Canada Law Journal.

VOL. XXXIII. OCTOBER 15, 1897. NO. 17.

It cannot be said that the efforts to simplify legal procedure by means of the numerous rules of practice, etc., have been as successful as had been hoped. There are many cases in which, when brought before counsel, a suggestion is made for a settlement, the amount in dispute, or the damages recoverable, being comparatively small. It is then seen that there have been numerous motions on side issues which render the question of costs of great importance. It is in effect found that the question of costs becomes a more important factor than the claim for the debt or damages, and, if the case goes to trial, it is more to determine the question of costs than the original demand. This certainly is not as it should be, and the remedy seems yet to be found. The chief trouble consists in the incurring of costs of purely interlocutory and in most instances, wholly unnecessary proceedings. There is too much thought devoted to the determination of some point of practice at the expense of the litigants and to keeping as far away from the settlement of the material issue as possible.

THE LEGISLATIVE TINKER.

A case has recently arisen in Ontario illustrating the perils attending the dealing with lands passing by descent or devise. A testator died leaving a large estate; his executors registered a caution in general terms under the Act, which was duly recorded in the general registry, under the names of the executors, and also under the name of the testator. One of the specific devisees of part of the testator's land applied to a loan company to borrow money on the security of the devised land. The solicitor of the loan company searched the title and found it perfectly straight and unencumbered.

He asked the registrar for a certificate of all instruments in which the testator appeared as grantor, assignor, plaintiff, or defendant, or otherwise parting with or creating any interest in the land, etc., and that officer certified according to the fact that no such instruments were recorded. Unfortunately the solicitor omitted to ask for any such certificate as to the executors named in the will, and the money was accordingly advanced, in ignorance of the registration of the caution. An interesting question has now arisen as to the person on whom the loss of the money is to fall, the lands being required to pay the debts of the testator.

We have on former occasions expressed the opinion in which others are now joining, that Sir Oliver Mowat made a grievous mistake in permitting the original simplicity of the Devolution of Estates Act of 1886 to be tampered with. We were somewhat surprised some time ago to see that a gentleman actually claimed credit for having induced him to make the change; we can only say that the combination of the old system of the heir or devisee taking directly from the deceased without the intervention of the personal representative, with the added machinery of cautions, instead of making things simpler has only introduced difficulties and pitfalls where there ought to have been none. Under the decisions of the Courts the Act as originally passed was beginning to run perfectly smoothly, when unfortunately Sir Oliver allowed it to be tinkered, and, as we think, spoilt.

This is one of the curses of our legislative system—its fatal facility—a good law carefully thought out is no sooner passed than it is marred through ill-advised alterations (we cannot call them amendments), introduced by some one with a little petty difficulty to remedy. In this case a desire to save a few dollars for a deed from an executor, or the cost of letters of administration, has been the indirect cause of some other person losing some thousands of dollars.

CAUSERIE.

Cut, and come again !
CRABBE.

Thank you, good sir, I owe you one !
GEORGE COLEMAN, JR.

BLACKSTONE AND THE PLENA PROBATIO.—Sir William Blackstone, great and scholarly legist as he was, had a very inadequate conception of the philosophy of the Civil Law, and this, coupled with his sturdy British prejudice against it on general principles, caused him to be badly unhorsed in some of his tilts with the Corpus Juris Civilis. Therefore those whose regard for the celebrated commentator has weathered the storm and stress of the hypercriticism (emanating in the main from Bentham, and somewhat from Bedlam) to which he has been subjected, feel much countenanced when he succeeds in scoring a point against some, to use Dr. Maitland's phrase, "Romanesque institution." We subjoin an instance in which he was felicitously victorious.

By the rules of the Civil Law two witnesses were required for the establishment of any material fact not made out in writing or by the solemn admission of the parties in Court (Dig. Lib. 22, tit. 5, I. 12 ; Cod. Lib. 4, tit. 20, I. 9 s. I) "To extricate itself out of which absurdity," says Blackstone (Com. Bk. 3 p. 370) "the modern practice of the Civil Law Courts has plunged itself into another. For, as they do not allow a less number than two witnesses to be plena probatio, they call the testimony of one, although never so clear and positive, semiplena probatio only, on which no sentence can be founded. To make up, therefore, the necessary complement of witnesses when they have only one to a single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf; and administer to him what is called the suppletory oath; and if his evidence happens to be in his own favour, this immediately converts the half-proof into a whole one. By this ingenious device satisfying at once the forms of the Roman law, and acknowledging the superior reasonableness of the law of England, which permits one witness to be sufficient where no more are to be had."

A VOICE FROM 'OLE VIRGINNY.'—There is a sufficient connection between the foregoing and what TUCKER, J. has to say in *Rowton* v. *Rowton*, 1 H. & M. (Va.) 96, in behalf of sustaining the positive evidence of a single witness against a number of adverse witnesses, whose testimony is entirely negative, to justify an extract here from the opinion of the learned judge:

"I consider it an undeniable position, both at law and in equity, that *one* witness, whose credibility is not impeached, who deposes clearly and positively in affirmation of any fact to which that witness was privy, is entitled to more belief than a *dozen* witnesses who merely depose to their own ignorance of that particular fact, though by possibility they might have been in such a situation as to have seen or heard the same, if their attention had been called to the acts or words of the parties at the time. As if a question were made upon the plea of *nil debet*, at law, whether the supposed endorser of a bill of exchange actually did write his name on the back of it, if one witness, present in a coffee-house should swear that he saw the party write his name upon the bill, such evidence, if the credit of the witness be unimpeached, ought to weigh more than the testimony of a dozen persons, present in the same coffee-house at the same time, who should swear that they *did not see him* write his name on the bill, though all of them were in such situations, as that, by possibility, they might have seen him do so, or might have remembered that he did so, had their attention been equally drawn that way, as that of the witness affirming the fact. And such testimony ought moreover to countervail that of fifty witnesses declaring that they heard the supposed endorser declare that he never endorsed a bill of exchange in his life, nor ever would as long as he should live."

* * *

AN ORTHOGRAPHICAL ISSUE.—The *Green Bag* has published what it alleges to be a recently discovered letter of Chancellor Kent to one of his friends, which has as rare an orthographical flavor about it as the masterpieces of Artemus Ward, Orpheus C. Kerr and Josh Billings—shining lights as they are in the American literary firmament. The *Albany Law Journal* scornfully rejects the claim of this treasure-trove to be placed among the *ana* of the famous Chancellor. It deems it beyond conception that he could have been guilty of such shameful illiteracy as to write "Salust" for Sallust, "Quinctillion" for Quintilian, "Bynkersheek" for Bynkershoek, and "Mackiavell" for Machiavelli. But if he really did so miscall them, fancy his charlatanry in claiming *any*

sort of acquaintance with these extremely defunct but yet immortal gentlemen! However a new field is opened up for Mr. Ignatius Donnelly and his commendable bureau for the detection of literary frauds. We must now expect it to be proved to a demonstration that Kent did not write the Commentaries that bear his name, but that they were written by —well, say Washington Irving. On the whole, we are glad that the unlettered Chancellor hailed from New York instead of from Boston. Boston has, of late, so far fallen from her high intellectual estate as to use a Latin infinitive to express a purpose—and this, too, in an inscription on one of her monuments. She has also, according to the newspapers, been publicly referring to the Bacchantes as if the pronunciation of the name of those bibulous ladies were compassed in two syllables! All of which is quite dreadful, and if the *locale* of this new literary discovery had been Boston, then indeed would the American Athens have been in the hands of the Bœotians.

