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In England Sir Richard Henn Collins takes the position of Master of the Rolls, vacant by the death of Sir A. L. Smith. Sir J. C. Matthews from the King's Bench Division steps into the vacancy thus caused in the Court of Appeal, and his place is taken by Mr. Joseph Walton, K.C. Mr. Justice Day, having retired from the King's Bench Division, Mr. A. R. Jelf, K.C., suceeeds him. These appointments are highly spoken of as being made on the ground of merit alone. An English contemporary speaking of an appointment to the city of London Court says that "After so many promotions and appointments due solely to merit, political services must be expected to re-assert their claim." More's the pity! But things are not quite so bad in England in this respect as they are in Canada.

Whilst a Judge must largely be considered in the light of a legal mill to grind out the law from the facts before him, we are glad to know that it is with many Judges a pleasant privilege to suggest and sometimes urge a settlement, when circumstances seem to make such a thing desirable and possible. In this connection we were glad to notice that at the recent sittings presided over by Mr. Justice MacMahon, at his suggestion and with his kind assistance, some suits were amicably adjusted. We know of no one who could complain except perhaps the lawyers engaged, but taking upon ourselves to be their mouth-piece, we think we may on their behalf, as good citizens, gladly chronicle the good offices of one of our best Judges in this regard.

The Court of Oyer and Terminer for the City of Toronto was opened last month by Chief Justice Falconbridge, and he appeared on that occasion in the purple robes with flesh tint facings worn in former days by our common law judges sitting in term. This change may not be in the line of the democratic tendency of the present day; but that is no reason against it—rather the contrary. This levelling tendency should find no place in the administration of justice. We were pleased to see the change, as we have always felt and long ago expressed the opinion that every reasonable effort, even in minor details, should be made to impress the public mind with the majesty and solemnity of the law and the dignity of the office of those who administer it.

THE ACT RESPECTING ASSIGNMENTS AS IT RELATES TO THE VALUATION OF NEGOTIABLE INSTRUMENTS.

The holder of a bill or note may prove for the amount of it against all parties liable upon it. Credit may be deemed to be given to the indorser as well as the acceptor or maker, and the indorsement may be an ingredient in mutual credit: *Alsager* v. *Currie* (1844) 12 M.& W. 755; and see *Starey* v. *Barnes* (1806) 7 East 435.

As regards the amount for which a holder can prove, the right is narrower than the right to sue. It is limited by rules peculiar to Bankruptcy, such as the rules relating to creditors holding security: *Re Howe* (1871) L.R. 6 Ch. Ap. 838.

The holder of a bill or note may receive a dividend from each of the estates against which he proves until he receives 100 cents on the dollar: *Beaty v. Samuel* (1881) 29 Gr. 105; *Eastman* v. *Bank of Montreal* (1885) 10 O.R 79; *Young* v. *Spiers* (1889) 16 O.R. 672. If, after proof, he receives dividends from other parties they will not be deducted from the amount of his proof, and he will be entitled to receive a dividend on the full amount until the debt is satisfied: *Ex parte Wyldman* (1750) 2 Ves. 103; *Ex parte Bank of Scotland* (1815) 19 Ves. 310.

If, at the time of proof, the creditor has received part of the debt he will be allowed to prove for the residue only: *Ontario Bank* v. *Chaplin* (1890) 20 S.C.R. 152. In this last case there was a contest arising in the liquidation of the Exchange Bank under the Dominion Winding Up Act. The Ontario Bank had discounted a number of notes for the Exchange Bank. These notes had been guaranteed by the latter. Amongst the notes so guaranteed were three notes of Hyde Turcot & Company, (a firm which had likewise failed) amounting to $6,450. The Ontario Bank had received, before it proved any claim against the Exchange Bank, two dividends from the estate of the insolvent firm amounting together to $2,454.29. The Ontario Bank claimed the right to rank for the whole amount. It was held that it was not so entitled, but must give credit for the amount received from the estate of Hyde Turcot & Co., and only rank for the residue.

In *Eastman* v. *Bank of Montreal* (1885) 10 O.R. 79, the facts were that Fawcett, a private banker, had a line of discount to the amount of $125,000 with the Bank of Montreal. He discounted

his customers' bills and notes which he himself had taken from them. Upon his failure the Bank claimed that it was bound to account only for moneys received up to the date of the assignment. Boyd, C., the trial judge, held that the amount upon which claim is to be made must be fixed at the date the claim is filed. Any moneys received prior to that date are to be credited, those received subsequently need not be taken into account, unless they with the dividend bring up the amount received by the creditor to 100 cents on the dollar. In this action it was also held that the same rule applied to the claim of the Merchants Bank, which had discounted Fawcett's own notes secured by the deposit of his customers' notes, as collateral.

Young v. *Spiers* (1888) 16 O.R. 672, was a decision under an assignment for the benefit of creditors. The question arose upon the claim of John Harvey, against the estate of John Wardlaw. The latter before his assignment was indebted to Harvey on two mortgages given for certain separate debts and also upon an open account. On filing his claim Harvey grouped the entire indebtedness and claimed a dividend upon the aggregate amount. Some time after the insolvency of Wardlaw, one Buchanan had paid the amount due on the two mortgages in the interest of and at the request of the assignee and had taken assignments of them to himself. As to the open account part was secured by some accommodation notes of one Turnbull, indorsed by the debtor to Harvey. Mr. Turnbull had paid these notes and was collocated for and paid a dividend in respect to them.

In the meantime Mr. Harvey had made an assignment. His assignees, who were plaintiffs in the action, contended that they were entitled to a dividend on the gross amount of Wardlaw's indebtedness, that is on the two mortgages and the open account, including the part which had been paid by Turnbull, as long as the amount received did not exceed 100 cents on the dollar. If they were so entitled the effect of it would be that the Wardlaw estate would be obliged to pay a dividend on the part of the indebtedness covered by the Turnbull notes amounting to $2,233.29, twice over.

Mr. Wardlaw's assignee, the defendant in the action, contended that so far as the mortgages were concerned that they were independent and isolated transactions and having been paid were absolutely out of the question altogether; and that with regard to the open account he was entitled to a credit of $2,233.29, the

amount paid by Turnbull, and that the plaintiffs were only entitled to rank on the estate for the balance. The Court (Ferguson and Robertson, JJ.) upheld the first contention of Wardlaw's assignee, but rejected the second contention. It was held that the money received from Turnbull ought not to diminish the sum for which the plaintiffs were entitled to rank on the estate. The effect of that decision, as already pointed out, was that a dividend was paid twice on the amount represented by the Turnbull notes which the Court was of opinion was proper. It may be mentioned in passing that in *Martin* v. *McMullen* (1891) 18 A.R. 559, the case of a guarantee, Maclennan, J.A., at p. 564 stated "it would be a violation of the trust" (*i.e* under an assignment for the benefit of creditors) "that dividends should be paid to two persons in respect of the same debt or the same part of a debt."

In no case in the Ontario Courts has the question of the valuation of bills and notes deposited as collateral security been so much litigated as in *Molsons Bank* v. *Cooper*. This case is first reported in (1895) 26 O.R. 575. The facts were not unlike those of the Merchants Bank case in *Eastman* v. *Bank of Montreal*. The wholesale firm of Cooper & Smith were the customers of the Bank. They were allowed a line of credit of $150,000 to be secured by the deposit of their customers' notes. The Bank advanced moneys on the notes of the firm who then deposited from time to time their customers' notes as collateral security. On the failure of the defendants, for some unexplained reason they made no assignment for the benefit of their creditors. Upon their suspending payment the Bank sued all their over-due notes giving credit for some moneys already received from collaterals, and recovered judgments amounting to $83,000, and placed executions in the sheriff's hands. The sheriff seized and sold goods of the defendants, but the amount was insufficient to pay all the executions he held in full, and he proceeded to a pro rata distribution under the Creditors' Relief Act. Some of the other creditors, dissatisfied with the course adopted by the Bank, disputed the plaintiff's claim, insisting that it should be reduced by the amount of the moneys subsequently received by the Bank on the collateral securities. It was held by Rose, J., at p. 577, that the Bank's claim ought not to be so reduced, following amongst other authorities what he believed "to be the principles laid down in *Eastman* v *Bank of Montreal*." The Bank subsequently brought an action for $50,000, representing the

balance of its claim. The defendants insisted that they were entitled to credit for the amount of the moneys collected on the collaterals which now considerably exceeded the sum sued for. This action came on for trial before the same judge, Rose, J., who adhered to his former decision and gave judgment for $50,000, interest and costs. On appeal to the Divisional Court, this judgment was reversed, and the action ordered to be dismissed with costs. On appeal, the Court of Appeal, (1896) 23 A.R. 146, reversed the decision of the Divisional Court and restored the judgment of the trial judge; two of the judges, Hagarty, C.J., and Burton, J.A., holding that the Bank was entitled to judgment for the full amount sued for, and was not bound to appropriate the moneys collected to that particular portion of the debt. The plaintiffs then appealed to the Supreme Court which reversed the decision of the Court of Appeal (1896) 26 S.C.R. 611, and in effect held that if a merchant obtains from a bank a line of credit on terms of depositing his customers' notes as collateral security, the bank is not obliged, so long as the paper so deposited remains uncollected to give any credit in respect of it, but when any portion of the collaterals is paid it operates at once as payment of the merchant's debt and must be credited to him. The Bank then appealed by special leave to the Judicial Committee of the Privy Council. The judgment will be found in the appendix to 26 A.R.

