repairs being charged by the local authority on the hereditaments. Such a charge had been made in this case, and the question, the learned Judge said, was, who was to pay the amount so charged—the freeholder or the tenant in possession? In deciding this question he was not affected by the marginal note to s. 27 of the Artizans' and Labourers' Dwellings Act (which is the important section), as there was nothing in the section itself warranting the words, "Charges recoverable as rent-charges in lieu of tithes." In the section the word "owner" meant freeholder, not statutory owner. For the plaintiff it had been argued that this charge could be recovered in any way that a rent-charge could be recovered; and as that could be recovered by an action of debt, although the grantor had not personally guaranteed the payment thereof, therefore such an action would lie for this charge. His Lordship assented that an action of debt would lie against the grantor, but it was argued for the defendant that the words meant that this charge was to be recoverable by any means by which a rent-charge can be recoverable, regard being had to the way in which this charge originated, it not being the intention to put the reversioner in the position of a grantor of a rent-charge. His Lordship thought that such a view of the Act was, no doubt, possible. It was said that the general scheme of the Act was that the rent should be charged on the property, that the person getting the benefit should bear the burden, and that it is the public who get the benefit in a broad sense, but the occupier gets the advantage till the rent-charge runs out, when the freeholder gets the advantage. His Lordship then reviewed the cases of "The Corporation of Birmingham v. Baker" (L. Rep. 15, Ch. D., 782); "Willoughby v. Willoughby" (4 Q.B., 687); and "Bedford v. Sutton Coldfield" (3 C.B., N.S., 472). His Lordship did not think that the Act in question places the liability in any person, but the premises were charged with it; and the present occupant, being the owner, was liable during the continuance of his estate.

Judgment was therefore given for the defendant on the claim and counter-claim.

Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.) April 12.

IN RE G. MAYOR COOKE.*

Solicitor—Suspension of Solicitor by Queen's Bench Division for unnecessarily incurring costs—Decision of Queen's Bench Division reversed by Court of Appeal—Duties of Solicitor in advising client and carrying on action explained.

This case raised questions of considerable importance. It was an appeal by a solicitor from an order of Mr. Baron Huddleston and Mr. Justice Manisty, sitting as a Divisional Court (*ante* p. 335), whereby they had directed him to be suspended from practice for a year. A motion had been made by the Incorporated Law Society upon a Master's report against the solicitor on a case stated in the report, the substance of which was that he had unnecessarily incurred costs to the amount of over £400 in respect of the sale and division of a property which only realized £365. The case, as stated in the Master's report, was substantially as follows:—A widow lady named Coppin was possessed of a house and premises at Croydon for life and after her death it was to go to her daughter, a Mrs. Allen, and several other persons as tenants in common. An endeavour was made by Mrs. Coppin by gift and by devise to transfer the property to her daughter, Mrs. Allen, alone, but Mrs. Allen was advised by counsel that her mother had no power to do this, having only a life estate in the property, and it was suggested that the best course to pursue would be for the tenants in common to agree to sell the property and divide the proceeds, and that, failing this, there should be a suit for a partition, in which the sale would be ordered as of course. It was alleged that the solicitor at once, without any attempt to ascertain if the other parties interested would agree with the daughter for a sale, brought a suit in 1886 in the County Court at Croydon for a partition and sale and for a receiver making an affidavit in support of it, which was considered by the Master to be misleading. Upon this a receiver was appointed at an expense in costs of nearly £50. The Master considered that the application for a receiver had been only made for the purpose of making costs, and that although the solicitor was informed that all parties would consent to a sale he still insisted that the suit was necessary and carried it to a hearing. Ultimately the property was sold under an order for sale in September, 1886, when it realized £365. The solicitor then delivered three bills of costs, which amounted altogether to over £400. These bills were greatly reduced upon taxation, and the Master reported that the solicitor had rushed into the suit without any attempt to ascertain whether the parties would consent to a sale; that the result of the application for a receiver was only to increase the costs; that the hearing of the suit was unnecessary, and that the bills of costs were enormous considering the value of the estate. Mrs. Allen filed an affidavit in favour of the solicitor, in which she stated that she had directed him to take the proceedings without any delay and without applying to the other persons interested, and that she had desired him to apply for a receiver. He stated that he had acted on these instructions. It appeared that on an intimation by the Registrar to the County Court Judge before whom the proceedings had been taken, his Honour had set aside the proceedings with costs, and had ordered the solicitor to pay all costs, declaring that he had acted discreditably and had brought the suit to get costs by it and had misled the Judge into making the order. On these facts the Divisional Court came to the conclusion that there had been a total disregard of all the duties which a solicitor should be most anxious to observe, and that he had not been sufficiently punished by the taxation of his bills of costs. They therefore ordered that the solicitor George Mayor Cooke should be suspended for a year and should pay all the costs of the motion. From this decision Mr. Cooke appealed and argued his case in person.

