

577, and cases cited; although the rule may be different in a purely common law action: *Cree v. St. Pancras*, [1899] 1 Q. B. 693; at p. 698. And it has been held in England and here that a successful party may be ordered to pay the costs of the unsuccessful party: *Myers v. Financial News*, 5 Times L. R. 42; *Neale v. Winter*, 9 Gr. 261. So that, even if it could be considered that these defendants were (as they are not) successful, they might be ordered to pay costs.

The executors will be entitled to all costs out of the estate, between solicitor and client, which they cannot make out of those ordered to pay; the Presbyterian Church being residuary legatees, it is unnecessary to make such an order as to them.

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OCTOBER 30TH, 1907.

DIVISIONAL COURT.

CLARK v. C. H. HUBBARD CO. LIMITED.

*Contract—Sale of Assets and Goodwill of Company—Promise to Pay Purchase Money by Instalments—Release by New Agreement—Conflicting Evidence—Finding of Trial Judge—Appeal—Invalidity of Novation Contract—Illegal Consideration—Powers of President and General Manager of Companies—Acquisition of Shares of one Company by another—Ultra Vires—Delay of Plaintiff in Repudiating Novation Contract—Change of Position—Estoppel.*

Appeal by plaintiff from judgment of FALCONBRIDGE, C.J., dismissing an action to recover \$2,842 and interest.

Z. Gallagher, for plaintiff.

W. R. Smyth, for defendants.

The judgment of the Court (MULOCK, C.J., ANGLIN, J., CLUTE, J.), was delivered by