571. The respondents were not represented on the appeal by counsel, but lodged a printed case. Lord Halsbury, L.C., at the conclusion of the argument delivered the judgment of the committee which affirmed the decision of the Supreme Court. In delivering his judgment Lord Halsbury said: "Really a very simple question becomes somewhat confused when one begins to enter into other questions of some supposed rights of sureties or principals, inter se. No such questions arise. The things which were handed over as securities for the debt were realized and turned into money, and when the creditor is suing his debtor for the amount of his indebtedness which exists at that time, the amount the creditor has received in money in respect of these matters, clearly, must be taken from the debt, because at that moment the debt has been to that extent paid as between these two persons and for that amount, and that amount only ought judgment to have been recovered."

Eastman v. *Bank of Montreal* and *Young* v. *Spiers* were decisions upon assignments made before the Ontario Act respecting Assignments and Preferences came into operation. These decisions are now no longer law. See per Street, J., in *Molsons Bank* v. *Cooper*, 26 O.R. 575, at p. 584.

In that Act (R.S.O. 1897, c. 147,) s. 20, sub-ss. 4 and 5 enact: (4). "Every creditor in his proof of claim shall state whether *he holds any security for his claim or any part thereof;* and if such security is on the estate of the debtor, or on the estate of a third party for whom such debtor is only secondarily liable, he shall put a specified value thereon and the assignee under the authority of the creditors may either consent to the right of the creditor to rank for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per cent. upon the specified value to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate."

(5). "If a creditor holds a claim based upon negotiable instruments upon which the debtor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section and shall put a value on the liability of the party primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend and re-value his claim."

A clear distinction is laid down between two classes of cases. In such cases as the Eastman case and the Molson Bank case (if the question arose in assignments under the Act) the bills and notes deposited by the debtor as securities for the debt would have to be valued on filing the claim, and the creditor would only be entitled to rank for a dividend on the balance of the claim. To this extent therefore the old rule that the creditor is entitled to rank for the full amount of his claim and to realize any securities as well, provided he does not receive in all more than 100 cents on the dollar must be considered as no longer law.

In cases arising under the 5th sub.-s. different considerations arise. If the debtor who has made an assignment is only indirectly

or secondarily liable and the bill or note is not mature or exigible the creditor must put a value on the liability of the party primarily liable and rank only for the balance, but after the maturity of the bill or note the creditor may re-value his claim and then rank on the estate for the full amount of his claim to as full an extent as he could sue the debtor. See *Ontario Bank* v. *Chaplin*, supra.

It may be remarked in closing that the provisions of sub-s. 5 are similar to those in the Insolvent Act of 1875, s. 84 and in the Winding up Act (Dom.) R.S.C. c. 129, s. 62.

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ENGLISH CASES.

EDITORIAL REVIEW OF CURRENT ENGLISH DECISIONS.

COMPANY—WINDING UP—FRAUDULENT CIRCULAR TO SHAREHOLDERS IN REFERENCE TO PENDING LITIGATION—CONTEMPT OF COURT.

In re Septimus Parsonage & Co. (1901) 2 Ch. 424. A petition of a creditor being pending for the winding up of a joint stock company, two of the directors and a third person issued a circular to the shareholders containing misrepresentations of fact, with intent to obtain a resolution of the company for its voluntary winding up, in order to mislead the court as to the real view of the shareholders, and prevent a compulsory winding-up order from being made. This, Wright, J., held to be a contempt of court, and the two directors were committed for six weeks, and the other person for four weeks and they were besides ordered to pay the costs of the motion.

WILL—CONSTRUCTION—GIFT OF ANNUITY TO WIDOW FOR MAINTENANCE OF CHILDREN—DEATH OF WIDOW.

In re Yates, Yates v. *Wyatt* (1901) 2 Ch. 438, Byrne, J., held that where a testator bequeathed an annuity to his widow for the maintenance and education of a child until she should attain 21, the child was entitled to the benefit of such annuity during her minority notwithstanding the death of the widow in the meantime.

BANKING—CROSSED CHEQUE—"NOT NEGOTIABLE"—DEFECTIVE TITLE—PAYMENT—BANKER, LIABILITY OF—"CUSTOMER"—BILLS OF EXCHANGE ACT 1882 (45 & 46 VICT., C. 61) S. 82—(53 VICT., C. 33, SS. 80, 81. D).

The Great Western Ry. Co. v. *London & County Banking Co.* (1901) A.C. 41, is a much litigated case which has at last reached its quietus. It was reported (1899), 2 Q.B. 172 (noted ante vol. 35, p. 704), and (1900) 2 Q.B. 464 (noted ante vol. 36, p. 701), and the House of Lords by its judgment has again vindicated its right to exist as a judicial tribunal. The decisions of the courts below certainly placed a construction on the Bills of Exchange Act, which seemed tantamount to a repeal of some of its provisions, and though we have already twice given the facts yet, as the decisions below have been reversed it may be well to state them again :—Huggins, a tax collector, pretending that taxes were due by the plaintiff, the Great Western Railway Co., obtained a cheque from them for the amount pretended to be due. This cheque was crossed in blank by the Railway Co., and marked "not negotiable." Huggins who had been in the habit of getting cheques cashed by the defendant bank, but was in no other way a customer of it, took the cheque in question to the bank, and the bank, in good faith, paid him a part of the money in cash, and the balance was placed to the credit of a municipal body by Huggins' direction. The defendant bank then crossed the cheque to itself and sent it to its office in London and received payment through the clearing house. The railway then brought this action against the bank to recover the amount of the cheque, claiming that as the cheque was marked "not negotiable" the bank could acquire no better title than Huggins.

Bigham, J., who tried the action found that Huggins was a "customer" of the defendant bank, and that it had received payment of the cheque for him, and in good faith, and was protected by s. 82 of the Bills of Exchange Act (see 53 Vict., c. 33, ss. 80, 81. D.) The House of Lords (Lord Halsbury, L.C., and Lords Shand and Davey, Brampton and Lindley), however, have held that the collector was not a "customer" of the defendant bank within the meaning of the Act, and it was not protected by s. 82, and that Huggins, having no title to the cheque, could transfer no title to the defendant bank either to the cheque or the money, and that the bank was consequently liable to the plaintiffs for the amount of the cheque.

TRADE UNION—REGISTERED NAME, RIGHT TO SUE OR BE SUED IN—UNINCORPORATED ASSOCIATION—TRADE UNION ACTS, 1871, C. 31; AND 1876, C. 22—(R.S.C. C. 131, S. 6).

The Taff Vale Ry. Co. v. *Amalgamated Society of Ry. Servants* (1901) A.C. 426, is an important decision on the law relating to Trades Unions. The decision of the Court of Appeal (1901) 1 Q.B. 170, is noted ante p. 262. In this case the House of Lords (Lord Halsbury, L.C., and Lords Macnaghten, Shand, Brampton and Lindley), has again rendered a decision, overruling the Court of Appeal, and more in accordance with the requirements of natural justice, and common sense. The short point was whether a trades union registered under the Trades Union Acts (see R.S.C., c. 131 s. 6) could be sued in its registered name. The court below held that it could not, and that in the absence of incorporation, or a statutory power to sue, and be sued, in this registered name, all the members would have to be joined, which was tantamount to saying that the Legislature had sanctioned the creation of organizations with enormous powers, with absolute immunity for responsibility for their acts. Happily the House of Lords has seen its way to a more satisfactory conclusion, and in reversing the judgment of the Court of Appeal restored that of Farwell, J.

BIGAMY—SECOND MARRIAGE ABROAD—OFFENCES AGAINST THE PERSON ACT (24 & 25 VICT., C. 100) S. 57.