Mr. R. T. Reid, Q.C., and Mr. Hollams appeared for the Incorporated Law Society.

The COURT allowed the appeal and reversed the decision of the Divisional Court.

The MASTER of the ROLLS said that a motion had been made against a solicitor for such misconduct in his profession as would call on the Court to deal with him by way of punishment. The application had been made by the Law Society, who had done nothing but their plain and simple duty in bringing the matter before the Court and who had conducted the case, as they conducted all their cases, with the utmost fairness. On the first complexion the case was an astoundingly wicked one. But in order that the Court should exercise its penal jurisdiction over a solicitor it was not sufficient to show that his conduct had been such as would support an action for negli-

*Reported by A. P. KEEP, Esq., Barrister-at-Law.

gence or want of skill. It must be shown that the solicitor had done something which was dishonourable to him as a man and dishonourable in his profession. A professional man, whether he were a solicitor or a barrister, was bound to act with the utmost honour and fairness with regard to his client. He was bound to use his utmost skill for his client, but neither a solicitor nor a barrister was bound to degrade himself for the purpose of winning his client's case. Neither of them ought to fight unfairly, though both were bound to use every effort to bring their client's case to a successful issue. Neither had any right to set himself up as a judge of his client's case. They had no right to forsake their client on any mere suspicion of their own or on any view they might take as to the client's chances of ultimate success. The duty of a solicitor to his client arose from the relationship of solicitor and client. A solicitor had no relation with his client's adversary which gave rise to any duty between them. His duty was, however, not to fight unfairly, and that arose from his duty to himself not to do anything which was degrading to himself as a gentleman and a man of honour. He had, however, a duty to the Court, and it was part of that duty that he should not keep back from the Court any information which ought to be before it, and that he should in no way mislead the Court by stating facts which were untrue. If either a solicitor or a barrister were wilfully to mislead the Court he would be guilty of dishonourable conduct. How far a solicitor might go on behalf of his client was a question far too difficult to be capable of abstract definition, but when concrete cases arose every one could see for himself whether what had been done was fair or not. If a client came to a solicitor with a case which was such that the solicitor must know that it was absolutely and certainly hopeless, and if the client nevertheless insisted on the solicitor going on with the case, although there could be absolutely no doubt as to the result and although the solicitor knew this, then, if the solicitor were to go on with the case in consequence of these mad instructions in order to make costs for himself, he would be betraying his duty to his client and would be guilty of a dishonourable act. But if the solicitor could not come to the certain and absolute opinion that the case was hopeless, it was his duty to inform his client of the risk he was running, and, having told him that and having advised him most strongly not to go on, if the client still insisted in going on the solicitor would be doing nothing dishonourable in taking his instructions. If an attorney were to know the steps which were the right steps to take and were to take a multitude of wrong, futile, and unnecessary steps in order to multiply the costs, then if there were both that knowledge and that intention and enormous bills of costs resulted, the attorney would be acting dishonourably. A solicitor must do for his client what was best to his own knowledge, and in the way which was best to his own knowledge, and if he failed in either of those particulars he was dishonourable. If he knew that his client must succeed and took unnecessary steps in order to swell the bill of costs against his client's opponent that would be dishonourable and unprofessional and would be fighting unfairly. These instances, of course, were not exhaustive—many others might be suggested. A solicitor or a barrister was not on the other hand, bound to assist his adversary. If he knew that there was a witness who would assist the adversary and injure his own client he was not only not bound to inform his adversary of this, but he would be betraying his client if he did so. But if he were to know that an affidavit had been made in the cause which had been used and which, if it were before the Judge, must affect his mind, and if he knew that the Judge was ignorant of the existence of that affidavit, then if he concealed that affidavit from the Judge he would fail in his duty. Of course if he were to make any wilful misstatement to the Judge he would be outrageously dishonourable. If a solicitor were instructed by his client to take certain proceedings which could legally be taken which would, to the knowledge of the solicitor, injure his antagonist unnecessarily, but the client nevertheless instructed him to go on in order to gratify his own anger or malice, then if the solicitor knew all this he would be unfair and wrong if he took those proceedings, although he was acting on instructions in so doing. In the present case every step taken by Mr. Cooke must be carefully regarded. At first sight the case seemed to be an absolute abomination. Property of the value of some £300, having to be divided among six tenants-in-common, was sold under the order of the Court ; but the costs incurred in getting to the sale amounted to more than £400. Therefore, the whole property was swallowed up by the costs. That was a state of things to make an honest man shudder. Now, the question was whether that state of things had beyond all doubt been brought about by such conduct on the part of Mr. Cooke as made it clear that he had betrayed his honour as a professional man. When the action began the family were on bad terms with each other. Mrs. Allen was her mother's favourite, and her mother had endeavoured to give and to devise this property to her. That she had no power to do, since she had only a life estate in the property. None of the family appeared to know exactly who was entitled or how they were entitled to the property, and there were many erroneous claims, and the whole family were quarrelling sadly even at the funeral of their mother. Then a case—which was a fair case, and in which there was no improper concealment of facts—was laid before counsel, and he advised that there should be a sale with the concurrence of all parties, or, if this could not be procured, that there should be a partition suit. Mrs. Allen, who instructed Mr. Cooke, was present at a consultation with the counsel who gave this advice, and she heard all this, but she immediately afterwards told Mr. Cooke that she would not have any application made to her relatives for their concurrence, and she instructed him to at once commence a suit for partition. It had been urged that it was Mr. Cooke's duty to strongly advise and even to insist on an application being made to the other beneficiaries for their concurrence. Mr. Cooke admitted that he had not done this, but he said that he had not done so because he thought that, considering the state of the title to the property, it would be better that it should be sold under the order of the Court, and also because, in the condition of feeling in the family, it was very unlikely that they would concur. There appeared to be considerable reason in both these suggestions, and, on the whole, he (the Master of the Rolls) would not say that Mr. Cooke had entered on the partition suit unnecessarily and in order to multiply costs. Then came a fatally wrong step—the application for a receiver. There was no occasion for a receiver ; the application ought not to have been *ex parte* ; and counsel ought not to have been taken to the Croydon County Court to make it. All that might be ground for an action for negligence against Mr. Cooke, but it was not sufficient to invoke the penal jurisdiction of the Court. It was suggested, however, that the application had been made simply to multiply costs, but the counsel who was taken did not think the application wrong, and the Judge had granted the application. The appointment of a