CHARLES MORSE.

ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

RAILWAY—PASSENGER'S BAGGAGE—CLOAK-ROOM—BAILMENT—TICKET—CONDITION EXEMPTING BAILEE FROM LIABILITY FOR ARTICLES ABOVE A SPECIFIED VALUE —DAMAGE TO ARTICLE DEPOSITED.

Pratt v. *South Eastern Ry. Co.*, (1897) 1 Q.B. 718, was an action brought to recover damages caused to the plaintiff's property, deposited with the defendants for safe keeping. The facts of the case were as follows: The plaintiff deposited with the defendants at a cloak-room at one of their stations, a gun of greater value than £10. He received from the person in charge a ticket on which was printed a notice inter alia, that "the company will not be responsible for any package

exceeding the value of £10." The gun was injured through the negligence of the defendants' servants, and the judge of the County Court gave judgment in favour of the plaintiff for £5 5s. 0d. On appeal, however, the judgment was set aside and the action dismissed by the Divisional Court (Cave and Lawrence, JJ.) on the ground that the stipulation on the ticket meant not only that the company would not be responsible for the loss of articles over the value of £10, but also that they would not undertake any responsibility for any damage to such articles.

BILL OF SALE—"PLANT"—HORSE—EJUSDEM GENERIS.

In *London and Eastern Counties Loan Co.* v. *Creasy*, (1897) 1 Q.B. 768, the Court of Appeal (Lord Esher, M.R., and Smith and Chitty, L.JJ.) have agreed with the decision of the Divisional Court (Wright and Bruce, JJ.) (1897) 1 Q.B. 442 (noted ante p. 420) to the effect that in the construction of the Bills of Sales Act, a "horse" is not within the term "plant" used therein, and that the decision in *Yarmouth* v. *France*, (1887) 19 Q.B.D. 647, was properly distinguished.

PRACTICE—DISCOVERY—PRODUCTION OF BOOKS—SEALING UP IRRELEVANT ENTRIES.

In *Graham* v *Sutton*, (1897) 1 Ch. 761, a very simple point of practice was involved, and yet it was one in which the Court of Appeal differed from North, J. An order for production had been made, and on the production of certain books for inspection thereunder, the defendant claimed the right simply to cover up such portions as contained irrelevant entries, instead of sealing them up as authorized by the terms of the order, on the ground that the sealing up of these parts of the books would seriously interfere with the carrying on of their business. North, J., refused to modify the order, except to the extent of authorizing the defendants from time to time to unseal and reseal on oath the irrelevant parts, but the Court of Appeal (Lindley, Smith and Rigby, L.JJ.) considered that the covering up of the irrelevant entries, accompanied by an affidavit that no parts of the books which were relevant had been covered up would answer all necessary purposes, and modified the order accordingly.

LEASE—COVENANT TO BUY WINE OF LESSOR AND HIS ASSIGNEES—PROVISO FOR ABATEMENT OF RENT—COVENANT RUNNING WITH LAND—ASSIGNMENT OF WINE BUSINESS—ASSIGNMENT OF LEASE—ASSIGN.

White v. *Southend Hotel Co.*, (1897) 1 Ch. 767, was an action to determine the true construction of a lease. The lease in question contained a covenant on the part of the lessee with the lessor and his assigns that he, the lessee, would not during the term buy or sell on the premises (a hotel) any foreign wines other than should have been supplied by the lessor or his assigns, and it was provided that so long as the lessee should observe the covenant the lessor should allow an abatement of £75 from each quarter's rent. The lessor died and the plaintiffs were his executors, and they sold his wine business to a firm of White & Price. The lessee assigned the lease to the defendants, and the question was whether the covenant for buying wines and proviso for the abatement of the rent were still in force, notwithstanding the assignment of the wine business by the plaintiffs, and the assignment of the lease to the defendants. The Court of Appeal (Lindley, Smith and Rigby, L.JJ.) considered that although the covenant to buy wines did not in terms include the assigns of the lessee the burden of it ran with the tenant's interest under the lease, and that the defendants as assigns of the original lessee were therefore still bound by the covenant, and entitled to the benefit of the proviso for the abatement of the rent so long as they continued to buy wines sold on the demised premises from White & Price.

INFANT—CUSTODY—GUARDIANSHIP OF INFANTS ACT, 1886 (49 & 50 VICT., C. 27), S. 5—(R.S.O., C. 137, S. 1).

In re A. & B., (1897) 1 Ch. 786, an application was made by a mother of certain infants to be allowed access to them, and that they might be placed in her custody. The father and mother had been married in 1885, and had three children. The application related to the two elder children, a girl and boy, aged 10 and 6 respectively. Both parents had been guilty of adultery, but had condoned each others offences. The mother had at one time contracted the habit of excessive indulgence in intoxicating liquors, but had for upwards

of twelve months broken the habit. Both parents were of good position, and the mother had a sufficient income secured by her marriage settlement. The husband had brought no property into settlement, and had no independent means. In June, 1895, they had ceased to live together, and the mother, with the youngest child had since resided with her parents. The two elder children had resided with and were properly cared for by the father's parents. Chitty, J., to whom the application was made ordered that each parent should have the custody of the two elder children for six months alternately, the applicant and her father undertaking that while they were in her custody they should be accompanied by their governess, and be properly educated, clothed and maintained at the expense of the applicant and her father. The respondent and his father giving a like undertaking as to the maintenance, etc., of the infants while in his custody. And the mother also undertaking that when not living with her parents while the infants were in her custody she would live with a suitable relation, friend or companion. The father appealed, but the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) refused to interfere with the order, being of opinion that the Act of 1886, above referred to, (and on which R.S.O., c. 137, s. 1, is based,) has materially altered the law relating to the custody of infants, and has given the mother of infants a co-ordinate voice with the father in matters of this nature. As Lopes, L.J., puts it, three things must now be looked at on applications of this kind, primarily the welfare of the infant—then the conduct of the parents, and then the wishes of both father and mother, the wishes of the father being no longer in the absence of misconduct, paramount.

COMPANY—WINDING UP—PAID UP SHARES ISSUED AS CONSIDERATION FOR PURCHASE OF PROPERTY.

In re Wragg, (1897) 1 Ch. 796, was an application by the liquidator of a company, to obtain a declaration that certain shares in the company held by E. J. Wragg and J. B. Martin as paid up shares, were not fully paid up, and to compel them to pay the amounts unpaid on such shares. It appeared that

the shares in question had been issued to Wragg and Martin as part of the consideration for the stock in trade, business and good will, which they had sold to the company. In fixing the amount of the purchase money, certain sums were set down for certain items of property, and it was attempted to be shown that some of the items were over-valued: but Williams, J., was of opinion that the value received by the company is measured by the price at which the company agreed to buy the property, and whilst the transaction is unimpeached, that is the only value the Court can take into consideration. While therefore a company cannot release a shareholder from obligation to pay for his shares either in money or money's worth, and cannot issue shares at a discount, it may, nevertheless, provided the contract is duly registered, buy property at any price it thinks fit and pay for such property, wholly or in part, by the issue of fully paid up shares: and such transaction will be valid and binding upon its creditors if the company has acted honestly and not colourably, and has not been imposed on by the vendor so as to be entitled to be relieved from the bargain. The decision of Williams, J., was affirmed by Lindley, Smith and Rigby, L.JJ.

ADMINISTRATOR PENDENTE LITE, LIABILITY OF, TO BE SUED.