The trial of Earl Russell (1901) A.C. 446, may be briefly noted inasmuch as it shews that an offence which would not be punishable in Canada according to *Regina* v. *Plowman*, 25 O.R. 656, is punishable in the United Kingdom. In other words, if the noble culprit had taken up his residence in Canada instead of going back to England, after his bigamous marriage in the United States, he would have enjoyed practical immunity from punishment. It would seem that this is a matter which should engage the attention of the learned Minister of Justice in order that this anomaly may be in some way removed.

FATAL ACCIDENT—COMPENSATION FOR DEATH—ACCIDENT ON HIGH SEAS CAUSING DEATH—ALIEN, DEATH OF, RIGHT OF REPRESENTATIVES TO RECOVER DAMAGES FOR—FATAL ACCIDENT ACTS (9 & 10 VICT., C. 93; 27 & 28 VICT., C. 95)—(R.S.O. C. 135).

Davidsson v. *Hill* (1901) 2 K.B. 606, was an action by the representatives of a deceased sailor, a foreigner, who had been killed by accident on board a British ship on the high seas, owing

to the negligence of the defendants' servants in charge of the ship, in which the point was raised, whether the Fatal Accident Acts (R.S.O. c. 135) applied to aliens, the decision of Darling, J., in *Adam* v. *British and Foreign S.S. Co.* (1898) 2 Q.B. 430 (noted ante vol. 34, p. 734), was relied on by the defendants, to the effect that the Acts in question conferred no right of action in favour of aliens out of the territorial jurisdiction of the Court, but a Divisional Court (Kennedy and Phillimore, JJ.) refused to follow that decision, and held that the plaintiffs were entitled to recover.

RELEASE OF CO-SURETY—ACCORD AND SATISFACTION—JOINT AND SEVERAL JUDGMENT AGAINST SURETIES—RELEASE OF JUDGMENT AS AGAINST ONE OF TWO CO-SURETIES, EFFECT OF.

In *Re E. W. A.* (1901) 2 K.B. 642, the doctrine of the discharge of one joint debtor by the release of the other is discussed. In this case A and B became liable on a "joint and several" guarantee to a bank for the sum of £6000 owing to the bank by a company. Subsequently judgment was recovered for that sum by the bank against A and B jointly and severally; and, the judgment not being satisfied, the bank presented a bankruptcy petition against B, which was afterwards withdrawn upon terms arranged between B and the bank, and embodied in a receipt given to B by the bank for £3000 "in full discharge of all claims by the bank against B in connection with that company, and in settlement of any outstanding questions as to the amount due to the bank." The bank then presented a bankruptcy petition against A for £3000, the alleged balance of the judgment debt of £6000. A set up that the release of B operated as a discharge of his, A's, liability on the judgment; and the majority of the Court of Appeal (Rigby and Collins, L.JJ.) upheld that contention, holding that the receipt amounted to an accord and satisfaction and release of B from the entire joint and several debt, and that there were no surrounding circumstances to qualify its effect as an absolute release. Romer, L.J., however, thought that the release did not amount to a discharge of the debt itself, but only to a discharge of B from personal liability therefor—in other words, that it was merely an agreement by the bank not to sue him. There can be no sort of doubt that the doctrine in question works hardship, and is one of those rules of law which often works downright injustice and needs modification. It is based apparently on the reason that if one joint debtor

is released, the other joint debtor loses his right to claim contribution from him if he pays the debt, but if, as in the present case, they are equally liable, and one is released on payment of half the debt, we fail to see why that fact should operate as a discharge to the other joint debtor from his liability for the other half of the debt, seeing that he has lost no right of contribution. In fact, the reason of the rule entirely fails, and it seems like a case of "the law gone mad."

MASTER AND SERVANT—AGREEMENT TO EMPLOY SERVANT—REFUSAL TO PROVIDE WORK FOR SERVANT—BREACH OF CONTRACT.

Turner v. *Sawdon* (1901) 2 K.B. 653, is a somewhat curious case. It was an action brought by a servant against his employers on a contract of hiring, alleging as a breach that the defendants refused to provide him with work. The plaintiff was employed as a salesman for four years at a salary of £250 per annum, payable in monthly instalments. After he had served about two years, the defendants, on 31st December, 1900, refused to provide him with further work, but notified him to call and get his salary for the following month, when further instructions would be given him. The defendants at the same time issued circulars to their customers stating that the defendant had no authority to transact business on their behalf. The plaintiff then commenced business on his own account, and brought the present action, claiming that the facts constituted a wrongful dismissal. Kennedy, J., who tried the case, left it to the jury to say whether there had been a breach of contract by the defendants, and they found that there had been, and assessed the damages at £125, for which Kennedy, J., ordered judgment to be entered for the plaintiff. The Court of Appeal (Smith, M.R., and Williams and Stirling, L.JJ.), however, held that there was no case to be submitted to the jury, as it was within the province of the master under the contract in question to say that he would go on paying the wages, but that he would not provide work for his servant, and that therefore the action should be dismissed. Stirling, J., however, points out that there are some cases in which a contract to "employ" may imply that work is to be provided by the employer, as in the case of an actor, or a commission agent.

COMPANY—REGISTER OF MEMBERS—INSPECTION—RIGHT TO TAKE COPY—COMPANIES ACT, 1862 (25 & 26 VICT., C. 89), S. 32.

In the case of *In re The Balaghât Gold Mining Co.* (1901) 2 K.B. 665, the Court of Appeal (Smith, M.R., and Williams and Stirling, L.JJ.), reversing Day, J., and overruling the decision of North, J., in *Boord* v. *African Consolidated L. and T. Co.* (1898) 1 Ch. 596 (noted ante vol. 34, p. 624), have held that, under the Companies Act, which provides that the register of shareholders shall be open to the inspection of members, and that members may require copies thereof or any part thereof on payment of sixpence per folio, the member, though he may inspect, is not entitled himself to make a copy of the register, but if he desire it, must get the copy as the Act prescribes, viz., from the company on payment of the prescribed fee.

NEGLIGENCE—NERVOUS SHOCK RESULTING FROM FRIGHT—REMOTENESS OF DAMAGE.

In *Dulieu* v. *White* (1901) 2 K.B. 669, the plaintiff claimed to recover from the defendant damages for injuries resulting from nervous shock consequent on fright, occasioned by the defendant negligently driving a pair-horse van into the bar-room of a public house in which the plaintiff was sitting, the plaintiff being at the time pregnant, and having been subsequently, in consequence of the fright, prematurely delivered of a child which proved to be an idiot. The defendants contended that the damages were too remote and the action would not lie. Kennedy and Phillimore, JJ., overruled the objection, and held that the action would lie, refusing to adopt the conclusion of the Judicial Committee of the Privy Council in *Victorian Railways* v. *Coultas*, 13 App. Cas. 222, that damages arising from mere sudden terror, unaccompanied by any physical injury, but occasioning a nervous or mental shock, cannot, under such circumstances, be considered a consequence which in the ordinary course of things would flow from the negligence of a gatekeeper who invited the plaintiff, in a vehicle, to cross a railway track as a train was approaching, with the result that she was so nearly run into by the train that she suffered a fright which resulted in a miscarriage. This decision, therefore, seems to shew that on the point of law in question there is at present a difference between the law of England and that of the colonies, in which the judgment of the Privy Council is binding. Phillimore, J., points

out that the plaintiff had no claim for damages for the idiocy of her child.

SALE OF GOODS—ESTOPPEL—LOSS OCCASIONED BY FRAUD OF THIRD PERSON—CONDUCT CONDUCING TO FRAUD—POWER OF DISPOSITION OF GOODS GIVEN TO CLERK FRAUD OF CLERK.

Farquharson v. *King* (1901) 2 K.B. 697, turns upon the old question which of two innocent persons is to suffer for the loss occasioned by the fraud of a third, and the answer the Court of Appeal has given to it is that the party whose conduct conduced to the fraud is the one to suffer. The facts of the case were as follows:—The plaintiffs were timber merchants, and kept stocks of timber warehoused in the name of their firm with a dock company. For the purposes of their business the plaintiffs directed the dock company to deliver the timber as the plaintiffs' confidential clerk Capon, should from time to time direct. The confidential clerk proved to be a rogue, and from time to time gave orders to the dock to transfer timber to the order of one Brown, and then assuming the name of Brown he sold the timber to the defendants. In the course of four years, forty-five different parcels were sold in this way, of the aggregate value of £1,200. The action was brought to recover the timber thus obtained by the defendants, or its value. The action was tried by Mathew, J., who, on the finding of the jury that the plaintiffs had not so acted as to hold Capon out to the defendants as the plaintiffs' agent for sale of the timber gave judgment for the plaintiffs. It was agreed by the parties, on the case going to appeal, that the Court should on the evidence determine which of the parties was entitled to succeed, and the Court of Appeal (Smith, M.R., and Williams, and Stirling, L.JJ.) came to the conclusion that the jury had rightly answered the question put to them, but that they ought to have been asked "Did the plaintiffs by their conduct enable Capon to hold himself out as the owner of the timber, or as entitled to dispose of it?" and that on the evidence the answer to that must have been in the affirmative, and on that ground the plaintiffs' action failed, and was accordingly dismissed.

