miss Muller. Then there is the other entry in the book, by some other clerk, who pays the stamp duties out of the money of the firm—he puts that down as a charge to Miss Muller. Everything that was done from the time that retainer was accepted was done in the office by the clerks of the firm. Then is it possible to say that whatever was omitted to be done was omitted to be done by the firm, just as much as what was done was done by the firm? Therefore the things which it was the duty of the firm to do were omitted by the firm. That is negligence on the part of the firm, and for that reason I think the firm was liable.

Then, what are the damages? The damages are what she lost. In my opinion she lost £450.

I may express my opinion that as to the personal honour of Mr. Nash, it is absolutely and wholly untouched ; he has been deceived by a fraudulent partner.

LORD JUSTICE FRY.—I can well understand that in this case the appellant, Mr. Nash, may feel that the decision of the Court against him has been hard ; but when one or other of two innocent persons must suffer for the wrong of a third person, the sufferer always feels that the judgment is a harsh one. The Master of the Rolls has already said that nothing has occurred in this case to impeach the honour of Mr. Nash ; therefore, in that sense, it is hard that he should have to pay for the defaults and misbehaviour of Mr. Deane ; but he had the misfortune to enter into partnership with a man whose character was such that he was likely to involve his partner in trouble—that is the long and short of this case.

Now, at the time of the partnership, the position of things was this, that Miss Muller was the creditor of Deane for a sum of £450, which Deane had received on her account, a few months before. After the partnership had been formed, and a circular had been received by her which invites her to continue her connection with the new firm, she sees Mr. Deane ; and, in my opinion, sees him as a member of the new firm of Deane & Nash ; and thereupon a conversation ensues between her and Deane with regard to this sum of £450. Deane, in the first place, proposes to borrow it of her, on his personal security, which she, with great prudence and propriety, declines. Thereupon he proposed the loan, and mentioned the life policy on Captain Woodhouse's life, and some property in the new three percents. That was the subject on which he proposed that the money might be invested, and she assented to that.

I have come, without much hesitation, to the conclusion that the name of the mortgagor was not mentioned to her. If Mr. Justice Grantham had come to a decided conclusion the other way, I should have felt probably bound to submit to his view, because he saw the witnesses ; but I do not think he has. He says he thinks she knew who the mortgagor was, but it is doubtful. That is not a finding of the learned Judge.

Therefore, we have to look at the evidence. Now the probabilities of the case are very strong that he would not name himself as the intended mortgagor, after she had refused to lend the money to him personally.

In the next place, I think, after what had taken place, she would have recollected the name of the mortgagor, if the mortgagor had been the person to whom she had just refused to lend ; and what is more important than all that speculation as to the probabilities of the case, I think the fair result of her evidence is that he did not mention the name of any mortgagor, and I do think she would have recollected if he had named himself. Therefore, I do not believe that any mortgagor's name was mentioned.

Now, in my judgment, it was within the business of the firm to accept a retainer from Miss Muller to lend the sum of £450, which was then in the character of a debt due from one of the members of the firm to her upon a mortgage of a particular named property ; this was not the case of receiving money for a client generally, no doubt, but it was an undertaking to carry

through a mortgage upon the particular property. That, I think, was within the partnership, and I do not think that the transaction was affected by the secret fraudulent intention which, it is said, was in the mind of Mr. Deane. I think Miss Muller gave the retainer to Mr. Deane as a member of the firm ; I think that he accepted that retainer, and by so doing he bound Mr. Nash.

Now, what was the duty of a solicitor as soon as that retainer had been received? It was, in the first place, to see to the proper preparation of that mortgage ; and the moment it came to his knowledge that the proposed mortgagor was a member of the firm, that ought to have been disclosed to the client. But further than that, he was bound to see that the mortgage was a proper mortgage—in fact, it was a most improper mortgage, for it was a mortgage of the equity of redemption of this property which was mortgaged up to the hilt. Therefore, there was, on the part of Mr. Deane, an entire default in his duty, as the solicitor of Miss Muller, and, inasmuch as he was acting in that character of solicitor to Miss Muller, as a partner with Mr. Nash, Mr. Nash was unfortunately affected by that default and negligence of Mr. Deane, and must answer for them.

Mr. Bompas has not satisfied me that if the firm had done their duty the £450 would not have been forthcoming, therefore the measure of damages is the amount in question.

LORD JUSTICE LOPES.—I am of opinion in this case that there was a retainer of the firm by Miss Muller, a retainer which was accepted by Deane as a partner of the firm of Deane & Nash. It is in that way that Miss Muller became a client of the firm.