In re Toleman, Westwood v. *Booker*, (1897) 1 Ch. 866, the defendant moved to stay all proceedings. The action was by a creditor of the late James Toleman to recover a debt, and so far as might be necessary for its payment, to administer the estate of the deceased and for the appointment of a receiver, also for the redemption of a mortgage. James Toleman had made a will, and as an action to determine the validity of the will was pending, the defendant had been appointed general administrator pendente lite. The defendant claimed that the plaintiff had no right without the leave of the Probate Division to sue him as administrator pendente lite; but North, J., was of opinion that the defendant was liable to be sued without any leave being first obtained, and dismissed the application with costs.

WILL—CONSTRUCTION—TENANT FOR LIFE AND REMAINDERMAN—LEASEHOLDS—"INCOME DERIVED"—GROUND RENTS—REPAIRS AND OUTGOINGS.

In re Redding, Thompson v. *Redding*, (1897) 1 Ch. 876, turns upon the construction of a will whereby the testator directed his executors and trustees to arrange his affairs and manage his estate and to retain certain leaseholds and let them on lease at fair rentals, and pay the income derived therefrom to his wife for life for the benefit of herself and children, and after her decease to divide the whole of his estate equally between his children. The question was between the tenant for life and the remainderman, whether the "income derived" meant the gross or the net income. Stirling, J., held that it meant the net income, and consequently that ground rents, current repairs and other outgoings in respect of the leaseholds must be borne by the tenant for life. *In re Baring*, (1893) 1 Ch. 61, (noted vol. 29, p. 142) was relied on by the tenant for life, but Stirling, J., refused to follow that case, and dissented from the construction placed by Kekewich, J., on *Re Courtier*, 34 Ch. D. 136, on which he professed to found his decision *In re Baring*.

WILL—CONSTRUCTION—RESIDUARY GIFT—SUCCESSIVE INTERESTS—LEASEHOLDS—CONVERSION.

In re Game, Game v. *Young*, (1897) 1 Ch. 881, was also a summary application to the Court for the construction of a will. In this case the testator directed that the rents and profits of his residuary real and personal estate, should be paid to his wife for life; and after her death he gave his residuary estate to his nephew, Geo. Game, for life, subject to, and charged with certain annuities, a power of distress being given to the annuitants, with remainder on the death of George to his children equally, as tenants in common. The residuary estate consisted of £142 invested in consols, and five freehold and five leasehold houses. The testator died in 1889, and his widow in 1896, having up to the time of her death received the whole of the rents and profits and income of the testator's residuary estate. George Game had sold his estate for life to an insurance company, and the contest was between George's children, who were entitled in remainder,

and the company, and the question presented for the decision of Stirling, J., was whether the company was entitled to the whole of the rents and profits of the leasehold during George's life, or whether the rule laid down in *Howe* v. *Dartmouth*, 7 Ves. 137 a, did not apply, and the leaseholds be deemed to have been converted at the end of a year from the testator's death; the applicants claiming, that the assignees of George should be declared entitled only to a sum equal to the dividends which would be payable had the leaseholds been sold at the end of the year from the testator's death, and the purchase money invested in Consols. It was contended on behalf of the company that the direction to pay rents, and the granting of a power of distress to the annuitants, were indicative of an intention on the part of the testator that the property was to remain in specie, but Stirling, J., was of opinion that the authorities were against that contention, and that the use of the word "rent" where there were both freeholds and leaseholds afforded no sufficient indication of intention that the leaseholds should not be converted, and in like manner he considered the giving of a power of distress might be referrable to the freeholds, and therefore no indication of an intention that the leaseholds were to be enjoyed in specie.

TRADE NAME—TRADE MARK—PASSING OFF GOODS AS THOSE OF ANOTHER—INJUNCTION—ACCOUNT OF PROFITS—EVIDENCE.

Saxlehiner v. *Apollinaris Co.*, (1897) 1 Ch. 893, was a case in which it was sought to enforce the principle laid down in the well known case of *Reddaway* v. *Banham*, (1896) A.C. 199 (noted ante vol. 32, p. 578), to the effect that "nobody has any right to represent his goods as the goods of somebody else." The plaintiff was the owner of a bitter spring in Buda Pesth, and the defendants had for many years acted as her agent for the sale of the water from this spring, in the United Kingdom and other places. The spring and the water were known as Hunyadi Janos, the name having been given to the spring and the water by the plaintiffs' husband, and meaning John Hunyadi, the name of a Hungarian patriot who died in the

15th century. In 1896 the contract between the plaintiff and the defendants came to an end, and thereafter they sold in similar bottles to those in which the plaintiff's water was sold, a water which they called "Apenta," but the labels on the bottles resembled those on the plaintiff's bottles, and had thereon the words, "bottled at the Uj Hunyadi Springs, Buda Pesth," the word "Hunyadi" occurring four times conspicuously on the bottles, and they also had a yellow label with a red diamond, similar to a label which the defendants had been accustomed to place on the bottles of water received from the plaintiff when acting as her agent. The plaintiff objected to the use in any way by the defendants of the word "Hunyadi," and also to the use of the yellow label with the red diamond mark. Kekewich, J., was of opinion that no evidence of intention to deceive is necessary where the defendants' goods on the face of them, and having regard to surrounding circumstances, are obviously calculated to deceive, because a person must be taken to intend the reasonable and natural consequences of his acts: but if a mere comparison of the goods, having regard to surrounding circumstances, is not sufficient, then evidence of intent is necessary, and that such evidence was necessary in regard to the use of the yellow label and diamond; but he was of opinion that the plaintiff failed to prove any intention to deceive on the part of the defendants by the use of the yellow label and the diamond mark, it appearing that the defendants had used that label as their trade mark so as to indicate that the goods to which it was attached were sold by them, and he therefore refused to make any order as to the use of that label; but he held that the use of the word "Hunyadi" was an invasion of the plaintiffs' rights, and he granted an injunction against its use on any water sold by the defendants other than that derived from the plaintiffs' spring, without clearly distinguishing the same from the water derived from the plaintiff's spring; he also ordered the delivery up, or destruction, of all labels or capsules in the defendants' possession or power, bearing the word "Hunyadi," and, although expressing a strong opinion that the defendant's sale of

"Apenta" water had not misled anyone into the belief that it was from the plaintiff's spring, he nevertheless, in deference to the case of *Lever* v. *Goodwin*, 36 Ch. D. 1, granted the plaintiff an account of the profits derived by the defendants from the sale of Hungarian Bitter Water, under a name or description of which the name "Hunyadi" forms part, without clearly distinguishing the same from water derived from the plaintiff's spring, and he condemned the defendants to pay the costs of the action.

TENANT FOR LIFE—BANKRUPTCY—FOREIGN BANKRUPTCY - DOMICILE OF BANKRUPT —FORFEITURE.

In *re Hayward*, *Hayward* v. *Hayward*, (1897) 1 Ch. 905, a life interest in £4,000 of a domiciled Englishman was under a trust by will, determinable on bankruptcy or alienation. After the death of the testatrix the tenant for life being domiciled in England was adjudicated bankrupt in New Zealand, and the question was whether the adjudication had worked a forfeiture of his life interest. Kekewich, J., on the anthority of *In re Blithman*, (1866) L.R. 2 Eq. 23, held that it had not, and that the New Zealand adjudication in bankruptcy had not the effect of vesting the bankrupt's estate in the assignee, notwithstanding the Colonial Act provided that all property of the bankrupt wheresover situate should on adjudication vest in the official assignee.