receiver in a County Court was not of frequent occurrence, and the practice was not well known either to the practitioners or the Judges. This Court had found that even in the High Court receivers were sometimes appointed not in the way in which they used to be appointed by those who were thoroughly conversant with the matter—namely, the Judges of the Court of Chancery. It could not be suggested that the County Court Judge had been misled ; all the statements had been made to him by counsel, and although, no doubt, it was possible for a solicitor by concealing facts from the counsel, to mislead the Judge by statements made by counsel, for which the solicitor and not the counsel would be held responsible, yet in this case all the facts were on affidavit and were before the Judge, and nothing was kept back from him. He (the Master of the Rolls) would say advisedly that the receiver ought never to have been granted by the Judge on the facts before him ; but the Judge, in common with many others, was not so well acquainted with the practice as to the granting of receivers as those who for many years had been familiar with such applications. It was impossible under these circumstances to say that Mr. Cooke knew that it was wrong to ask for a receiver, and that he had done so in order to multiply costs. Then came the hearing, and a form of order was prepared by Mr. Cooke, and was given to the other side and was placed before the Judge. The form was absurd and unnecessary in the inquiries it directed ; but neither the Judge nor the other side saw any objection to it, and the order was in fact made in that form. Everyone appeared to think that such a form of order was proper and usual in a partition suit, whereas if the matter had gone before a Judge conversant with such proceedings, a far simpler order, which would have had a much less costly operation, would have been made. It was, no doubt, most unfortunate that the order had been made in such a form, as the inquiries directed by it had been most costly and expensive, and they were absolutely unnecessary. But though the order was wrong, absurd, and ridiculous he could not say that Mr. Cooke must have known it to be so. It resulted, no doubt, in these terrible bills of costs ; but if the solicitor had not knowingly taken unnecessary steps in order to make bloated bills of costs, however monstrous they might be—as long as he had not charged for things not done or made false charges he had not acted dishonourably in sending them in. It could not be denied that the case had been brought by erroneous proceedings to a shocking end, but he could not infer that Mr. Cooke had acted with an evil and dishonourable mind in taking those proceedings. If, as the County Court Judge had found, Mr. Cooke had wilfully misled the Judge, he would, of course, have acted most dishonourably ; but, with all respect to the Judge, he could not agree with him. From inadvertence and from want of practice in this branch of the law, the Judge did not examine the facts, which were all before him, with sufficient care. It was unnecessary to say anything as to the want of skill on the part of Mr. Cooke. All that need now be said was that, in his opinion, there was not such evidence of dishonourable conduct on Mr. Cooke's part as to lead the Court to confirm the decision of the Queen's Bench Division. The appeal would therefore be allowed, but without costs.