STOCK EXCHANGE—PRINCIPAL AND AGENT—BROKER INCLUDING SEVERAL ORDERS IN ONE CONTRACT WITH JOBBER—LIABILITY OF PRINCIPAL TO JOBBER ON DEFAULT OF BROKER—PRIVITY OF CONTRACT.

In *Scott* v. *Godfrey* (1901) 2 K.B. 726, the plaintiffs were stock jobbers, and claimed to recover the difference between the price at

which they had bought certain shares for the defendants' broker and that which they had realized on sale, under the following circumstances. The defendants had employed a broker to purchase 225 shares on the stock exchange, and directed him to carry them over to the next account: the broker having also other orders from other clients for shares in the same undertaking, made one contract with the plaintiffs to buy and carry over 925 of these shares. Before the settling day the broker failed, and his transactions with the plaintiffs were closed by the official assignee. The defendants when communicated with declined to be further bound by the contract, the plaintiffs then sold the shares for the best price that could be obtained, and now claimed to recover the difference in price of the 225 shares in which the defendants were interested. The defendants contended that there was no privity of contract, and on that ground the plaintiffs could not recover, but Bigham, J., held that, notwithstanding the broker had included in his contract with the plaintiffs' other orders besides the defendants', he had in his book appropriated 225 of the shares to the defendants, and that he must have been taken to have made the contract with the plaintiffs on behalf of the defendants as to such 225 shares, and he gave judgment for the plaintiffs.

UNUSUAL MODE OF PURGING CONTEMPT OF COURT.

We are indebted to an old and well-known medical practitioner of the town of Barrie (the natal place by the way of this journal), who was once a travelling companion of Sir George Dibbs, K.C.M.G., Premier of New South Wales, on a voyage from thence to England, for a newspaper cutting giving some interesting items concerning his life, which it will not be out of place to reproduce, especially as Sir George was a fine type of the men who have built up British Colonies into nationhood, and in character and strength of body and mind not unlike the late Sir Matthew Begbie, Chief Justice of British Columbia. As to the latter it is said that when he sentenced to death any notorious criminal during the turbulent mining days of British Columbia and the occasion seemed to require it, he remained on the ground to see the sentence promptly carried into effect. Lynch law was therefore unknown and unnecessary in that colony. The incidents hereafter referred to were recalled by the fact that Sir George Dibbs recently presented the King with a walking stick specially made for him under the peculiar circumstances detailed by a colonial correspondent of the paper.

Twenty years ago, in connection with a famous colonial case, Sir George was sentenced, for contempt of Court, to twelve months' detention

in Darlinghurst jail, and it was while there that he acquired the skill for turning out sticks, pipes, dolls and other things which has since made him the great stand-by of the philanthropic ladies of Sydney who organize bazaars for charitable purposes. When he went to jail he turned the "first-class" side of Darlinghurst into a busy workshop when he brought in his lathe and had it mounted. Among other things he built two clipping little yachts during his confinement.

The Sydney courts were easily "contemned" in those days and Sir George had many companions from time to time during his detention. All these he promptly pressed into his service, for he naturally preferred this class of helper to the hardened convicts the Governor always lent him when he was short handed. Visitors were also made to take a turn at the lathe, and often, when I had occasion to go up and see him on business, he gave me a perspiring half hour.

Dibbs was always fond of describing the incidents surrounding his capture. He had been condemned in costs to the tune of about £6000, which, on principle, he declined to pay, and the whole colony was in sympathy with his attitude. The refusal to pay being contempt of court; the judges sentenced him to twelve months imprisonment. Dibbs had a town and country house; he cleared all the furniture, paintings, etc., from the former to the latter, up at Emu Plains, at the foot of the Blue Mountains. He was at Emu Plains when a couple of court bailiffs turned up one night to "take his body." As Dibbs stands 77 inches in his socks, and then weighed about 18 stone, the bailiffs—wizened old men and weak—were somewhat taken aback when the giant politician coolly got into bed and said: "Go on and take me." They waited till morning and as Dibbs declined to go until he was "taken," the men were in a fix. At last the prisoner said, "Look here, men, there's plenty of food and whiskey in the house. You stop here for a few days and help me to hang the pictures and put the house straight for my wife and family, and then I'll go down to Sydney with you." The bailiffs fell to willingly enough, everything was put shipshape, and the three went off to Darlinghurst together!

Once, when Dibbs was contesting one of the Sydney divisions, an outcry was raised against him because the Australian Steam Navigation Company, of which he was the most active director, was employing Chinese labour on its vessels. A monster anti-Dibbs meeting was held in Hyde Park, and he was strongly advised to keep indoors, as feeling ran so high against him that he would be in great personal danger if the working men got hold of him. The giant who had run dangerous blockades in South America, was not to be easily intimidated, and went to the meeting, walking straight through the crowd to the pedestal of Captain Cook's statue, where a windy orator was busily maligning him. Dibbs reached up, caught the speaker, and after nearly shaking the life out of him, threw him out into the crowd. Then he got on the pedestal himself, made a great speech, told the crowd—mostly Hyde Park loafers—that he would rather have one

Chinaman than six of them, and that if they didn't like to vote for him they could go to Cooktown—a significant term in Australia. In the end Dibbs was triumphantly returned.

In later years he became Premier of his colony, and, when on a visit to England about ten years ago, was made much of by the Prince of Wales —and was made a K.C.M.G. by the Queen—an incident that evoked some chaffing criticism in view of the fact that in the early days of his political career Dibbs always preached about "cutting the painter" and setting up an Australian Republic.

REPORTS AND NOTES OF CASES.

Dominion of Canada.

EXCHEQUER COURT OF CANADA.

Burbidge, J.] MELDRUM *v.* WILSON. [Nov. 2.

Patent of invention—Cleansing pickled eggs—Claim—Patentability.

The application of well known things to a new analogous use is not properly the subject of a patent. The defendants employed a solution of hydro-chloric acid to remove from pickled eggs the deposit of carbonate of lime that forms upon them while being preserved in a pickle of lime-water. From the known properties of the acid and its use for analogous purposes it was to be expected that it would accomplish the purpose to which it was put. The purpose was new, and the defendants were the first to use the process and to discover that it could be practised safely and with advantage in the business of preserving and marketing eggs; but there was nothing in the mode of employing such solution demanding the exercise of the inventive faculties.

Held, that there was no invention, and that a patent for the process could not be sustained.

Duclos and *Masten*, for plaintiff. *Aylesworth*, K.C., and *W. C. Mackay*, for defendants.

Province of Ontario.

COURT OF APPEAL.

From Divisional Court.] PATTERSON *v.* FANNING. [Sept. 21.

Negligence—Highway—Horse at large.

The defendant's horse strayed from his field to the highway, the fence being defective, and, being frightened by a boy, ran upon the sidewalk and knocked down and injured the plaintiff:—

Held, that the horse was unlawfully upon the highway and that the defendant was liable in damages for the injury suffered by the plaintiff, the injury being the natural result of, and properly attributable to, his negligence. Judgment of a Divisional Court, 1 O.L.R. 412; ante p. 233, affirmed.

Lazier, for appellant. *Washington*, K.C., for respondent.

From Street, J.] [Sept. 21.

NORTH AMERICAN LIFE ASSURANCE COMPANY *v.* BROPHY.

Insurance—Life insurance—Wager policy—Cancellation—Repayment of premiums.

The defendant, an elderly man, purchased from the plaintiff company an annuity upon his life, and, pursuant to a pre-existing arrangement between them, an insurance agent, who was a much younger man, insured his life with the plaintiff company for an amount the premiums upon which were equal to the amount of the annuity, and at once assigned the insurance to the defendant who agreed to pay, and did for some years pay, the premium. The insurance agent got the benefit of the commissions on the annuity and the insurance, and was not otherwise interested in the insurance:—

Held, that the insurance was void, as being in violation of 14 Geo. III, c. 48, s. 1, and that the plaintiffs, in an action brought after the death of the assured, were entitled to have the policy delivered up to be cancelled. Judgment of STREET, J., affirmed.

Held, also, however, that though the defendant could not have maintained an action to recover the premiums, the plaintiffs seeking equitable relief were bound to do equity and to repay the premiums, the risk never having attached. Judgment of STREET, J., reversed.