COMPANY—PREFERENCE AND ORDINARY SHAREHOLDERS—ENGLISH COMPANY DOING BUSINESS IN COLONY—INCOME TAX IMPOSED BY COLONY.

Spiller v. *Turner*, (1897) 1 Ch. 911, was a special case stated for the opinion of the Court. The action was brought by the plaintiff on behalf of himself and all other ordinary shareholders of an English company doing business in Australia, and the defendants were the company and certain preference shareholders who by a resolution of the company had been declared entitled to payment of interest at 6 per cent. per annum on their shares, in priority to other shareholders. By a subsequent Act of the Colonial Legislature a duty in the nature of income tax was imposed on all dividends or interest paid out of assets in the colony to the

members of companies carrying on business therein, and it was declared that the duty payable in respect of the amount received by any member should be a debt due by him to the Crown. The question submitted to the Court was whether this duty was to be deducted by the company from the 6 per cent. payable to the preference shareholders, or whether they were entitled to the 6 per cent. clear of the duty. Kekewich, J., decided that the contract between the company and the preference shareholders being an English contract, the rights of the preference shareholders, not domiciled in the colony, were not affected by the Colonial Act, and that they were therefore entitled to their 6 per cent. without any deduction in respect of the colonial duty.

ADMINISTRATION—ANNUITY TERMINABLE ON ALIENATION—DEFICIENCY OF ASSETS —VALUATION OF ANNUITY—ANNUITANT, RIGHT OF, TO AMOUNT OF VALUATION OF ANNUITY, IN CASE OF DEFICIENCY OF ASSETS.

In re Sinclair, Allen v. *Sinclair*, (1897) 1 Ch. 921: The question to be determined was what are the rights of an annuitant in the case of a deficiency of assets to meet the annuity. In Seton on Judgments, 5th ed., vol 2, p. 1384, it is laid down "where assets are deficient an annuity should be valued, and abate proportionately, and the apportionment belongs to the annuitant absolutely; *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357, unless given subject to condition: *Carr* v. *Ingleby*, 1 De G. & Sm. 362." In the present case the annuity in question was given to the annuitant for life "or until the annuitant should do or suffer some act or thing whereby, or by means whereof, the said annuity, or any part thereof, if belonging to him absolutely, would become vested in or pay-payable to some other person or persons, whichever should be the shorter period." The fund out of which the annuity was payable was deficient, and the annuity had been valued, and the amount of the valuation was represented by a fund in Court of £1327 15s. 11d. The annuitant applied for payment out of the fund to him. Kekewich, J., with some hesitation made the order, refusing to follow *Carr* v. *Ingleby*, supra. It is to be noted that although the annuity was given until the happening of the event above mentioned, yet there was no

gift over, and the covenantor's estate could have no claim on the fund. These two circumstances appear to have weighed with the learned judge very much.

CHARITY—MORTMAIN—INTEREST IN LAND—IMPURE PERSONALTY.

In *re Crossley, Birrell, Greenhough a*, (1897) 1 Ch. 928, Kekewich, J., held that certain stock issued by a public municipal body under the authority of an Act of Parliament, and which by the terms of the Act was made a charge on the whole of the lands of the corporation was impure personalty, and as such, within the Mortmain and Charitable Uses Act, 1888.

LANDLORD AND TENANT—BUILDING AGREEMENT—OPTION TO PURCHASE—INTEREST OF TENANT AFTER EXERCISE OF OPTION—BREACH OF CONDITION—RIGHT OF RE-ENTRY.

Raffety v. *Schofield*, (1897) 1 Ch. 937, is a case of some importance. The plaintiff had made an agreement with the defendant, whereby the defendant agreed to erect certain buildings, and to carry out certain works on the plaintiffs' land, and "forthwith to proceed" and complete the works, when a 99 years lease was to be granted to the defendant; the agreement provided that if the defendant did not perform the agreement on his part the plaintiff might by notice in writing terminate the agreement and re-enter; it also gave an option to the defendant to purchase the freehold. The defendant made default in carrying out the agreement as to building, etc., but gave the plaintiff notice of his election to purchase the freehold. The plaintiff, notwithstanding this exercise of the option to purchase, gave the defendant notice of his intention to terminate the agreement, and brought the present action to recover possession. Romer, J., dismissed the action, because although the defendant had made default in carrying out the agreement as to building, yet as the right to exercise the option to purchase was not dependent on his not being in default as to that part of the agreement, he held that he had the right to exercise it notwithstanding his default, and the time for completion of the contract of purchase not having arrived, he held that the defendant was under the contract entitled to retain possession; because as soon as the

relationship of vendor and purchaser is established, the powers of the vendor to act as owner of the property, and (inter alia) to change tenants or holdings are suspended pending completion of the purchase.

SETTLEMENT—HOTCHPOT—TWO FUNDS—PREFERENTIAL TRUST.

In re Bristol, Grey v. *Grey*, (1897) 1 Ch. 946, is a case which arose out of a marriage settlement whereby the father of the intended wife settled a sum of £13,000 and the intended husband by the same instrument brought into settlement a policy on his life for £5,000. By the terms of the settlement the capital of the £13,000 was to go to such children of the marriage as the husband and wife by deed, or the survivor by deed or will should appoint, and in default of appointment to the children equally, subject to a hotchpot clause in the form usually adopted in the case of one fund: the £5,000 of policy moneys was to go to such children of the marriage as the wife should by deed or will appoint, and in default of appointment then "upon the same or the like trusts" and subject "to the same and the like powers" and provisions as were expressed in the settlement concerning the £13,000, after the death of the husband and wife and in default of appointment by them. The whole of the £13,000 had been appointed unequally among the three children of the marriage, and the £5,000 was unappointed, and the question for Romer, J., was how the same was distributable, and whether the appointees of the £13,000 were or were not bound to bring their shares of that fund into hotchpot or whether the £5,000 was divisible in equal shares between the three children. The learned Judge was of opinion that the two funds could not be regarded as one for the purpose of the hotchpot clause, and therefore that the £5,000 was divisible between the three children in equal shares.

COPYRIGHT — ASSIGNMENT — INFRINGEMENT OF COPYRIGHT — REGISTRATION OF ASSIGNMENT—COPYRIGHT ACT, 1842 (5 & 6 VICT., C. 45) SS. 13, 24—COSTS.

Liverpool General Brokers' Association v. *Commercial Press Telegram Bureaux*, (1897) 2 Q.B. 1, was an action by an assignee of a copyright for an injunction to restrain an infring-

ment of the copyright. It failed because the plaintiff had neglected before action to register his assignment. A dictum of Cockburn, C.J., in *Wood* v. *Boosey*, L.R, 2 Q.B., at p. 351, was relied on by the plaintiff, as indicating that the provisions of the Copyright Act, 1842, (5 & 6 Vict,, c. 45) s. 13, respecting registration did not extend to assignments, but Kennedy, J., was of opinion that the assignee of a copyright must be registered before he can maintain an action for infringement; but, inasmuch as he considered the merits of the case were with the plaintiff, although he dismissed the action, he refused to give the defendants costs.

FRAUDULENT PREFERENCE—PAYMENT OF OVERDUE BILL OF EXCHANGE—ONUS OF PROOF (54 VICT., C. 20, S. 1, O.)