Now, in those circumstances, what was the duty of the firm? It was their duty, putting it shortly, without travelling over ground that has already been covered, to see that a safe mortgage was obtained for her. I agree with what has been said, and I do not think that there was any intimation conveyed to Miss Muller that Deane himself was to be the mortgagor. A mortgage was obtained, of which Deane himself was the mortgagor ; that mortgage subsequently turned out to be no security at all ; it was only an equitable mortgage ; the legal estate was outstanding ; there was a previous mortgage ; the property was sold, and the money resulting from the sale was not sufficient to pay the first mortgage, and in that way Miss Muller lost her £450.

In these circumstances I think Mr. Nash is liable in damages for the neglect of his partner, Deane, in conducting the business of the firm.

With regard to Mr. Nash, I desire to make an observation which has been already made, but I desire to repeat that it is my opinion that his conduct is unimpeachable. He has had the misfortune (not an uncommon misfortune) of being the partner of a dishonest man, and in that respect one sympathises with him.

With regard to the measure of damages, I think Miss Muller was entitled to that which she had lost, namely, £450.

Solicitors : *Mote & Son, Bompas, Bischoff, Doagson & Coxe.*

Early Notes of Canadian Cases.

SUPREME COURT OF JUDICATURE FOR ONTARIO.

COURT OF APPEAL.

GALT, C.J.] [Jan. 14.

GRANT *v.* THE PEOPLE'S LOAN AND DEPOSIT COMPANY.

Contract—Interest post diem—Damages.

This was an appeal by the defendants from the judgment of GALT, C.J., and came on to be heard before this Court (HAGARTY, C.J.O., BURTON, OSLER and MACLENNAN, JJ.A.,) on the 10th of February, 1890.

Delamere for the appellants.

Beck for the respondents.

The action was one for redemption, and the chief question involved in the appeal was the construction of the following proviso for payment contained in the mortgage, in respect of which the action was brought : "provided this mortgage to be void on payment . . of $7,500 . . on or before the 1st day of June, 1884, with interest thereon at the rate of ten per cent. per annum until such principal money and interest shall be fully paid and satisfied."

The defendants were allowed by the referee interest after the first of June, 1884, as damages and at the rate of six per cent., and his ruling was affirmed by GALT, C.J.

At the conclusion of the argument this Court delivered judgment affirming the judgment of GALT, C.J., being of opinion that the case was not distinguishable from *Powell* v. *Peck*, 15 A.R., 138, and *St. John* v. *Rykert*, 10 S.C.R., 270.

HIGH COURT OF JUSTICE.

Queen's Bench Division.

Div'l C't.] [Feb. 7.

FLATT *v.* WADDELL. TOWNSEND *v.* WADDELL.

Company—Defective incorporation of—Actions by, dismissed with costs—Liability for costs, of intending corporators and solicitors—Malice—Want of reasonable and probable cause—Liability upon unpaid shares.

Actions brought in the name of a road company against the present plaintiff were dismissed with costs on the ground that the company had never been incorporated according to law. The present actions were brought against four corporators of the company, three of them composing the firm of solicitors who had conducted the former actions on behalf of the supposed company, and all four having expressly authorized the bringing of the former actions, seeking to recover the costs of such former actions, execution therefore against the company having been returned *nulla bona.*

Held, that in the absence of malice and of want of reasonable and probable cause in bringing the former actions, the present actions were not maintainable against the defendants as corporators or as solicitors bringing actions on behalf of plaintiffs who had no legal existence.

It was contended by the plaintiffs before the Divisional Court that the defendants were members of a *de facto* corporation in which they held shares that were not fully paid up, and that recovery could be had against them to the extent of the amounts remaining unpaid upon their shares, but no such case was made upon the pleadings or at the trial.

The Court treated this contention as not having been raised, and reserved leave to the plaintiffs to raise it in fresh actions as they might be advised.

Osler, Q.C., and *F. Fitzgerald* for the plaintiffs.

Bain, Q.C., and *F. Waddell* for the defendants.

Practice.

OSLER, J. A.] [Jan. 14.

MCPHERSON *v.* WILSON.

County Court appeal—Order in chambers striking out jury notice—R.S.O., c. 47, s. 42.

The right or claim mentioned in s. 42 of the County Courts Act, R.S.O., c. 47, is that which forms the subject of the action, not the right to take any particular step in the course of the action; and an order made in Chambers in a County Court action, striking out a jury notice is not an order finally disposing of a right or claim within the meaning of the section, but is in its nature an interlocutory order, and not appealable.

G. W. Marsh for the appellant.

Aylesworth for the respondent.

FALCONBRIDGE, J.] [Jan. 20.