D. O'Connell, and *E. J. Butler*, for appellant. *J. K. Kerr*, K.C., and *J. A. Paterson*, for the respondent.

From Street, J.] FAHEY *v.* JEPHCOTT. [Sept. 21,

Master and servant—Negligence—Factories Act—Breach—Damages—New Trial.

Employing a girl under eighteen years of age to work at a self acting machine in breach of the provisions of s. 14 of the Ontario Factories Act, R.S.O. 1897, c. 256, is in itself sufficient to render the matter prima facie liable in damages for an accident which happens in the course of such employment, and negligence on his part directly conducing to the accident need not be shewn. Judgment of STREET, J., 1 O.L.R. 18; ante p. 163. reversed.

The court being of opinion, however, that the damages awarded by the jury were excessive directed that there should be a new trial unless the damages were reduced.

Mulvey, for appellants. *Dewart*, K.C., for respondent.

From McDougall, Co. J.] [Sept. 21.

IN RE MCMASTER AND TORONTO.

Assessment and taxes—Exemptions—Trustees—Income.

Under s. 46 of Assessment Act, R.S.O. 1897, c. 224, the income derived from property vested in trustees must be regarded for the purpose of assessment as their own income, and is subject to assessment, although the trustees have no personal interest in it. Its ultimate destination and mode of expenditure are immaterial, and the obligation of the trustees to pay it to the beneficiaries is not a debt to be offset against it.

Quære, whether the amendment to the section by 63 Vict., c. 34, s. 3 (O.) affects the question. Judgment of MCDOUGALL, Co. J., affirmed.

Thomson, K.C., for appellants. *Lobb*, for respondents.

From Rose, J.] GIBSON *v.* NELSON. [Sept. 21.

Mortgage — Redemption — Acceleration — Assignment pendente lite — Parties.

When a mortgagee upon default in payment of an instalment of interest brings a foreclosure action, and claims payment of the full amount secured by the mortgage, any party to the action, by original writ or added in the master's office or by subsequent order, is entitled to hold him to his election and to pay his claim. But this right must be taken advantage of in the foreclosure action, and does not enure to the benefit of a person not a party to that action who ignores the foreclosure proceedings and brings a redemption action after making an independent tender to the mortgagee.

A person who, after the institution of the foreclosure action, acquires an interest in or claim against the mortgaged premises, may, on his application, be added as a party. Judgment of ROSE, J., reversed.

Idington, K.C., for appellant. *Mabee*, K.C., for respondent.

From Meredith, J.] CHANDLER *v.* GIBSON. [Sept. 21.

Will—Construction—Estate tail—Estate for life—Mistake of title—Improvements.

A will made in 1877 by a testator who died in 1882, contained the following provision: "To my son Moses I give and bequeath fifty acres during his lifetime and then to go to his children, if he has any, but should he have no issue then to be equally divided among all my grandchildren." Moses married after his father's death, and left children him surviving at the time of his own death:—

Held, that Moses took an estate for life with a remainder in fee to the children, and not an estate tail.

Held, also, that a person who had purchased the land in question under the bona fide but mistaken belief that Moses took an estate tail was entitled to a lien for lasting improvements, the statute being held to apply to a mistake of title depending upon a question of law. The point for determination in such a case is whether the person claiming for the improvements made them under the bona fide belief that the land was his own. Judgment of MEREDITH, J., affirmed.

Armour, K.C., and *M. Houston*, for appellant. *M. Wilson*, K.C., for respondent.

From Drainage Referee.] [Sept. 21.

IN RE TOWNSHIPS OF MERSEA AND GOSFIELD, ETC.

Drainage—Artificial drain—Repairs—Outlet.

Section 75 of the Drainage Act, R.S.O. 1897, c. 226, applies only to drains artifically constructed, and does not apply to the repair or improvement of a natural watercourse. *Sutherland-Innes Company* v. *Romney* (1900) 30 S.C.R. 495, considered and followed.

Where part of a drainage work to which the provisions of s. 75 apply is out of repair it is not necessary, before initiating proceedings for the improvement of the drain under that section, for the initiating township to repair the portion of the existing drain which it is bound to repair. Both classes of work may be provided for in the same by-law, the engineer in that case estimating and assessing separately the cost of each class. Judgment of the Drainage Referee affirmed.

M. Wilson, K.C., for appellants. *A. H. Clark*, for respondents.

From Divisional Court.] FORSTER *v.* IVEY. [Sept. 21.

Mortgage—Covenant—Release.

When land subject to mortgage is sold by the mortgagor and the purchaser assumes and covenants to pay the mortgage, the mortgagor does not become to the mortgagee a surety in the technical sense, and the

doctrines as to the discharge of sureties do not apply to him to their full extent. The mortgagor is liable, therefore, upon his covenant, notwithstanding a previous extension of time granted by the mortgagee to the purchaser, if when the liability is enforced the right of the mortgagor to redeem is not affected. Judgment of the Divisional Court, 32 O.R. 175; 36 C.L.J. 640, affirmed, OSLER and MACLENNAN, JJ.A. dissenting.

H. D. Gamble, for appellant. *D. W. Saunders*, and *E. C. Cattanach*, for respondent.

From Boyd, C.] LANGLEY *v.* VAN ALLEN. [Sept. 21.

Insolvency — Assignments and preferences— Extension agreement—Secret advantage.

The defendants, while ostensibly entering into an extension agreement, took secretly from the debtor notes at short dates for a large portion of their claim in favour of their nominee. These notes the debtor paid, and shortly afterwards made an assignment for the benefit of his creditors, the general extension payments not having been met :—

Held, that the other parties to the extension agreement, suing in their own names, and in the name of the assignee under an order, could not recover back the amount paid. Judgment of BOYD, C., 32 O.R. 216; 36 C.L.J. 641, affirmed. ARMOUR, C.J.O., dissenting.

George Kerr, and *J. G. Shaw*, for appellants. *Lynch-Staunton*, K.C., for respondents.

From Falconbridge, C.J.] [Sept. 21.

CUNNINGTON *v.* CUNNINGTON.

Executors and administrators—Accounts—Surrogate Court—Estoppel.

The Surrogate Courts of Ontario are invested with the authority and jurisdiction over executors and administrators and the rendering by them of inventories and accounts conferred in England on the Ordinary under 21 Hen. VIII. c. 5, the effect of Rule 19 of the Surrogate Court Rules of 1892, as limited by s. 73 of the Surrogate Courts Act, R.S.O. 1897, c. 59, being to bring the practice back to that in force under the ancient statute.

It is not only the duty of an executor or administrator to file an inventory and render an account when duly called upon to do so, but it is his privilege to do so voluntarily in any case in which he is liable to be called upon, and this privilege, in case of his death, extends to his personal representative, though not at the same time the representative of the original testator, and even though there is a surviving representative of the original testator.

Where, therefore, the executors of an executor brought into the proper Surrogate Court an account of the dealings of their testator with the assets of the estate of the original testator, treating in the account as cash received

by the accounting executor a certain promissory note, and the account was audited and approved after due notice to the surviving executor of the original testator, it was held in an issue in the High Court between the surviving executor of the original testator and the executors of the deceased executor upon pleadings so framed as to raise not only the question of the property in this note but also the question of the right to the proceeds thereof, that the audit and approval of the account were a binding adjudication as against the surviving executor that the proceeds of the note were payable to the estate of his deceased co-executor. Judgment of FALCONBRIDGE, C.J., affirmed.

Armour, K.C., and *T. J. Blain*, for the appellant. *W. E. Middleton*, for respondents.

From Meredith, C.J.] GUNN *v.* HARPER. [Sept. 23.

High Court of Justice—Jurisdiction—Foreign land—Trusts.

An action will not lie in Ontario for a declaration that land outside the Province is held by the defendant as mortgagee from the plaintiff and for redemption, even though both parties reside in the Province. Judgment of MEREDITH, C.J., 30 O.R. 650, affirmed. MACLENNAN, J.A., dissenting.

Aylesworth, K.C., and *Macdonnell*, K.C., for appellant. *Whiting*, K.C., for respondents.

From Divisional Court.] THURESSON *v.* THURESSON. [Oct. 8.

Limitation of actions—Grant to uses—Deed of appointment—Intervening adverse possession.