LORD JUSTICE FRY, in concurring, said that he viewed with the greatest jealousy *ex parte* applications for a receiver. It was the duty of professional men, whether solicitors or counsel, in making an *ex parte* application to show the utmost fairness and good faith, and to see that all relevant matters, whether for or against the application, were brought to the attention of the Court. It was impossible not to regret the orders which had been made by the County Court Judge in this case; but Judges were but human and mortal, and such proceedings were rare and unusual in County Courts.

LORD JUSTICE LOPES agreed, saying that he also was unable to draw the same inferences from the evidence as the Divisional Court had done.

[Solicitor for the Incorporated Law Society, E. W. Williamson.]

Chan. Div. (Kekewich, J.) April 11.

TOMLIN V. LUCE.*

Mortgage—Power of Sale—Duties and responsibility of Mortgagee in exercising power.

This case raised a question of interest and importance to mortgagees selling under their powers of sale. The action was brought by a second mortgagee against first mortgagees for an account of all moneys received by them, or which, but for their wilful neglect or default, they might have received, in respect of sales by the first mortgagees of the mortgaged property. In February, 1886, the defendants, acting under their power of sale, caused the premises to be offered for sale by auction. In preparing the particulars of sale the auctioneers inserted a statement that "all the roads on the property are constructed in the best possible manner, are kerbed and sewered, and there is perfect main drainage." This statement turned out to be in some respects erroneous, and certain purchasers refused to complete without being allowed compensation. Ultimately a compromise was arrived at between the purchasers and the mortgagees under which the latter allowed the former a deduction, by way of compensation, of the sum of £895. His Lordship at the trial held that this compromise was prudent and proper on the part of the mortgagees, but reserved judgment on the further point raised by the plaintiff, whether the mortgagees were to be allowed the amount of reduction in their accounts, the proceeds of sale thus reduced being about £30 less than the amount due on the first mortgage.

Mr. Ralph Neville, Q.C., and Mr. Charles Browne were for the plaintiff ; and Mr. Warmington, Q.C., and Mr. George Harris Lea for the defendants.

MR. JUSTICE KEKEWICH delivered judgment as follows :—The relations of mortgagor and mortgagee are not easily defined. A mortgagee is not in any proper technical sense a trustee of his power of sale, or any like powers, for the mortgagor, and to say that he occupies a fiduciary position towards the mortgagor is, if true, wanting in precision. A power of sale is given to a mortgagee in order to enable him to realize his security, and he necessarily exercises it to that end. But he is not the owner of the estate, and therefore cannot sell, as an absolute owner might, regardless of all other persons than himself. He owes a duty to the person entitled to the equity of redemption, or, as expressed by Lord Justice Lindley in a pregnant passage of the judgment of the Court of Appeal in the recent case of "Farrar v. Farrars and Co., Limited" (*The Times* Law Reports, vol. 5, p. 164 ; L. Rep, 40, Ch. Div., 410), he is under obligations to him. What restriction does this duty place on his actions ? What is the limit of this obligation ? Granted that all conditions calling the power of sale into operation have been ful-

*Reported by F. EVANS, Esq., Barrister-at-Law.