LEESON *v.* LICENSE COMMISSIONERS OF DUFFERIN.

License Commissioners—Liquor License Act—R.S.O., 1887, c. 194, s. 11.

Held, that R.S.O., 1887, c. 194, s. 11, s-s. 13, applies only to the case of the Board of License Commissioners hearing and disposing of formal objections to the granting of a license, and not to every decision of the board having reference to the granting or refusing of licenses.

Bigelow, Q.C., & *Hughson* for the plaintiff.

Delamere, Q.C., & *Myers* for the defendants.

ROSE, J.] Jan. 25.

GRANT *v.* CULBARD.

General Inspection Act—Inspector of Hides—R.S.C., c. 99.

Action against a Government Inspector of leather and raw hides for fraudulently grading and branding incorrect weights and qualities on hides.

R.S.C., c. 99, s. 26, provides that in any such action the defendant may plead the general issue, and that what he did was "done under this Act . . . and if it appears so to have been done, then the judgment shall be for the defendant," etc.

Held, that "done under this Act" means "intended to be done under this Act," and the defendant, not appearing to have acted *mala fide* or to have intended not to perform his duty under the Act, was entitled to the protection of the above section, though he had not pleaded the general issue in terms, inasmuch as he had in effect stated that what he did was done under this Act.

Nesbitt & Ball for the plaintiff.

Blackstock & Watts for the defendant.

Mr. DALTON.] [Feb. 4.

DENHAM *v.* GOOCH.

Dismissing action—Non-attendance of plaintiff for examination — Unmeritorious action — Security for costs—Former action for same cause by another plaintiff.

Upon a motion to dismiss the action for the plaintiff's non-attendance to be examined for discovery pursuant to appointment, the plaintiff offered to submit herself for examination at any time at her own expense. The Master in Chambers, nevertheless, dismissed the action with costs, the plaintiff's claim not being, in his opinion, an honest or fair one.

The plaintiff sued, as lessee from her brother of certain goods, for damages for illegal distress. An action had b en previously brought by her brother in respect of the same distress against the same defendant, and had been dismissed.

Semble, that under these circumstances security for costs might be ordered.

A. W. Burk for plaintiff.

H. H. Macrae for defendant, Gooch.

Q.B. Div'l C't.] [Feb. 5.

MILLIGAN *v.* SILLS.

Venue—Change of—Preponderance of convenience—County Court action — Appeal from Master in Chambers—Rule 1260 — Appeal to Divisional Court.

Held, by the Divisional Court upon appeal from the decision of ROSE, J., ante p. 90, that the venue was properly changed to Napanee, and that even if an appeal did not lie from the Master in Chambers to a Judge in Chambers under Rule 1260, the latter had the right, as upon a substantive application, to make the order which the Master refused.

As the appeal to the Divisional Court was dismissed upon the merits, no opinion was expressed as to whether such appeal lay.

Hilton for the plaintiff.

Aylesworth for the defendant.

ROSE, J.] [Feb. 5.

MEAD *v.* TOWNSHIP OF ETOBICOKE.

Indemnity— Question between co-defendants— Order directing determination of—Application for, after judgment—Con. Rule 328.

The plaintiff sued a municipal corporation and a railway company for damages ; the corporation in their statement of defence claimed indemnity or relief over against the company, but the company did not answer the pleading, and no order was made or applied for before or at the trial to have the question determined ; judgment was given for the plaintiff against the corporation, but not either in favour of or against the company.

After the judgment had been affirmed by a Divisional Court, the corporation applied to the trial judge for an order under Rule 328 to have the question between them and the company determined.

Quære, whether there was power under the Rules to make the order ; and

Held, that, if there was power, it would not be a wise exercise of discretion to make it ; for new pleadings and a new trial would be necessary, and it would be better that a fresh action should be brought than that the plaintiff should be kept before the Court while the defendants settled their dispute.

McMichael, Q.C., for defendants, Township of Etobicoke.

McCarthy, Q.C., for defendants, G.T.R. Co.

ROBERTSON, J.] [Feb. 8.

RAYMOND *v.* LITTLE.

Masters and referees—Reference under sec. 101 of the Judicature Act—Report—Confirmation —Motion for judgment—Rules 753, 848.

Where the Court at the trial of a partnership action after declaring that a partnership existed and ordering that it be dissolved and wound up, ordered that all other matters in dispute in the action be referred for inquiry and report to a Master, under s. 101 of the Judicature Act,

Held, that the report of the Master under such reference was not subject to the provisions of Rule 848 as to confirmation by filing and lapse of time, but that any time after it was made, a motion for judgment upon it was in order under Rule 753, and upon such motion the Court could adopt it wholly or in part, and any party dissatisfied with it might, before or on the return of the motion for judgment, move to set it aside or vary it.