The purchaser of land in 1870 had it conveyed by the vendor to grantees named by him to hold to such uses as the purchaser should by deed or will appoint, and in default of, and until, appointment to the use of the grantees. The purchaser put his mother in possession of the land and she remained in possession till her death in 1878, her two daughters, the defendants, living with her, and they after her death continued in possession down to the time of the bringing of this action in 1897, no rent having been paid, nor any acknowledgment of title made. In 1892 the purchaser, in alleged exercise of the power, executed a deed of appointment in favour of his solicitor, who on the following day conveyed to him in fee simple. He died in 1894, having devised the land to the plaintiffs:—

Held, that the grantees to uses took an estate in fee simple which was barred before the execution of the deed of appointment and that that deed did not give a new starting point to the statute, the estate appointed not being within the meaning of the statute, a future estate coming into existence at the time of the exercise of the power. Judgment of a Divisional Court, 30 O.R. 504, reversed. BOYD, C., and STREET, J., dissenting.

Armour, K.C., and *Mickle*, for appellants. *Aylesworth*, K.C., and *E. W. Boyd*, for respondents.

From Boyd, C.] [Oct. 16.

JONES *v.* LINDE BRITISH REFRIGERATION CO.

Master and servant--Dual employment—Profits.

While a servant cannot in the course of his employment, and in connection with the services he has agreed to render to his master, earn for his own benefit any remuneration or profit, he can do so in connection with any collateral or independent work or business, not carried on in competition with that of the master.

The manager of a cold storage company was held entitled, therefore, to a commission on the sale of a cold storage plant effected by the makers thereof through his efforts, the company not being themselves makers of or dealers in cold storage plant. Judgment of BOYD, C., 32 O.R. 191; 36 C.L.J. 642, reversed.

Wallace Nesbitt, K.C., and *C. B. Nasmith*, for appellant. *H. S. Osler*, and *C. S. MacInnes*, for respondents.

From Falconbridge, C.J.] [Oct. 16.

MCNEVIN *v.* CANADIAN RAILWAY ACCIDENT INSURANCE COMPANY.

Insurance—Accident insurance—Change in occupation—Exposure to danger.

An accident insurance policy in favour of a railway servant, described as a baggageman, and employed as such at a small railway station, provided that if the insured were injured "in any occupation or exposure," classed by the company as more hazardous than that stated therein, the amount recoverable should be reduced in a certain proportion, and also that injuries resulting from "voluntary exposure to unnecessary danger" were not covered. The insured while coupling cars received injuries which resulted in his death. It was shewn that at a small station like that in question a baggageman would not infrequently couple cars, and that the insured had often done this work, although not strictly within the scope of his employment, this work being as a rule done by brakesmen, and the occupation of brakesman was classed by the defendants as more hazardous than that of baggageman.

Held, that hazardous "occupation or exposure" referred to in the policy was something of a permanent nature, and that the doing of isolated acts of a more hazardous nature did not change the insured's class or entitle the insurers to reduce the amount recoverable.

Held, also, per ARMOUR, C.J.O., and MACLENNAN, J.A., that as the insured might reasonably have thought that it was his duty to couple the cars there was not a voluntary exposure to unnecessary danger. But, per OSLER, and MOSS, JJ.A., that there was, the act being a voluntary one and its danger being apparent.

In the result, the judgment of FALCONBRIDGE, C.J., 32 O.R. 248; ante p. 74, in favour of the insured's representatives, was affirmed.

Fripp, for appellants. *Aylesworth*, K.C., for respondent.

From Falconbridge, C.J.] DANA *v.* MCLEAN. [Oct. 16.

Insolvency—Assignments and preferences—Presumption.

The statutory presumption of the invalidity of a preferential transfer of goods is rebutted by shewing that it was entered into by the transferee in good faith and without knowing, or having reason to believe, that the transferor was insolvent. Judgment of FALCONBRIDGE, C.J., affirmed.

Aylesworth, K.C., for appellant. *Whiting*, K.C., for respondent.

From MacMahon, J.] PALMER *v.* JONES. [Oct. 16.

Indemnity—Bond—Future payment.

The Court held that College Street in the City of Toronto was, up to the year 1889, a private road to which adjoining owners acquired no right of access, that the reservation upon its dedication in that year by the University of Toronto to the City of Toronto of the right of the University to compel adjoining owners to pay for the right of access was valid, that a covenant by a vendor of land adjoining the street in favour of the purchaser thereof to indemnify him "against the payment of any money, and against all loss, costs or damages he may be obliged to pay to secure access," was therefore enforceable, and that the covenantee could recover not only the amount of payments actually made, but also the amount of payments to be made by him in the future under an agreement by which he agreed to pay for the right of access a sum in instalments. Judgment of MACMAHON, J., 1 O.L.R. 382; ante p. 311, affirmed.

Du Vernet, and *J. E. Jones*, for appellant. *Robinson*, K.C., and *D. Macdonald*, for respondent.

From Falconbridge, C.J.] LUDLAM *v.* WILSON. [Oct. 16

Contract—Building contract—Extras—Certificate of superintendent.

A contract for the carpenter's work at the defendant's house provided that the contractor should be paid for work and extras, if any, "on certificate of superintendent of work." The contractor died after doing part of the work and the plaintiff thereupon agreed to deliver at the house "all the material referred to in the late (contractor's) contract, and all the conditions of that contract are to apply." The superintendent of work was a relation of and indebted in a large sum to the defendant, and the plaintiff did not know this. Disputes having arisen, the superintendent of the work gave to the plaintiff, under the defendant's instructions, a certificate that the plaintiff had furnished all the material according to specifications "except small matters which I will adjust under the terms of the contract."

Held, that as to extra material furnished by the plaintiff the condition as to the superintendent's certificate did not apply; and that at all events the certificate in fact given put an end to the contract and relieved the

plaintiff from doing anything further under it, so that the non-completion of the "small matters" in dispute formed no defence.

Held, also, per ARMOUR, C.J.O., that the relationships, family and financial, of the superintendent to the defendant, should have been disclosed to the plaintiff, and that under the circumstances the plaintiff was not bound to obtain a certificate at all. Judgment of FALCONBRIDGE, C.J., reversed.

Aylesworth, K.C., for appellant. *J. G. Kerr*, for respondent.

HIGH COURT OF JUSTICE.

Trial of actions, Street, J.] [Oct. 16.

BENNETT *v.* GRAND TRUNK R. W. Co.

Railway Company—Carriage of animals—Nuisance—Proper exercise of powers—Negligence.

Held, that the Grand Trunk Railway Company of Canada are authorized by law to carry on the business of carrying cattle and hogs, and they are not liable if, in the proper exercise of their powers, and without negligence, they create a nuisance. *Truman* v. *London and Brighton R. W. Co.*, 11 App. Cas. 45, followed.

John A. Robinson, for plaintiff. *Wallace Nesbitt*, K.C., for defendants.

Street, J.] WILSON *v.* BUTLER. [Oct. 22.

Will—Devise to one for his life, and that of his wife or the survivor—Special occupant—Part intestacy.

A testator by his will devised his farm to his son, Abner Butler, "for and during his natural life, and in the event of his marriage, during the life of his wife or the survivor, and at his or their decease to his children, if any, but if the said Abner Butler should die without issue the said land to descend to my then living children." The son married twice, having children by his first wife, but none by his second, who was left a widow.

Held, that the widow was not entitled to a life estate by implication, and that there being no special limitation to the heirs of Abner, they could not take as special occupants during her life, and the result was that the estate for the residue of her life went to the executors of Abner and were assets in their hands.

Heyd, K.C., for plaintiffs. *G. W. Wells*, K.C., for defendants.

Falconbridge, C.J., Street, J.] [October 29.

BATEMAN *v.* MAIL PRINTING CO.

Defamation—Pleading—Justification—Particulars—Appeal—Res judicata.

The libel originally complained of in the statement of claim stated that the plaintiff had been cashiered from the army for cheating at cards,

and also that divorce proceedings had been taken against him. The defendants pleaded justification to the whole, and added two clauses to the same paragraph of his statement of defence, one of which related to the first charge and the other to the second. The first of these clauses was as follows: "The plaintiff was obliged to leave the army on the ground that he had cheated at cards, and stories of the peculiar character of the plaintiff's card-playing and of his having been cashiered from the army for cheating at cards were in circulation in the city of Vancouver." The plaintiff applied for an order striking out both these added clauses, but the application was refused on the ground that the defendants were entitled to plead them as particulars of the defence of justification. There was no appeal from this order, but the plaintiff amended (by leave) by striking out so much of his complaint as related to the divorce proceedings, and the defendants then struck out of their defence the second clause, relating to the divorce proceedings. An application was then made to strike out the first clause, that relating to the plaintiff being cashiered from the army, and was refused by the Master and by a Judge in Chambers on appeal.

Held, per FALCONBRIDGE, C.J., that the plaintiff was not prejudiced by the clause; and, moreover, approving *Dodge* v. *Smith*, 1 O.L.R. 46, that a second appeal was not to be encouraged in a case of this kind.

Per STREET, J., that the matter of the second application was res judicata by the order made on the first application and not appealed against.