In re Eaton, (1897) 2 Q.B. 16, was a decision in bankruptcy, but has a bearing on the construction of the Ontario Act, 54 Vict., c. 20, s. 1. The question was whether the payment of an overdue acceptance by the bankrupt could be considered a preferential payment. The bill in question was not presented when due but was held over at the acceptor's request, and subsequently paid by him within thirty days prior to a bankruptcy receiving order being made against him. Williams, J., although of opinion that the payment of a bill in the ordinary course of business is not a preference, yet considered that where, as in this case, the payment is not made in ordinary course it may be a preference, and that the onus of showing it was not preferential was on the creditor, and he had failed to show that it was not.

CONVEYANCE TO MAKE GOOD BREACHES OF TRUST—REVOCABLE MANDATE—FRAUDULENT PREFERENCE—DECLARATION OF TRUST—DEPOSIT OF SHARE CERTIFICATES—(54 VICT., C. 20, S 1 O.)

New, Prance, & Garrard's Trustee v. *Hunting* (1897), 2 Q.B. 19, is another case of the same character as the preceding. In this case a bankrupt two days before his bankruptcy executed a deed whereby he conveyed real estate to a person upon trust by sale or mortgage to raise thereout £4,200, and therewith make good divers breaches of trust committed by the grantor in respect of certain scheduled estates of which

he was trustee. He also shortly before his bankruptcy deposited certificates of shares in a box accompanied with memoranda to the effect that they were deposited as securities for moneys due to several specified estates, of which he was trustee. Neither the deed, nor the deposit of the shares, were communicated to the beneficiaries. Both transactions were attacked as being fraudulent preferences, but the attack was unsuccessful. Williams, J., holding, and the Court of Appeal (Lord Esher, M.R., and Smith and Chitty, L.JJ.) agreeing with him, that the deed created the relation of trustee and cestui que trust, as between the grantor and the persons interested in the trust estates, and was consequently not a revocable mandate; and that the deposit of the shares with the memoranda constituted a good declaration of trust in favour of the beneficiaries of the trust estate; and that neither transaction could be regarded as a fraudulent preference. The deposit of shares being covered by the case of *Middleton* v. *Pollock*, 2 Ch. D. 104, the accuracy of which was attempted to be impeached. The Court of Appeal points out that the question of fraudulent preference is one depending on the motive of the grantor, and although a man must be held to intend the natural consequence of his own acts, at the same time where his object is plainly to make good a breach of trust, that cannot be deemed to involve an intention to prefer the cestui que trust, as a creditor, but rather a desire to save himself from, or to avert, the consequences of his own wrong doing.

ACTION, CAUSE OF—NERVOUS SHOCK—PRACTICAL JOKE CAUSING SHOCK—REMOTENESS OF DAMAGE.

Wilkinson v. *Downton* (1897), 2 Q.B. 57, may be regarded as a unique case, and as Wright, J., declares, without a precedent, and ought to be a warning to practical jokers. The action arose out of a false representation made by the defendant to the plaintiff, a married woman, to the effect that her husband had met with a serious accident whereby both his legs were broken,—the defendant knowing the statement to be false, but intending the plaintiff should believe it to be true—

she did believe it to be true, and in consequence suffered a violent nervous shock which rendered her ill. The main question at issue was whether the plaintiff could recover damages for the nervous shock, or whether such damage was not too remote. Wright, J., was of opinion that the plaintiff had a good cause of action, and was entitled to recover substantial damages for the nervous shock, notwithstanding the decision of the Privy Council in *Victorian Railways Commissioners* v. *Coultas*, 13 App. Cas. 222, the authority of which had been doubted, and in which the element of wilful wrong was absent. He also considered the case of *Allsop* v. *Allsop*, 5 H. & N, 534, which had been approved by the House of Lords, distinguishable, on the ground of its being an action for slander, and which had been determined on the ground of there being no precedent for giving damages for illness consequent upon slanderous statements, and the inexpediency of holding that such damages were recoverable in that particular class of cases.

PRACTICE—DISCOVERY—DOCUMENTS FORMING PART OF DEFENDANTS' CASE ONLY—AFFIDAVIT CONCLUSIVE.

Frankenstein v. *Gavin's Cycle Co.* (1897), 2 Q.B. 62, turns on a simple point of practice. The action was brought against the defendants for damages for alleged misrepresentation in a prospectus, whereby he was induced to agree to take shares, and for a rescission of the contract. One of the alleged misrepresentations was the statement that 12,500 persons had enrolled themselves as subscribers to the company. The defendant company through their secretary, in answer to an order for production of documents, stated that they had in their possession 12,500 applications by persons wishing to be enrolled as annual subscribers to the company, which they objected to produce, on the ground that they were part of the evidence to support the defendants' case, and did not support or tend to support the plaintiff's case. The defendant applied for inspection, which was refused by a Judge in Chambers, and on appeal to the Court of Appeal (Lord Esher, M.R., and Smith and Chitty, L.JJ.) his order was upheld, and the defendants' secretary's affidavit was held to be conclusive as to the effect of the documents.

PRACTICE—SPECIAL ENDORSEMENT ON WRIT—RECOVERY OF LAND AND MESNE PROFITS—TIME UP TO WHICH MESNE PROFITS RECOVERABLE.

In *Southport Tramways Co.* v. *Gandy*, (1897) 2 Q.B. 66, the plaintiff sought to recover possession of land and mesne profits: the writ of summons was specially endorsed. The plaintiff applied for leave to sign judgment under Ord. xiv. (Ont. Rule 603) for possession and £80 claimed as mesne profits, and in his affidavit filed in support of the motion alleged, the £80 was claimed as double value for six months, on account of defendants' refusal to give up possession. On the hearing of the motion Kennedy, J., gave the plaintiff leave to sign final judgment for possession, and for mesne profits calculated up to the time of the plaintiff's obtaining possession. From this order the defendant appealed—on the ground that the plaintiff's affidavit showed that he was claiming double value, which was a penalty under the statute and therefore not the subject of a special endorsement, and that at any rate mesne profits could not be given after the date of the order. The Court of Appeal (Lopes and Rigby, L.JJ.) however, held that the order was right, and that the affidavit did not vitiate the endorsement.

PRACTICE—DISCOVERY—ACTION FOR FORFEITURE OF LEASE.

Mexborough v. *Whitwood Council*, (1897) 2 Q.B. 111, was an action to enforce the forfeiture of a lease for breach of covenant, and the simple question was, whether the defendant was liable to be examined for discovery, for the purpose of establishing the forfeiture. The Court of Appeal (Lord Esher, M.R., Smith and Chitty, L.JJ.) answered that question in the negative,

PRACTICE—STRIKING OUT STATEMENT OF DEFENCE—FRIVOLOUS AND VEXATIOUS DEFENCE—ABUSE OF PROCESS OF COURT.

Remmington v. *Scoles* (1897), 2 Ch. 1, is a somewhat unusual case. The action was against a solicitor to compel him to account as a trustee, and for an injunction to restrain him from dealing with the alleged trust property. The defendant had in another action under oath admitted the several material statements in the plaintiff's claim, but notwithstand-

ing in the present action filed a statement of defence, in which he either denien or refused to admit each of the allegations of the statement of claim, but set up no other defence. The plaintiff applied to Romer, J.. to strike out the defence as frivolous and vexatious, relying in support of his application on the defendant's admissions under oath in the other case, and that learned judge granted the order, which the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) held to be rightly made. The Court of Appeal is careful to point out that on such applications the Court cannot try on affidavit the truth or falsity of a defence, and it is only where there are undisputed facts upon which the Court can proceed, that such an order can properly be made. We may observe that the jurisdiction of the Court to make such an order is not based on any rule or statute, but on its inherent jurisdiction to prevent an abuse of its process.