W. H. Blake for the plaintiff.

Langton for the defendant.

FERGUSON, J.] [Feb. 10.

IN RE MURRAY.

Infants—Service on official guardian—Quieting Titles Act.

In a proceeding by petition under the Quieting Titles Act service on the official guardian is good service upon infants who are required to be notified of the proceedings.

H. D. Gamble for petitioner.

FALCONBRIDGE, J.] [Feb. 18.

PAYNE *v.* NEWBERRY.

Costs—Security for—Motion for judgment under Rule 739—Rule 1251.

Since the passing of Rule 1251, the practice sanctioned by *Doer* v. *Rand*, 10 P.R., 165, and *Anglo-American Casings Co.* v. *Rowlin, ib.*, 391, is no longer applicable.

And where a plaintiff against whom a præcipe order for security for costs had been obtained, moved to set it aside, and for judgment under Rule 739, without paying $50 into Court under Rule 1251, his motion was dismissed.

E. Taylour English for plaintiff.

Douglas Armour for defendant.

Q.B.D., Ct.] [Feb. 12.

DANAHER *v.* LITTLE.

Costs—Scale of—Jurisdiction of County Court—Title to land.

The plaintiff, by his statement of claim, alleged that he was and had been for more than six years the owner of certain land, which was unoccupied, and claimed damages for timber cut by the defendant on such land. The defendant, by his statement of defence, disputed the plaintiff's claim, and set up certain facts by way of confession and avoidance. The action was brought in the High Court, but the plaintiff recovered only $120 damages.

Held, that under the pleadings the plaintiff was obliged to prove his title to the land, and therefore the County Court would have had no jurisdiction, and the costs should be on the scale of the High Court.

J. B. Clarke for plaintiff.

Langton for defendant.

FALCONBRIDGE, J.] [Feb. 18.

CENTRAL PRESS ASSOCIATION *v.* AMERICAN PRESS ASSOCIATION.

Discovery—Examination of officer of company—Refusal to attend—Motion to strike out company's defence.

There is no power to strike out the defence of an incorporated company for the refusal of an officer to attend for examination for discovery. *Badgerow* v. *Grand Trunk Railway Co.*, 13 P.R., 132, approved.

McCrimmon for plaintiffs.

C. J. Holman for defendants.

Law Students' Department.

EXAMINATION BEFORE HILARY TERM: 1890.

CERTIFICATE OF FITNESS.

Mercantile Law—Statutes—Practice.

Examiner—R. E. KINGSFORD.

1. A. is agent for B., and as such effects a sale for B. by fraudulent misrepresentation at a high price. A. is subsequently compelled by the purchaser to refund the money. He is then sued by B. to recover the price. How far should he succeed? Why?

2. What is a *Charter Party?* What are its customary stipulations?

3. A. is mortgagee of chattels under a chattel mortgage whereby the mortgage debt is to be

paid on a certain day, and the mortgagor is to hold possession until default? Before default the mortgagor deals fraudulently with the goods. What effect has this proceeding upon A.'s rights? Why?

4. A., a purchaser of goods from C., being unable to pay for them, transfers and delivers them to B. B. verbally promises C. to pay for these goods. C. sued B. for the goods, and B. sets up as a defence that the agreement should be in writing, because it was a promise to answer for the debt of another. How far is the defence good? Why?

5. How far can a surety revoke a continuing guarantee under seal where there is no reservation of such a power in the instrument? Is there any difference in the case of simple contracts of continuing guarantee?

6. Give examples of promises *implied in law.*

7. A. is a creditor of B., and as such holds valuable security. B. pays A. money, and in return therefor A. gives up his security. B. immediately thereafter makes an assignment for the general benefit of creditors. The assignee sues A. for the money paid him by B. What test would be applied to the transaction, and what would be A.'s rights? Why?

8. What statutory provision is there by which an assignee for benefit of creditors can have a claimant who does not furnish particulars of claim barred?

9. On what material can you obtain an order for replevin?

10. When may relief by way of interpleader be granted, and on what point must the applicant satisfy the Court?

Benjamin—Smith.

Examiner—R. E. KINGSFORD.

1. What are the three general grounds of *illegality* of contracts at common law?

2. What is the effect, if any, as regards the Statute of Limitations of a written acknowledgment of a debt containing a promise to pay it upon a certain condition?