C. S. MacInnes, for plaintiff. *J. B. Clarke*, K.C., for defendants.

Boyd, C.] IN RE MCCLELLAN, HALL *v.* TRULL. [Nov. 4.

Will—Construction—Devise—Estate—Rule in Shelley's Case.

Motion under Rule 938 for an order declaring that under the true construction of the will of Jane McClellan the applicant Mary Hall is a devisee of an estate in fee simple in the lands of the testator. The devise was as follows: "I give and devise to my daughter Mary . . . the following described parcels of real estate to be held and controlled by her during her natural life, and after her death to be divided in a legal manner among her heirs."

Held, that the devisee took an estate in fee-simple, under the rule in Shelley's Case.

Grierson, for applicant. *George Bell*, for executors. *Harcourt*, for infants.

Boyd, C.] MINNS *v.* VILLAGE OF OMEMEE. [Nov. 5.

Way — Non-repair — Opening in street — Accident to foot-passenger — Liability of municipal corporation — Non-feasance — Limitation of actions — Trap-door — Want of guard — Master and servant.

Two servants of the defendant G. were engaged in their master's business in unloading and storing a cask of beer in the cellar of his house by

means of opening a trap-door in the sidewalk in front of the house. This was at night, and the trap-door being left open, and no light or guard being provided, the plaintiff fell into the opening and was injured.

Held, that this negligence of the servants was attributable to the master, who was liable for the injury.

No act of negligence was proved against the village corporation, nor was there evidence upon which notice to the corporation might be attributed; the construction of an opening in the sidewalk is authorized by the Municipal Act, s. 639, and no fault was alleged in its construction or maintenance; the corporation had no knowledge of the opening being left after dark without protection, and it was not shewn that they had means of guarding against it.

Semble, that, under these circumstances, the corporation were not liable.

Homewood v. *City of Hamilton*, 1 O.L.R. 266; ante p. 240, considered.

But, supposing the corporation is liable, it could only be for non-feasance, and not for mis-feasance, and the action failed because not brought within three months after the damages had been sustained.

Watson, K.C., and *T. Stewart*, for plaintiffs. *F. D. Moore*, for defendant corporation. *Stratton*, K.C., for defendant Graham.

Boyd, C.] RE MOORE AND LANGMUIR. [Nov. 6.

Executors and administrators—Power to sell lands—Charge of legacies—Trustee Act—Devolution of Estates Act.

Petition under the Vendors and Purchasers Act with regard to a question of title arising upon a contract for the sale of land. The vendors made title under the will of P., who died on the 11th September, 1886, leaving a will in which he appointed executors and gave all his estate, real and personal, to his wife for life subject to certain bequests, and should his brother survive the wife he was to have the life use of the residue of the property, which was afterwards to go to the brother's children. In several places in the will (which was not skilfully drawn), the testator used the expressions "from the time Humewood is sold," "after the sale of Humewood," and "so soon as Humewood is sold," but there was no devise to the executors in trust, and no express power of sale. The lands in question, which were a portion of what is called "Humewood" in the will, were sold and conveyed by the executors, and the vendors made title under such conveyance. The sale was not made in any way under the Devolution of Estates Act. The sale was not for the payment of debts. The question was whether the executors had power to sell. The Devolution of Estates Act, 1886, came into force on the first July, 1886, shortly before the death of the testator.

Shepley, K.C., for the vendors, contended that under what is now s. 18 of the Trustee Act, R.S.O. 1897, c. 129, the executors had power to sell, the testator having created such a charge as is described in s. 16, and not having devised the real estate to the executors in trust; that s. 16 of the Devolution of Estates Act, as found in R.S.O. 1897, c. 127 (which first became law in 1891), did not oblige the executors to sell under the Devolution of Estates Act, for by sub.-s. 2 that section is not to derogate from any right possessed by an executor or administrator independently of the Act; that if the testator had devised the land to the executors upon trust, the machinery of the Devolution of Estates Act was not to be applied; *Re Booth's Estate*, 16 O.R. 429; and no more should it where the executors have a statutory power of sale to satisfy a charge.

E. B. Brown, for purchaser.

THE CHANCELLOR agreed with the argument of the vendors, and made order declaring that the vendors could make a good title under the sale and conveyance of the executors.

Boyd, C.] IN RE SOLICITOR. [Nov. 6.

Solicitor—Taxation of bill of costs—Collection of moneys—Commission.

An appeal by the client from the report of the senior taxing officer at Toronto upon the taxation of a bill of costs rendered by the solicitor to the appellant in respect of services of the solicitor in collecting $70,000 of insurance moneys. The principal item was a commission amounting to $3,200 upon the amount collected.

Held, having regard to *In re Richardson*, 3 Ch. Ch. 144, and the line of practice founded thereon as manifested in the certificate of the taxing officer appended to *In re Attorneys*, 26 C.P. 495, that the conclusion of the taxing officer should not be disturbed. The circumstances surrounding the professional employment in this case were very exceptional, and justified the somewhat liberal allowance ascertained upon the reference.

Appeal dismissed with costs.

D. O'Connell, for appellant. *W. E. Middleton*, for solicitors.

Falconbridge, C.J., Street and Britton, JJ.] [Nov. 6.

HILL *v.* HILL.

Alimony—Lunatic—Admission to asylum—Removal—Summary judgment.

Held, affirming the decision of MEREDITH, C.J., 2 O.L.R. 289; ante p. 751, that the plaintiff was not entitled to alimony.

Held, also, that upon a motion by the plaintiff for summary judgment under Rule 616, where all the facts were before the court and the conclusion was against the plaintiff, it was proper to pronounce judgment dismissing the action, instead of merely dismissing the plaintiff's motion.

S. H. Bradford and *B. E. Swayzie*, for plaintiff. *W. R. Riddell*, K.C., for defendant.

Falconbridge, C.J.] COUNSELL *v.* LIVINGSTON. [Nov. 6.

Promissory note—Notice of dishonour—Sufficiency—Husband and wife.

Action to recover the amount of a promissory note for $3,500 made by one of the defendants and indorsed by the other two. Notice was given to one of the indorsers on the day after the maturity of the note, as follows: "I beg to advise you that Mr. T. C. Livingston's note for $3,500 in your favour and indorsed by yourself and wife, and held by our estate, was due yesterday. As I have not received renewal, will you kindly see that same is forwarded, with cheque for discount, as there is no surplus on hand."

Held, a sufficient notice of dishonour to the indorser to whom it was addressed, and also to his wife, as he was her agent.

Judgment for the plaintiff against all three defendants, with interest and costs.

E. Martin, K.C., and *D'Arcy Martin*, for plaintiffs. *L. F. Heyd*, K.C., for defendant Thomas C. Livingston. *G. Lynch-Staunton*, K.C., for other defendants.

GENERAL SESSIONS OF THE PEACE, COUNTY OF YORK.

McDougall, Chairman.] [Nov. 2.

FOSTER, Appellant *v.* ROSE, Respondent.

Ontario Medical Act—Use of title "Doctor."

The appellant had been convicted by the Police Magistrate of the City of Toronto on the information and complaint of the respondent for unlawfully taking and using a name, title and description, implying and calculated to lead people to infer that he was registered under the Medical Act, R.S.O. c. 176, and that he was recognized by law as a physician, surgeon and a licentiate in medicine or surgery.

The only evidence given upon the original hearing which in any way pointed to guilt was that of the informant who swore that the appellant made use of the sign "Dr. Foster" on the door of his place.

Held, that his assumption of the title "Doctor," without supplemental words, from which it might be gathered that a particular meaning was intended, did not bring the appellant within the Act; and the conviction was, therefore, quashed.

Du Vernet, for appellant. *Curry*, K.C., for respondent.

McDougall, Chairman.] [Nov. 2.

PRUST, Appellant; ROSE, Respondent.

Ontario Medical Act—Act complained of done by salaried clerk of druggist.

The appellant had been convicted by the Police Magistrate for the City of Toronto on the information and complaint of the respondent of a violation of the Medical Act, R.S.O. c. 176, s. 49.

The appellant was shewn by the evidence to have been a salaried clerk in the employ of one Truss, a licensed druggist, whom the convicting magistrate had previously refused to hold liable on the facts adduced in this case, by reason of his not having prepared or supplied in person the remedies applied for. The whole transaction was carried on by the appellant without the intervention of his employer.

Held, that, no profit inuring to him from the sale, the appellant could not be said to have practised medicine for "hire, gain, or hope of reward," and the conviction was, therefore, quashed.

Du Vernet, for appellant. *Curry*, K.C., for respondent.

Province of Manitoba.

KING'S BENCH.