JURISDICTION—SETTLED LAND—REBUILDING HOUSES—(58 VICT., C. 20, O.)

In re Montagu, Derbishire v. *Montagu*, (1897) 2 Ch. 8, may be usefully referred to as showing how purely statutory is the jurisdiction of the Court to deal with settled estates, and therefore that it cannot go beyond its statutory powers however beneficial it might be for the cestui que trusts so to do. In this case land was vested in trustees upon trust for Philip Montagu for life, and after his death upon trust for his children. He had two children, both infants. Four of the houses on the property were old and in bad repair, and it appeared that if they were pulled down and rebuilt at an expense of about £8,000, the value of the settled property would be increased by £13,000 and its income doubled. The settlement contained no powers under which this could be done, and it did not appear that it was necessary by way of salvage. The trustees applied to the Court for leave to raise money by mortgage for the purpose of carrying out this scheme. Kekewich, J., refused the application on the ground of want of jurisdiction, and his decision was affirmed by the Court of Appeal (Lindley, Lopes and Rigby, L.JJ.) Under the Ontario Settled Estates Act of 1895 (58 Vict., c. 20) the Court under similar circumstances would appear to have ample jurisdic-

tion to make such an order wherever satisfied that it is proper and consistent with a due regard for the interest of all parties interested under the settlement.

WILL—CONSTRUCTION—ABSOLUTE GIFT—GIFT ON CONDITION—PRECATORY TRUST "IN THE FULLEST CONFIDENCE"—ELECTION.

In *re Williams, Williams* v. *Williams*, (1897) 2 Ch. 12, the Equity doctrines of election, and precatory trusts, came in question. A testator bequeathed his residuary estate to his wife absolutely, "in the fullest confidence that she will carry out my wishes in the following particulars," these were to pay the premiums on a policy on her own life and which was her own property, and by her will leave the moneys payable thereunder, and also certair moneys payable at the testator's death in respect of a policy on his life, and which was his own property, to his daughter Lucy Morris. On the testator's death his widow took possession of his property and enjoyed it till her death, when she bequeathed the policy moneys received under the policy on her husband's life to Lucy Morris, but the policy on her own life she disposed of otherwise. The action was brought for the construction of the husband's will, and it was contended on behalf of Lucy Morris, that the widow having taken the benefit of her husband's will was bound to carry out its provisions as regarded the policy on his own life, and that she was put to her election between the benefits conferred by the will and her right to her own policy: but Romer, J., held that the words "in fullest confidence," etc., were not sufficient under the modern cases to create a precatory trust of the policies, and that the widow took all the property which the testator gave her absolutely, and with this decision the majority of the Court of Appeal (Lindley and Smith, L.JJ.) agreed; but Rigby, L.J., dissented, being of opinion that although the gift to the wife was absolute it was conditional, and that she was bound to comply with the condition.

WILL—CONSTRUCTION—CLASS—SUBSTITUTION.

In re Hannam, Haddelsey v. *Hannam*, (1897) 2 Ch. 39, was also a case for the construction of a will, whereby a testator after giving a life estate to his mother on certain pro-

perty, directed his trustees after the death of the tenant for life "to sell and dispose of any real estate or any personal estate that may remain unsold, and to transfer and pay the said trust premises and the dividends and annual produce thereof unto my brothers and sisters in equal shares and proportions, the lawful child or children of any deceased brother or sister, taking his, her or their, deceased parents' share. The testator had no issue living at the time of his death, and his mother (the tenant for life) predeceased him. He had one brother, Charles, who died before the date of the will, leaving children. He had another brother, Richard, who died after the making of the will, but before the testator, also leaving children. He had also three sisters, who survived him. The children of Richard claimed to be entitled to a share in the fund, but North, J., was of opinion that neither they, nor the children of Charles, were entitled under the substitutionary clause. The effect of the will was to give shares to those brothers and sisters only who were living at the time of the testator's death, and the children of such of them as might die between the time of the testator's death and the period of division, alone could be let in to take the shares of their deceased parents. Notwithstanding the adverse comments upon the case of *Thornhill* v. *Thornhill*, (1819) 4 Madd. 377, by Vice Chancellor Shadwell in *Smith* v. *Smith*, 8 Sim. 353, and in Jarman on Wills, it was approved by North, J.

NEWS AGENCY—UNPUBLISHED INFORMATION—INJUNCTION.

Exchange Telegraph Co. v. *Central News*, (1897) 2 Ch. 48, was an action for an injunction brought by the plaintiffs, a news agency, against a customer and also against a rival news agency company, to restrain the customer from communicating to the defendant company news supplied by the plaintiffs upon the terms that it was not to be communicated to third parties; and also to restrain the defendant company from inducing the plaintiffs' customer to break his contract with the plaintiffs by supplying such news for publication by the defendant company. Stirling, J., granted the injunction.

FIXTURES—MOVABLE CHATTELS—MANSION—STUFFED BIRD COLLECTION.

Hill v. *Bullock* (1897), 2 Ch. 55, was an action brought to determine the question whether stuffed birds, attached to movable trays, placed in cases affixed to the walls of a mansion house, were fixtures, and as such passed with the house as annexed to the freehold, or whether they were chattels which would pass to a trustee in bankruptcy. Kekewich, J., decided that the stuffed birds were not fixtures, but passed as chattels. The cases in which the birds were contained were conceded to be fixtures. An attempt was made to bring the case within the principle of a decision of Lord Romilly to the effect that statues, though not actually affixed to a building, but which were placed in or upon it in furtherance of the general architectural design of the building and not merely ornaments to be afterwards added, were fixtures, but Kekewich, J. thought the principle of that decision might properly be extended to structures such as those in which the birds were contained, but not to the contents thereof.

Correspondence.

NEW RULES AND FORMS—ONTARIO.

To the Editor of the Canada Law Journal.

DEAR SIR,—How long will the long suffering legal profession submit to injustice without murmur? The popular delusion to the contrary notwithstanding, no class of men are more patient under tribulation than members of this profession, even when wounded in the house of their friends. This soliloquy is occasioned by the innovations created by the new Consolidated Rules of Practice. If the learned Commission, whose labors have resulted in the promulgation of the new Rules deemed it necessary to amend the old ones, surely they might have kept their hands off the forms. What further information the non-professional defendant may be supposed to gather from the intimation in the new form of writ, that if he does not defend himself the plaintiff may pro-

ceed on his own showing "subject to Rules of Court," than what was contained in the old, which said the same thing in fewer words, it is impossible for the average practitioner to perceive. Is it supposed that after he is presented with a copy of the new form of writ the denizen of the back township will rush to the law bookseller's and procure a copy of these new rules in order to learn what significance is attached to these new and mysterious words? It is not long since a change was made in the forms of endorsements on writs for foreclosure and sale under mortgages, a change involving more words, but expressing identically the same meaning, at all events to the non-professional citizen, as the old one. Some of these changes consist merely in the transposition of lines and sentences, leaving the sense unaltered. The objection to these changes is not purely whimsical, but is founded on substantial ground, namely, the serious expense they entail to the individual practitioner and the enormous cost that results to the profession in the aggregate. The practitioner being supplied with a full stock of forms, the the so-called law reformer comes along with his desolating pen and renders the stock utterly valueless—no one profiting thereby except the vendor of these articles. I believe I voice the sentiments of the profession at large when I say it is time to call a halt in this respect. The personnel of the Commission places anything they do above all criticism, but possibly these details are left to some one who was not a member of the Commission. Whoever it may be, he inflicts great loss in the aggregate upon the profession at large.