3. Goods are sold in Montreal, to be delivered in Toronto. When delivered to the railway company in Montreal, they are in good order, but on the way become unavoidably deteriorated by the conveyance. Must the loss be borne by the vendor or vendee? Why?

4. What is the difference between a *lease* and an *agreement for a lease*, as regards the necessity for a writing?

5. A. sends by mail to B. an offer to sell him goods at a certain price, and the next day he mails a letter revoking the offer. B., after the mailing of the revocation, but before receiving it, mails a letter to A., accepting the offer. Is there any contract? Why?

6. How far does delivery of goods to a carrier go towards constituting an *acceptance* and *receipt* to satisfy the Statute of Frauds?

7. A. sells to B. for $30 a stack of hay standing on A.'s farm. The hay is to remain where it is for three months, and is to be paid for before removal. Before the three months expire, and before removal, or payment, the hay is burnt without the fault of any one. Who bears the loss, and why?

8. Explain briefly the difference between a *condition precedent*, and a *warranty*.

9. Goods which have been sold remain in possession of the vendor. The vendee having made default in payment of the price, the vendor re-sells the goods. Is he liable to an action by the vendee? If so, in what way, and for what amount?

10. A. and B. enter into a written contract by which A. is to serve B. for six months, at $20 per month. In an action by A. for his wages, will B. be permitted to give parol evidence to show that a week after the written contract was made, it was verbally agreed that in consideration of certain privileges to A. he was to receive only $15 per month instead of $20? Give reasons.

Equity.

Examiner—P. H. DRAYTON.

1. Are contracts, entered into with lunatics, void, or voidable only? Explain.

2. What are the provisions of the Act 27 Eliz., c. 4? Are they in any way affected by Provincial Legislation, if so, how?

3. A. believes himself to be the owner of a certain lot in Toronto, and on the faith of such belief proceeds to erect thereon a valuable building; it turns out on an action of ejectment brought by B., that he, B., is the true owner. Can A. obtain any compensation? Reasons for your answer.

4. A. and B. are respectively vendor and purchaser of a certain property. Acting for B. you serve certain requisitions on title on A.'s solicitor, which he says he is not bound to answer, and that the questions raised do not affect the title. What steps should you take to have the matter judicially decided?

5. Under what circumstances will the giving of time by a creditor to the principal debtor discharge a surety, and when not? Explain also the doctrine of contribution between co-sureties.

6. Distinguish between tacking and consolidation, and state how, if in any way, they have been affected by Provincial Legislation.

7. Where a right, title, or interest in lands is in question, what step can a plaintiff take so as to prevent the land being conveyed to an innocent purchaser without notice of plaintiff's claim?

8. State some cases in which the Courts will order an account between partners without a view to the final dissolution of the partnership.

9. What are, and what are not, sufficient acts of part performance of a contract for the sale of lands to take a case out of the operation of the Statute of Frauds? Give reasons for your answer.

10. Define, and illustrate by an example, the *cy-pres* doctrine.

Real Property.

Examiner—P. H. DRAYTON.

1. Is it necessary that the witnesses to a will should sign their names in the presence of each other?

2. In what manner may a trustee invest trust funds where there is no direction in the will to guide him?

3. What is a vendor's lien? In what way may it be defeated?

4. State the four general principles to be observed in the construction of wills.

5. Distinguish between a *marketable* and a *doubtful* title.

6. A., a married man, owns two estates, Blackacre and Whiteacre. Blackacre is sold under an execution. Whiteacre for arrears of taxes. What effect has each sale upon the wife's rights to dower?

7. A writ of *fi. fa.* lands of a vendor is placed in the hands of the sheriff after delivery, but before registration of the deed. Does it bind the lands in the hands of the purchaser? Explain.

8. To what covenants is a purchaser entitled to on a purchase from a trustee?

9. What effect has a registered *lis pendens* upon the title of a purchaser subsequent thereto?

10. To what extent does constructive notice affect a *bona fide* purchaser under the Registry Act of this Province?

CALL.

Harris—Broom—Blackstone.

Examiner—R. E. KINGSFORD.

1. Give an example of *constructive breaking* sufficient to constitute *burglary*.

2. Enumerate the cases in which an officer may lawfully kill a person charged with crime.

3. Explain how far the *animus* is regarded in cases of breach of contract, tort, and crime, respectively.

4. State the main rules for construction of statutes independently of the Interpretation Acts.

5. What facts must be proved to establish a case of slander of title?

6. On a trial of an alleged murderer, how far will evidence be admissible to prove that the prisoner on a former occasion attempted to murder the deceased? Why?

7. What was the common law rule as to the mode of trying accessories? What is the present law?

8. When a prisoner on a criminal trial gives general evidence of good character, how may such evidence be met by the Crown?