Killam, C.J.] SCHWARTZ *v.* WINKLER. [Oct. 15.

Fraudulent preference—Assignments Act, R. S. M. c. 7, s. 33—63 & 64 Vict. (M.) c. 3, s. 1—Trust assignment made to creditor—Pressure—Knowledge of insolvency.

The plaintiff was an assigneee in trust for the creditors of W. and brought this action to have a mortgage of W.'s property given to the defendant shortly before the assignment set aside as creating an undue preference. Defendant having a large claim against W. and holding no security, asked for payment, and on being informed by W. that he had no money, asked for and obtained the mortgage in question without making any fresh advance to W. It was found as facts that W. was in insolvent circumstances at the time and knew himself to be so, and that defendant had such a knowledge of W.'s financial position that an ordinary business man would conclude from it that W. was unable to meet his liabilities.

Held, 1. Under section 33 of "The Assignments Act," R.S.M. c. 7, as amended by 63 & 64 Vict., c. 3, s. 1, the mortgage should be set aside as a preference although it may have been obtained by pressure from the defendant and given by W. without any active desire to prefer the defendant to his other creditors, for he knew that would be the result of giving the mortgage.

2. The plaintiff had a right to bring the action in his capacity as assignee in trust for creditors, under section 39 of the Act, although there was no evidence of the acceptance of the benefit of the assignment by any creditor except the plaintiff or even of communication of it to any other, as the assignee was a creditor himself: *Mackinnon* v. *Stewart*, 1 Sim. N. S. 76; *Siggers* v. *Evans*, 5 E. & B. 367.

3. An assignment of property made by a debtor for the benefit of his creditors generally is, by virtue of section 2 (a) of the Act, an "Assignment under this Act," although the description of the property may not be in the words set forth in section 3 or words to the like effect.

Held, also, following *Stephens* v. *McArthur*, 6 M. R. 496, notwithstanding the decisions of the Ontario Court of Appeal in *Johnson* v. *Hope*, 17 A. R. 10 and *Ashley* v. *Brown*, ib. 500, that it is not necessary to show notice to the transferee of the debtor's insolvent condition; but that, in any case, the defendant, though direct notice to him was not proved, had such a knowledge of W.'s financial position, that constructive notice of his insolvency should be imputed to defendant: *National Bank of Australasia* v. *Morris*, (1892) A. C. 287.

A. J. Andrews and *Maulson*, for plaintiff. *Perdue* and *Rothwell*, for defendant.

Bain, J.] SWORD *v.* TEDDER. [Oct. 17.

Contract of sale—Construction of covenants—Dependent or independent.

The plaintiff's claim was for payment of the balance of the purchase money of land under an agreement of sale in the usual form in which the purchaser covenanted that he would well and truly pay . . . the said sum of money together with the interest thereon on the days and times mentioned, and the vendor covenanted that in consideration of the purchaser's covenant and on payment, etc., he would convey and assure, or cause to be conveyed and assured to the purchaser, his heirs and assigns, by a good and sufficient deed in fee simple, etc., the said piece or parcel of land freed and discharged from all incumbrances.

Held, following *Macarthur* v. *Leckie*, 9 M. R. 110, that the two covenants were independent, and that the defendant was bound to pay the purchase money before he could call on the plaintiff to convey the property and that it was not necessary for the plaintiff to prove the tender of a conveyance or to allege that he was ready and willing to convey, although it appeared that the property was subject to two mortgages.

With the plaintiff's consent the defendant's purchase money was ordered to be paid into Court so that the incumbrances could be discharged out of it and only the balance paid to the plaintiff.

Howell, K.C., and *Caldwell*, K.C., for plaintiff. *Bradshaw* and *Affleck*, for defendant.

Province of British Columbia.

SUPREME COURT.

Walkem, J.] VANCOUVER AGENCY *v.* QUIGLEY. [May 4.

Practice—Special endorsement—Omission of words "Statement of Claim."

Summons for judgment under Order XIV. *Bowser*, K.C., for application.

Creagh, *Davis*, *Marshall* and *Macneil*, contra, took the preliminary objection that the writ was not specially endorsed in that the words "Statement of claim" were omitted, and cited in support *Cassidy* v. *M'Aloon* (1893) 32 L.R. Ir. 368.

WALKEM, J., held that the objection was fatal and dismissed the application with costs.

ERRATUM.—P. 693 ante, line 22, for "secured" read "refused."

REGISTRY ACT.

The following decisions of Donald Guthrie, K.C., Inspector of Registry Offices for Ontario, extracted from his last report, will be of interest.

I. *Copies of registered instruments affecting same lot can be verified by one certificate.*

Where a large number of certified copies of registered instruments affecting one lot are required,

Held, that they may be certified similar to the form for certifying an abstract by reference to the numbers, and it is not necessary to have a separate certificate for each instrument.

II. *Fee for registering discharge of mortgage covering lands in more than one municipality in same Registry Division.*

The discharge was of a mortgage covering lands in two municipalities in one Registry Division. The instrument contained about 290 words or about three folios. Having to be copied in two books the copying came to six folios in all. The registrar charged 80c., being 50c. for the registration of the discharge and 10c. per folio for copying over the 300 words. It was contended that the discharge not being over three folios the fee should be 50c. and no more; that the amending Act (62 Vict., c. 16) does not provide for an additional fee over 50c. for a registration of a discharge of mortgage.

Held, that the amendment provides not only for a certificate being itself over three folios, but for the case of a certificate which has to be copied into more than one book. It means that the amount of copying in each book shall be added together and the aggregate or whole number of folios of copying thus ascertained. Here six folios are copied, and therefore the registrar's charge of 80c. is correct.

III. *A registered agreement of a mortgagee binding himself to accept a less sum than the mortgage debt is not a cloud on the title after the mortgage is discharged.*

A mortgage in favour of one B. for $1050 was registered in the registry office. Subsequently the mortgagor and B. entered into an agreement which was registered as number 5534, the effect of which was that B., the mortgagee, agreed to take less than the amount of the mortgage if the reduced amount should be promptly paid on or before the date named, and on such payment the mortgagee agreed to discharge the mortgage. The mortgagee subsequently discharged the mortgage and thus released the land from the whole mortgage debt.

Held, that the agreement was not a mortgage, nor was it a further charge, nor indeed was it an independent instrument at all which required a separate discharge. It did not really encumber the land. When the mortgage was discharged the agreement had fulfilled its purpose and could not longer have any operation or effect. It is not in any way a cloud on the title.

IV. *An executor of an administrator has not power to execute a valid discharge of a mortgage made to the intestate mortgagee.*

A mortgagee died intestate. Letters of administration to his estate were taken out by his widow. His widow afterwards died, leaving a will appointing executors. These executors executed a discharge of mortgage made to the intestate mortgagee, and it is contended on their behalf that they are competent to discharge the mortgage by reason of their being executors of the deceased administratrix.

Held, that an executor of an administrator has not power simply because he is executor to execute a valid discharge of a mortgage made to the intestate mortgagee. I think it is necessary to have another legal personal representative appointed to the estate of the deceased mortgagee before a valid discharge can be executed.

V. *Only one mortgage can be included in a discharge.*

The discharge offered for registration comprised three separate mortgages made to the same mortgagee. The first mortgage covered lot 239 only, and the last two mortgages covered lots 239 and 240. The construction contended for by the solicitor seeking registration was that the Act warrants the discharge of several mortgages by one discharge.

Held, that only one registered mortgage can be discharged by one certificate. To hold otherwise involves more than was meant by the Legislature, namely, that any number of registered mortgages could be discharged in one certificate, even where the mortgagors were different parties, provided they were held by the same mortgagee or assignee. Perhaps also were held by different mortgagees or assignees.

VI. *An instrument which alters terms of mortgage and also assigns, may not be endorsed "not to be registered in full."*

The instrument is called an assignment of mortgage. The instrument was something more than an assignment of mortgage, as it contained an agreement between the assignee and a person who was not a party to the mortgage assigned. The registrar refused to receive it as an instrument which might be endorsed "Not to be registered in full."

Held, where the mortgagor or the owner of the equity of redemption joins in the assignment of mortgage for the purpose of assenting to the assignment and acknowledging the amount due, and even covenanting directly with the assignee to pay the amount, the assignment may notwithstanding be endorsed "Not to be registered in full." The instrument here, however, varies the terms of the mortgage, and not only introduces a new party, but alters the terms of the mortgage by extending time for payment and reducing rate of interest. It alters the charge on the land and the terms thereof. This instrument accomplishes what is ordinarily accomplished by two instruments, an assignment of mortgage and a deed of extension of time and for the reduction of the rate of interest. The instrument is not one which can be endorsed "Not to be registered in full."