PRACTITIONER.

[Our correspondent adds some comments, which although cleverly put are perhaps unnecessary to the point at issue. We are not entirely surprised at his wrath. The reduction of a stock of forms to waste paper is a process few of us can contemplate with equanimity. We agree with his criticism as to the changes in the writ; but in other respects the changes seem to be improvements, and, if this be so, the loss complained of would be a matter of necessity.—ED. C.L.J.

QUASHING SUMMARY CONVICTIONS.

To the Editor of the Canada Law Journal.

Procedure to quash a summary conviction, which is wrong both as to law and evidence, by way of certiorari and rule nisi, is both circuitous and costly, and a remedy in name only. The unfortunate defendant, being wrongly convicted in a criminal court, must either submit to have the conviction stand against him, and be mulcted in the sum of from $10 to $20 in fine and costs, or run the risk, all too frequent of late, of having it quashed "without costs," and the "usual order of protection for the convicting Justices," which means an item of anywhere from $50 to $75 of costs, to which he has been put in defending himself in the first instance and in vindicating his position by such an empty order as above mentioned.

There are many such cases—let me quote from your last issue at page 570 in *Re Queen* v. *McLeod*, before the full Court of Nova Scotia, in which it was held that the conviction was bad and must be quashed, there being no jurisdiction under the statutes in one magistrate to try and convict for the offence charged, and "the motion being unopposed no costs were allowed. Terms were imposed that no action should be brought by defendant."

Now admit for the purpose of argument that the evidence in this case has proven the defendant guilty of the committal of the offence charged, and that he succeeded in quashing the conviction against him on solely legal grounds, *i. e.*, want of jurisdiction in the convicting magistrate under the statute, should it not be laid down as a principle that magistrates are presumed to know the law under which they assume to act, and that when they act without jurisdiction that they must assume, with the complainant in the case, the responsibility for the consequences? In this case the merits might have been against the defendant, and the Court might be justified in the particular circumstances in so disposing of the costs, but the report certainly does not read that way. Is it a mat-

ter of excuse sufficient to deprive the defendant of the costs to which he has been put, that the complainant or the convicting justices do not oppose the motion?

This way of disposing of these applications is having a bad effect on country justices, who in the majority of cases are consulted beforehand by the complainant in the laying of the information, and are to that extent prejudiced before the hearing, and if there is the slightest amount of evidence against the defendant they are determined to convict, knowing that in such applications they are invariably protected by the higher court.

This applies particularly to cases instituted at the instance of a private prosecutor, called the complainant, which are often the outcome of a private feud between himself and the accused, and the information is laid not so much to forward the interests of justice as for what may be termed "satisfaction." In all cases so instituted, I submit it would be in the best interests of justice that the old rule regarding costs should govern, namely, that costs should follow the event. That would have a salutary effect on persons invoking the machinery of our criminal courts to have their private grievances aired, and it would also impose upon our magistrates the necessity of caution and care in their office. Particularly should costs be imposed in cases were it appears that at the hearing of the complaint, due objection was taken on the defendant's part either to the jurisdiction or to the admissibility of evidence, or to the form and sufficiency of the information and the evidence, despite which, the complainant pressing, the magistrates convict.

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REPORTS AND NOTES OF CASES

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] [Sept. 14.

IN RE RUBY.

Partnership—Joint and separate creditors—Administration.

In the administration by the Court of the insolvent estate of a deceased partner the surviving partner is entitled to rank for a balance due to him in respect of partnership transactions and partnership debts paid by him, when even apart from his claim there would be no surplus available for partnership creditors.

Judgment of a Divisional Court reversed. OSLER, J.A., dissenting.

R. S. Cassels, for the appellant.

Aylesworth, Q.C., and *J. B. Clarke*, Q.C., for the respondents.

From Divisional Court.] [Sept. 14.

BOULTBEE *v.* GZOWSKI.

Broker—Sale of shares—Undisclosed principal—Marginal transfer—Indemnity.

A broker who buys bank shares for an undisclosed principal and does not accept the shares himself, but, pursuant to a general power to transfer given by the vendor, transfers them to his principal, is not liable to indemnify the vendor against the statutory "double liability" which the principal fails to pay.

Judgment of a Divisional Court, ante p. 241; 28 O.R. 285, reversed.

Aylesworth, Q.C., and *W. Barwick*, for the appellant.

H. J. Scott, Q.C., and *R. Boultbee*, for the respondent.

From Divisional Court.] [Sept. 14.

OSTROM *v.* SILLS.

Water and watercourses—Surface water—Easement—Lands of different levels.

The relationship of dominant and servient tenement does not exist between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level, although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon, although by so doing he keeps back the surface water to the injury of the owner of the land of higher level.

Judgment of a Divisional Court, reversed.

Clute, Q.C., and *J. Williams*, for the appellants.

C. J. Holman, and *E. Gus Porter*, for the respondent.

From Divisional Court.] [Sept. 14.

ARMSTRONG *v.* LYE.

Principal and agent—Attorney for sale of land—Direction to pay advance out of proceeds—Attorney subsequently purchasing—Personal liability of attorney — Equitable assignment — Acknowledgment — Registry Act — Notice.

Where the attorney under an irrevocable power from the owner for the sale or other disposition of certain lands, and entitled in the event of sale to a share of the proceeds after payment of charges, agrees to pay out of the proceeds the amount of a further charge made by the owner, he is not personally liable to pay that charge, but the chargee is entitled to enforce his charge as an equitable assignment of the proceeds of sale.

Judgment of a Divisional Court, 32 C.L.J. 413; 27 O.R. 511, reversed MACLENNAN, J.A., dissenting.

Execution of the document creating the further charge was proved by affidavit and attached to it, but without any proof of execution, were the agreement by the attorney to pay the charge and a transfer by the chargee to the plaintiff of the charge, and all the documents were accepted by the Registrar and registered.

Held, affirming the judgment of a Divisional Court; 32 C.L.J. 413; 27 O.R. 511, that the defect in registration was cured by s. 80 of the Registry Act, R.S.O. c. 114, and that the attorney who subsequently became himself the purchaser of the lands in question was affected with notice of the plaintiff's rights.

J. B. Clarke, Q.C., and *F. A. Hilton*, for the appellant.

Watson, Q.C., *W. Read* and *R. Ruddy*, for the respondent.

HIGH COURT OF JUSTICE.

MOSS, J.A.] [July 20

IN RE MILLS, NEWCOMBE *v.* MILLS.

Administration—Satisfaction—Insurance for benefit of child—Evidence.

Appeal from the Master at St. Thomas.

A man having been appointed administrator of his deceased wife's estate, received after her death certain moneys payable under a mortgage of which she had died possessed, and appropriated them to his own use. In the course of the administration by the Court of his own estate, a claim was put in by his only surviving daughter to these mortgage moneys. In opposition to the claim, however, it was alleged that a certain life policy which he had taken out, and declared under the Act to secure to wives and children the benefit of life insurance, to be for the benefit of his daughter, and the proceeds of which had been received by her guardian, was a satisfaction of her claim. No evidence was offered to prove that such was the intention of the insured, except certain alleged oral statements by him in his lifetime.