9. How far is evidence of *prior convictions* admissible against a prisoner? How is it tendered?

10. What are the different species of bailments? Briefly state the essential feature of each kind.

ERRATUM.—It was, doubtless, with the best intention that the printer altered the words "*minute* characters" to "*immense* characters," at the close of *Law Student's* letter, on page 79. He evidently felt the injustice of the proceeding, and, not realizing the depravity of human nature, thought our classical correspondent had made a mistake.—*Hinc illae lachrymae.*

Law Society of Upper Canada.

HILARY TERM, 1890.

The following gentlemen were called to the bar during the above term, viz. :

February 3rd—Arthur Whyte Anglin, with honours and gold medal ; Charles Eddington Burkholder, with honours and silver medal ; and Robert Elliott Fair, George Smith McCarter, David Hooey, Edmund Sheppard Brown, Duncan Henry Chisholm, Albert Constantineau, William Albert Smith, Walter Allen Skeans, William Edward Fitzgerald, Alfred Edmund Cole, Francis Pedley, William Charles Mikel, Arthur St. George Ellis, Daniel Thos. Kennedy McEwan, Alexander Duncan Dickson, Edward Lindsay Elwood, Albert Edward Baker, Alex. Purdom, Walter Augustus Thrasher, George Harvey Douglas, John Thomas Hewitt, Robert Elliott Lazier.

February 4th—Richard Vercoe Clement.

The following gentlemen were granted Certificates of Fitness as solicitors, viz. :

February 3rd—A. W. Anglin, C. E. Burkholder, J. A. Webster, D. H. Chisholm, A. Purdom, W. A. Skeans, A. E. Baker, A. D. Dickson, G. H. Hutchison, R. S. Chappell, A. S. Ellis.

February 4th :—G. S. McCarter, W. E. Kelly, A. Constantineau, D. Hooey, F. Pedley, H. P. Thomas, H. W. Lawlor.

February 8th :—R. V. Clement, M. C. Biggar, A. E. Cole.

The following gentlemen passed the Second Intermediate Examination, viz. :—R. McKay, F. R. Martin, W. G. Owens, A. H. O'Brien, A. A. Smith, A. J. Anderson, G. B. Wilkinson, J. McEwan, W. P. McMahon, J. H. H. Hoffman, G. D. Grant, A. Bridgman, F. F. Pardee, J. F. Lennox, W. L. McCarthy, W. Mills, A. Crow, D. McKenzie, S. D. Evans, J. G. Farmer, T. W. Scandrett, F. W. Wilson.

The following gentlemen passed the First Intermediate Examination, viz. :—J. C. Cameron, J. S. Robertson, W. B. Taylor, W. L. Wickett, J. R. Milne, P. F. Carscallen, J. E. Varley, E. Harley, H. F. Gault, F. M. Harrison, L. Lafferty, S D. Schultz, G. G. Duncan, A. B. Jones, W. H. Cairns.

The following gentlemen were entered as Students-at-Law, viz. :

Matriculant Class.—Norman Young Poucher, Bertram Halford Ardagh, John Ashworth, Zachary Richard Edmund Lewis.

Junior Class.—John Alexander Stewart, Geo. Wilson Patterson, William Albert Mace, George Edward Deroche, George Hossack Findlay, James Houston Spence, Charles Arthur Batson, John Thos. White, Ralph McDonald Blackley, William Henry Lovering, James O'Brien, Jas. Dickson, Lewis Frederick Clary, Allan Norman Cameron.

Articled Clerks.—Edward J. Going, John Charles Elliott, Ethelbert Fletcher Harrison Cross.

This notice is designed to afford necessary information to Students-at-Law and Articled Clerks, and those intending to become such, in regard to their course of study and examinations. They are, however, also recommended to read carefully in connection herewith the Rules of the Law Society which came into force June 25th, 1889, and September 21st, 1889, respectively, copies of which may be obtained from the Secretary of the Society, or from the Principal of the Law School, Osgoode Hall, Toronto.

Those Students-at-Law and Articled Clerks, who, under the Rules, are required to attend the Law School during all the three terms of the School Course, will pass all their examinations in the School, and are governed by the School Curriculum only. Those who are entirely exempt from attendance in the School will pass all their examinations under the existing Curriculum of The Law Society Examinations as heretofore. Those who are required to attend the School during one term or two terms only will pass the School Examination for such term or terms, and their other Examination or Examinations at the usual Law Society Examinations under the existing Curriculum.

Provision will be made for Law Society Examinations under the existing Curriculum as formerly for those students and clerks who are wholly or partially exempt from attendance in the Law School.