Held, that even if it was open to anyone, after the death of the insured, to show upon evidence of expressions of intention, understandings, or bargains made or come to before effecting the insurance, and to which the beneficiary was no party, that the money secured was, when paid, not to be for her abso

lute benefit, but subject to be used for the purpose of indemnifying the estate of the insured, which was doubtful,—it should, at any rate, only be by means of some writing. There should at least be something evidencing the trust or obligation as formal as the Act requires in the case of changes, in the designation of or appointment among the beneficiaries.

J. M. Glenn and *W. L. Wickett*, for the appellant.

Maxwell, for the plaintiff and defendants David H. Gooding, and Mary E. Mills.

F. W. Harcourt, for the infant defendants.

MASTER IN CHAMBERS.] [Sept. 11.

TORONTO TYPE FOUNDRY CO. *v.* TUCKETT.

Action—Dismissal—Default—Rules 434, 542.

Rule 434 provides that "in actions in the County of York, to be tried without a jury, if the plaintiff does not set down the action for trial within six weeks after the pleadings are closed and proceed to trial as provided in Rule 542, the action may be dismissed for want of prosecution."

Held, that unless there is default both in setting down and in proceeding to trial, an action cannot be dismissed.

C. W. Kerr, for the plaintiffs.

H. Cassels, for the defendant.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. } [Sept. 15.

ALDIS *v.* CITY OF CHATHAM.

Municipal Corporations — Highway—Negligence — Acciaent—Notice of—55 Vict., c. 43, s. 531 (1)—57 Vict., c. 50, s. 13—59 Vict., c. 51, s. 20.

The latter part of the clause added to s. 531 (1) of the Consolidated Municipal Act, 1892, by 57 Vict., c. 50, s. 13, as amended by 59 Vict., c. 51, s. 20, whereby it is provided that "no action shall be brought to enforce a claim for damages under the sub-section unless notice in writing of the accident and the cause thereof has been served," applies to all cases of non-repair of highways, etc., and is not confined to cases where the non-repair is by reason of the corporation not removing snow or ice from the sidewalks.

Drennan v. *City of Kingston*, 23 A.R. 406, discussed.

Edwin Bell, for the plaintiff.

W. Douglas, Q.C., for the defendants.

ARMOUR, C.J., FALCONBRIDGE, J., STREET, J. } [Sept. 17.

REGINA *v.* WILLIAMS.

Criminal law—Crown case reserved—Rejection of evidence—Discharge of prisoner—Service of case—Motion for new trial.

Crown case reserved by ROBERTSON, J., at the Napanee Assizes.

The defendant was tried upon an indictment for manslaughter. He had appeared at the coroner's inquest as a witness, and given his evidence, not being then

charged with the death. At the trial counsel for the Crown proposed to giv in evidence the depositions of the defendant before the coroner. Following *Regina* v. *Hendershott*, 26 O.R. 678, the Judge rejected the evidence, but reserved for the consideration of the Court the question whether he was right in so rejecting it. The prisoher was acquitted.

J. R. Cartwright, Q.C., for the Crown, stated that the case was important in view of the decision referred to above, and the case of *Regina* v. *Madden*, C.L.J. 1894, p. 765.

No one appeared for the defendant.

A copy of the case and notice of the hearing had been served upon the solicitor who had acted for the defendant at the trial.

Held that the solicitor ceased to represent the defendant when the latter was discharged, and that there was no cause pending in Court unless the Crown were asking for a new trial.

Province of New Brunswick.

SUPREME COURT.

BARKER, J.
Equity Chambers.

[Sept. 10.

RYAN *v.* MCNICHOL.

Practice—Injunction—Appeal—Stay of injunction.

Defendant was restrained by injunction in the terms of an ag' ement with the plaintiff from practising as a physician in a certain locality. An appeal was made for a suspension of the injunction pending the appea.. Order made on the terms of the defendant paying into Court a sum to cover the plaintiff's costs of suit and damages, estimated at a sum to be specified by the Court.

Allison, for ti e plaintiff.

Currey, Q.C., for the defendant.

Book Reviews.

Fisher on Mortgages, fifth edition, 1897, by ARTHUR UNDERHILL, M.A., LL.D.,of Lincoln's Inn, Barrister-at-Law, author of Underhill's Law of Trusts, etc.; London: Butterworth & Co.; Toronto, Canada Law Journal Co., pp. 995.

The author of this edition correctly says that the late Mr. Fisher's work has been recognized by judges and practitioners as a monument of learning. The last edition was published in 1884, since which time a we' lth of decided cases have made it necessary to rearrange the material and to rewrite a large portion of the work. New chapters have been added on mortgage,debentures, mortgages of choses in action, and mortgages by tenants for life and owners of limited estates. Cases decided in the early part of the present year are included, and the work may be said to be thoroughly up to date. Typographically also it is exceedingly creditable to the publishers.

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NEW CURRICULUM.

FIRST YEAR.—*General Jurisprudence.*—Holland's Elements of Jurisprudence. *Contracts.*—Anson on Contracts. *Real Property.*—Williams on Real Property, Leith's edition. Dean's Principles of Conveyancing. *Common Law.*—Broom's Common Law. Kingsford's Ontario Blackstone, Vol. 1 (omitting the parts from pages 123 to 166 inclusive, 180 to 224 inclusive, and 391 to 445 inclusive). *Equity.*—Snell's Principles of Equity. Marsh's History of the Court of Chancery. *Statute Law.*—Such Acts and parts of Acts relating to each of the above subjects as shall be prescribed by the Principal.

SECOND YEAR.—*Criminal Law.*—Harris's Principles of Criminal Law. *Real Property.*—Kerr's Student's Blackstone, Book 2. Leith & Smith's Blackstone. *Personal Property.*—Williams on Personal Property. *Contracts.*—Leake on Contracts. Kelleher on Specific Performance. *Torts.*—Bigelow on Torts, English edition. *Equity.*—H. A. Smith's Principles of Equity. *Evidence.*—Powell on Evidence. *Constitutional History and Law.*—Bourinot's Manual of the Constitutional History of Canada. Todd's Parliamentary Government in the British Colonies (2nd edition, 1894). The following portions, viz: chap. 2, pages 25 to 63 inclusive; chap. 3, pages 73 to 83 inclusive; chap. 4, pages 107 to 128 inclusive; chap. 5, pages 155 to 184 inclusive; chap. 6, pages 200 to 208 inclusive; chap. 7, pages 209 to 246 inclusive; chap. 8, pages 247 to 300 inclusive; chap. 9, pages 301 to 312 inclusive; chap. 18, pages 804 to 826 inclusive. *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.

THIRD YEAR.—*Contracts.*—Leake on Contracts. *Real Property.*—Clerke & Humphrey on Sales of Land. Hawkins on Wills. Armour on Titles. *Criminal Law.*—Harris's Principles of Criminal Law. Criminal Statutes of Canada. *Equity*—Underhill on Trusts. De Colyar on Guarantees. *Torts.*—Pollock on Torts. Smith on Negligence, 2nd ed. *Evidence.*—Best on Evidence. *Commercial Law.*—Benjamin on Sales. Maclaren on Bills, Notes and Cheques. *Private International Law.*—Westlake's Private International Law. *Construction and Operation of Statutes.*—Hardcastle's Construction and Effect of Statutory Law. *Canadian Constitutional Law.*—Clement's Law of the Canadian Constitution. *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.

NOTE.—In the examinations of the Second and Third Years, students are subject to be examined upon *the matter of the lectures* delivered on each of the subjects of those years respectively, as well as upon the text-books and other work prescribed.