Each Curriculum is therefore published herein, accompanied by those directions which appear to be the most necessary for the guidance of the Student.

CURRICULUM OF THE LAW SCHOOL, OSGOODE HALL, TORONTO.

Principal, W. A. REEVE, Q.C.
Lecturers, E. D. ARMOUR. A. H. MARSH, LL.B.
Examiners, R. E. KINGSFORD, LL.B. P. H. DRAYTON.

The School is established by the Law Society of Upper Canada, under the provisions of rules passed by the Society with the assent of the Visitors.

Its purpose is to promote legal education by affording instruction in law and legal subjects to all Students entering the Law Society.

The course in the School is a three years' course. The term commences on the fourth Monday in September and closes on the first Monday in May; with a vacation commencing on the Saturday before Christmas and ending on the Saturday after New Year's Day.

Students before entering the School must have been admitted upon the books of the Law Society as Students-at-Law or Articled Clerks. The steps required to procure such admission are provided for by the rules of the Society, numbers 126 to 141 inclusive.

The School term, if duly attended by a Student-at-Law or Articled Clerk is allowed as part of the term of attendance in a Barrister's chambers or service under articles.

By the Rules passed in September, 1889, Students-at-Law and Articled Clerks who are entitled to present themselves either for their First or Second Intermediate Examination in any Term before Michaelmas Term, 1890, if in attendance or under service in Toronto are required, and if in attendance or under service elsewhere than in Toronto, are permitted, to attend the Term of the School for 1889-90, and the examination at the close thereof, if passed by such Students or Clerks shall be allowed to them in lieu of their First or Second Intermediate Examinations as the case may be. At the first Law School Examination to be held in May, 1890, fourteen Scholarships in all will be offered for competition, seven for those who pass such examination in lieu of their First Intermediate Examination, and seven for those who pass it in lieu of their Second Intermediate Examination, viz., one of one hundred dollars, one of sixty dollars, and five of forty dollars for each of the two classes of students.

Unless required to attend the school by the rules just referred to, the following Students-at-Law and Articled Clerks are exempt from attendance at the School:

1. All Students-at-Law and Articled Clerks attending in a Barrister's chambers or serving under articles elsewhere than in Toronto, and who were admitted prior to Hilary Term, 1889.

2. All graduates who on the 25th day of June, 1889, had entered upon the *second* year of their course as Students-at-Law or Articled Clerks.

3. All non-graduates who at that date had entered upon the *fourth* year of their course as Students-at-Law or Articled Clerks.

In regard to all other Students-at-Law and Articled Clerks, attendance at the School for one or more terms is compulsory as provided by the Rules numbers 155 to 166 inclusive.

Any Student-at-Law or Articled Clerk may attend any term in the School upon payment of the prescribed fees.

Every Student-at-Law and Articled Clerk before being allowed to attend the School, must present to the Principal a certificate of the Secretary of the Law Society shewing that he has been duly admitted upon the books of the Society, and that he has paid the prescribed fee for the term.

The Course during each term embraces lectures, recitations, discussions, and other oral methods of instruction, and the holding of moot courts under the supervision of the Principal and Lecturers.

During his attendance in the School, the Student is recommended and encouraged to devote the time not occupied in attendance upon lectures, recitations, discussions or moot courts, in the reading and study of the books and subjects prescribed for or dealt with in the course upon which he is in attendance. As far as practicable, Students will be provided with room and the use of books for this purpose.

The subjects and text-books for lectures and examinations are those set forth in the following Curriculum :

CURRICULUM.

FIRST YEAR.

Contracts.

Smith on Contracts.
Anson on Contracts.

Real Property.

Williams on Real Property, Leith's edition.

Common Law.

Broom's Common Law.
Kerr's Student's Blackstone, books 1 and 3

Equity.

Snell's Principles of Equity.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures each day except Saturday, from 3 to 5 in the afternoon. On every alternate Friday there will be no lecture, but instead thereof a Moot Court will be held.

The number of lectures on each of the four subjects of this year will be one-fourth of the whole number of lectures.

The first series of lectures will be on Contracts, and will be delivered by the Principal.

The second series will be on Real Property, and will be delivered by a Lecturer.

The third series will be on Common Law, and will be delivered by the Principal.

The fourth series will be on Equity, and will be delivered by a Lecturer.

SECOND YEAR.

Criminal Law.

Kerr's Student's Blackstone, Book 4.
Harris's Principles of Criminal Law.

Real Property.

Kerr's Student's Blackstone, Book 2.
Leith & Smith's Blackstone.
Deane's Principles of Conveyancing.

Personal Property.

Williams on Personal Property.

Contracts and Torts.

Leake on Contracts.
Bigelow on Torts—English Edition.

Equity.

H. A. Smith's Principles of Equity.

Evidence.

Powell on Evidence.

Canadian Constitutional History and Law.

Bourinot's Manual of the Constitutional History of Canada. O'Sullivan's Government in Canada.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday from 10.30 to 11.30 in the forenoon, and from 2 to 3 in the afternoon respectively and on each Friday there will be a Moot Court from 2 to 4 in the afternoon.

The lectures on Criminal Law, Contracts, Torts, Personal Property, and Canadian Constitutional History and Law will embrace one-half of the total number of lectures and will be delivered by the Principal.

The lectures on Real Property and Practice and Procedure will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

The lectures on Equity and Evidence will embrace one-fourth of the total number of lectures and will be delivered by a lecturer.

THIRD YEAR.

Contracts.

Leake on Contracts.

Real Property.

Dart on Vendors and Purchasers.
Hawkins on Wills.
Armour on Titles.

Criminal Law.

Harris's Principles of Criminal Law.
Criminal Statutes of Canada.

Equity.

Lewin on Trusts.

Torts.

Pollock on Torts.
Pmith on Negligence, 2nd edition.

Evidence.

Best on Evidence.

Commercial Law.

Benjamin on Sales.
Smith's Mercantile Law.
Chalmers on Bills.

Private International Law.

Westlake's Private International Law.

Construction and Operation of Statutes.

Hardcastle's Construction and Effect of Statutory Law.

Canadian Constitutional Law.

British North America Act and cases thereunder.

Practice and Procedure.

Statutes, Rules, and Orders relating to the jurisdiction, pleading, practice, and procedure of the Courts.

Statute Law.

Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

In this year there will be two lectures on each Monday, Tuesday, Wednesday, and Thursday, from 11.30 a.m. to 12.30 p.m., and from 4 p.m. to 5 p.m., respectively. On each Friday there will be a Moot Court from 4 p.m. to 6 p.m.

The lectures in this year on Contracts, Criminal Law, Torts, Private International Law, Canadian Constitutional Law, and the construction and operation of the Statutes, will embrace one-half of the total number of lectures, and will be delivered by the Principal.

The lectures on Real Property, and Practice and Procedure will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

The lecturers on Equity, Commercial Law, and Evidence, will embrace one-fourth of the total number of lectures, and will be delivered by a lecturer.

GENERAL PROVISIONS.

The term lecture where used alone is intended to include discussions, recitations by, and oral examinations of, students from day to day, which exercises are designed to be prominent features of the mode of instruction.

The statutes prescribed will be included in and dealt with by the lectures on those subjects which they affect respectively.

The Moot Courts will be presided over by the Principal or the Lecturer whose series of lectures is in progress at the time in the year for which the Moot Court is held. The case to be argued will be stated by the Principal or Lecturer who is to preside, and shall be upon the subject of his lectures then in progress, and two students on each side of the case will be appointed by him to argue it, of which notice will be given at least one week before the argument. The decision of the Chairman will be pronounced at the next Moot Court.

At each lecture and Moot Court the roll will be called and the attendance of students noted, of which a record will be faithfully kept.

At the close of each term the Principal will certify to the Legal Education Committee the names of those students who appear by the record to have duly attended the lectures of that term. No student will be certified as having duly attended the lectures unless he has attended at least five-sixths of the aggregate number of lectures, and at least four-fifths of the number of lectures of each series during the term, and pertaining to his year. If any student who has failed to attend the required number of lectures satisfies the Principal that such failure has been due to illness or other good cause, the Principal will make a special report upon the matter to the Legal Education Committee. For the purpose of this provision the word "lectures" shall be taken to include Moot Courts.

Examinations will be held immediately after the close of the term upon the subjects and text books embraced in the Curriculum for that term.

Examinations will also take place in the week commencing with the first Monday in September for students who were not entitled to present themselves for the earlier examination, or who having presented themselves thereat, failed in whole or in part.

Students are required to complete the course and pass the examination in the first term in which they are required to attend before being permitted to enter upon the course of the next term.

Upon passing all the examinations required of him in the School, a Student-at-Law or Articled Clerk having observed the requirements of the Society's Rules in other respects, becomes entitled to be called to the Bar or admitted to practise as a Solicitor without any further examination.

The fee for attendance for each Term of the Course is the sum of $10, payable in advance to the Secretary.

Further information can be obtained either personally or by mail from the Principal, whose office is at Osgoode Hall, Toronto, Ontario.